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78. Hon'ble Mr. Justice Ajai Kumar Srivastava - I
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100. Hon'ble Mr. Justice Surendra Singh - I
101. Hon'ble Mr. Justice Nalin Kumar Srivastava

(2022) 9 ILRA 8
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2022 & 19.09.2022

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. Bail Application No. 51323 of 2021

Anand Giri @ Ashok Kumar Chotiya ...Petitioner
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Petitioner:
Sri Vineet Vikram, Sri Imran Ullah, Sri G.S. Chaturvedi (Senior Counsel)

Counsel for the Respondents:
G.A., Sri Anurag Kumar Singh, Sri Neeraj Tiwari, Sri Sanjay Kumar Yadav, Sri Gyan Prakash (Sr. Advocate), Sri Vinay Saran (Sr. Advocate), Sri Alok Kumar, Sri Alok Kumar Dubey, Sri Saumitra Dwivedi, Sri Vinay Prakash Shukla, Sri Rishi Shankar Dwivedi.

(A) Criminal Law - Rejection of bail - Indian Penal Code, 1860 - Section 107,306 - Abetment of suicide - The Code of criminal procedure, 1973 - 161,439 - Bail - matters of suicide - each case has to be decided on the basis of its own facts and circumstances - basic principle of criminal jurisprudence - a man may tell a lie, but circumstances do not - Even an indirect act of incitement to the commission of suicide would constitute the offence of abetment of suicide.(Para - 30)

Mahant Narendra Giri nominated Anand Giri (applicant) as his successor - after his arrest and involvement in molestation cases in Australia - changed his will deed - Co-accused Adhya Prasad Tiwari was head priest at "Shri Bade/Lete Hanuman Mandir", Prayagraj - Mahant Narendra Giri removed Adhya Prasad Tiwari and his son Dileep from post of Priest - flower-garland shop taken back - Accused persons hatched a criminal conspiracy to tarnish Mahant's reputation – immense mental pressure – committing suicide - proximate link between suicide of deceased and acts of accused persons - suicide note and video – presumption - no one tells a lie while dying by committing suicide - abetment of suicide by Anand Giri and his associates, cannot be ruled out. **(Para - 29,31)**

HELD:- Prima-facie case for abetment and instigation is made out against the applicant. Provisions of Section 107 IPC attracted. In case, applicant released on bail, every likelihood of winning over other witnesses and tampering evidences. **(Para -34,39)**

Bail application rejected. (E-7)

List of Cases cited:-

1. Arnab Manoranjan Goswami Vs St. of Maharashtra & ors., (2021) 2SCC 427

2. M.Ravindran Vs Intelligence Officer, Directorate of Revenue Intelligence (2021) SCC 485

3. Geo Varghese Vs The St. of Rajasthan & Anr. 2021 SCC OnLine SC 873

4. Gurcharan Singh Vs The St. of Punj. 2020 SCC OnLine SC 796

5. The St. of W.B. Vs Indrajit Kundu & Ors. 2019 SCC OnLine SC 1364

6. Kalyan Chandra Sarkar Vs Rajesh Ranjan Alias Pappu Yadav & anr. (2004) 7 SCC 528

7. Chenna Boyanna Krishna Yadav Vs St. of Maharashtra & Anr. (2007) 1 SCC 242

8. Praveen Pradhan Vs St. of Uttranchal & Anr. (2012) 9 SCC 734

9. St. of Kerala & Ors. Vs S.Unnikrishnana Nair & Ors. (2015) 9 SCC 639.

10. Ude Singh & Ors. Vs St. of Harayana (2019) 17 SCC 301

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

1. By means of this application under Section 439 Cr.P.C., applicant-Anand Giri alias Ashok Kumar Chotiya seeks enlargement on bail in FIR No. RC-8(S)/2021/SC-III/ND, under Section 306 IPC, PS SC-III/ND, New Delhi lodged by C.B.I, Special Crime-III, New Delhi (earlier registered as Case Crime No. 322 of 2021, under Section 306 IPC at Police Station George-town, District Prayagraj).

Brief Facts

2. The facts that formed the bedrock of the instant bail application moved by accused-applicant Anand Giri alias Ashok Kumar Chotiya are that Mahant Narendra Giri (deceased) was Adyaksh, of "Akhil Bhartiya Akhada Parishad, Mahant/Head of Shri Math "Baghambari Gaddi", Allahpur, Prayagraj and "Shri Bade/Lete Hanuman Ji Temple", Prayagraj.

3. On 20.09.2021 at 05:30 PM, Station House Officer, police station-George Town, Prayagraj received an information on his CUG Mobile No. 9454402825 from Mobile No. 7905160834 of Sarvesh Kumar Dwivedi that Mahant Narendra Giri Maharaj has committed suicide in his room by hanging himself inside the Math. Acting on the aforesaid information, he immediately rushed to the place of incident. Meanwhile other senior officers were also informed, who also reached there. The said information was recorded in General Diary No. 51 dated 20.09.2021 of police station-George Town, Prayagraj. On arriving at the place of incident, he found that dead body of Mahant Narendra Giri Maharaj was lying on floor of the room. Information was also given to field Unit / Crime Branch team. Shri Sunil Kumar, Additional City Magistrate-III, District Prayagraj also reached there for conducting inquest proceeding on cadaver, which commenced at 22:30 hours on 20.09.2021 and completed at 23:45 hours on the same day.

4. A hand written suicide note containing seven pages of Mahant Narendra Giri, which was kept in two open envelops, two mobile phones of the deceased, knife, bloodstained rope, four packets *Sulphas* (sulphate) and three DVR of CCTV camera installed at the Math etc. were recovered from the spot in the presence of witnesses, officers and forensic team by the Station House Officer, police station-George Town, Prayagraj. After perusing the suicide note, recovery memos (fard) of recovered items were prepared. Finger prints and chance prints of deceased-Mahant Narendra Giri were also taken. Recovered items were sealed at the spot. The site plan was prepared by the police and photography was also done.

5. Mahant Narendra Giri in his suicide note, has categorically held accused Anand Giri, Adhya Prasad Tiwari and Sandeep Tiwari responsible for taking extreme step to end his life. For better appreciation of the facts, the contents of suicide note are being reproduced herein below:-

मैं महन्त नरेन्द्र गिरी, मठ बाघम्बरी गद्दी बडे हनुमान मंदिर (लेटे हनुमान जी) वर्तमान में अध्यक्ष अखिल भारतीय अखाडा परिषद अपने होशो हवास में बैगेर किसी दबाव में यह पत्र लिख रहा हूं जब से आनन्द गिरी ने मेरे ऊपर असत्य मिथ्या मनगढंत आरोप लगाया तब से मैं मानसिक दबाव में जी रहा हूं जब भी मैं एकान्त में रहता हूं मर जाने की इच्छा होती है।

आनन्द गिरी अध्या प्रसाद तिवारी उनका लडका संदीप तिवारी मिलकर मेरे साथ विश्वास घात किया मुझे जान से मारने का प्रयास किया सोसल मिडीया फैस बुक एवं समाचार पत्रों में आनन्द गिरि ने मेरे चरित्र के ऊपर मनगढन्त आरोप लगाया मैं मरने जा रहा हूं सत्य बोलूंगा मेरा घर से कोई सम्बन्ध नहीं है मैंने एक भी पैसा घर पर नहीं दिया मैंने एक एक मंदिर एवं मठ में लगाया 2004 में मैं महन्त बना 2004 से मैंने मैंने अभी जो मठ एवं मंदिर का विकास किया सभी भक्त जानते हैं। आनन्द गिरि द्वारा जो भी आरोप लगाया गया उससे मेरी एवं मठ मंदिर की बदनामी हुई मैं बहुत आहत हूं मैं आत्म हत्या करने जा रहा हूं मेरे मरने की सम्पूर्ण जिम्मेदारी आनन्द गिरी अधा प्रसाद तिवारी जो मंदिर में पुजारी है अधा प्रसाद तिवारी का बेटा सन्दीप तिवारी की होगी। मैं समाज में हमेशा शान से जिया लेकिन आनन्द गिरि मुझे गलत तरीके से बदनाम किया प्रिय बलबीर गिरी ओम नमो नारायण मैं तुम्हारे नाम एक रजिस्टर वशीयत की है जिसमें मेरे ब्रम्हलीन (मरने के बाद) हो जाने की बाद तुम बडे हनुमान मन्दिर एवं मठ बाघम्बरी गद्दी की महन्त बनोगे तुमसे मेरा एक अनुरोध है कि मेरी सेवा लगे विद्यार्थी जैसे मिथिलेस पाण्डे, रामकृष्ण पाण्डेय, मनीष शुक्ला, शिवेक कुमार मिश्रा, अभिषेक मिश्रा, उज्जवल द्विवेदी, प्रजवल द्विवेदी, अभय द्विवेदी निर्भय द्विवेदी, सुमित तिवारी का ध्यान देना जिस तरह से मेरे समय में रह रहे हैं उसी तरह से तुम्हारे समय में रहगें इन सभी का ध्यान देना उपरोक्त सभी जिनका मैंने नाम लिया है तुम लोग भी हमेशा बलवीर गिरी महराज का सम्मान करना जिस तरह से हमेशा मैं सेवा एवं मठ की सेवा किया उसी तरह से बलबीर गिरि महराज एवं मठ मन्दिर की सेवा करना वैसे हमें सभी विद्यार्थी प्रिय हैं। लेकिन मनीष शुक्ला, शिवेक मिश्रा, अभिषेक मिश्रा मेरे अति सप्रिय है। कोरोना काल जब मुझे कोरोना हुआ मेरी सेवा सुमित तिवारी मेरी सेवाद की मंदिर में माला फूल की दुकान मैंने सुमित तिवारी को किराय नामा रजिस्टर किया है मिथिलेष पाण्डे को श्री बडे हुना रूपा इम्मोरियम की दुकान किराये पर दी है। मनीष शुक्ला शिवेक मिश्रा, अभिषेक मिश्रा को दुकान नं०-1 लड्डू की दुकान किराये में दी है रामकृष्ण पाण्डेय (रोनू) उजवल द्विवेदी उजवल द्विवेदी को दुकान नं०- 2 जो हाल के अन्दर है किराये पर दी है रजनीश पाण्डेय बाल कृष्ण पाण्डेय को श्री बडे हनुमान मन्दिर श्रंगार की दुकान किराये पर दी है अभिय द्विवेदी को श्री बडे हनुमान सूखा प्रसाद की किराये पर दी है। अभय द्विवेदी लड्डू नहीं बेच सकते है। अमर गिरी मंदिर की व्यवस्था करते रहेंगे आनन्द गिरी मेरी समाधि में भाग नहीं ले सकते मेरे मृत्यु शरीर को छू नहीं सकते बलवीर गिरि तुमसे एक अनुरोध है कि आनन्द गिरि को कभी भी मठ में एवं मन्दिर में नहीं रखना यह बहुत ही खतरनाक व्यक्ति है। अधा प्रसाद तिवारी पर कभी विश्वास नहीं करना पवन पुजारी वफादार व्यक्ति है। पवन तुमसे निवेदन है कि जिस तरह से मेरी एवं मन्दिर मठ की सेवा की है उसी तरह से सेवा करते रहना श्री हनुमान जी तुम्हे कभी कष्ट नहीं देंगे बलबीर गिरि मेरी समाधि बाघम्बरी गद्दी मठ में दिया जाय यही मेरी इच्छा है। सभी मेरे शिष्यगण भक्तजन प्रयागवासी एवं मंदिर मठ के कर्मचारी मुझे माफ करना सभी विद्यार्थी माफ करना मैं मजबूर हूं आनन्द गिरी ने मुझे मजबूर किया मैं इसलिए आत्महत्या कर रहा हूं सभी पुजारी गड कर्मचारी मठ के सभी विद्यार्थी गड कर्मचारीगड को मेरा ओम नमो नाराण मेरे कमरे की चाभी बलवीर गिरि महराज के दिया जाय बलबीर गिरि मेरी समाधी पार्क में निबु के पेड के पास दि जाये यही मेरी अन्तिम इच्छा है धनन्जय विद्यार्थी मेरे कमरे की चाभी बलबीर गिरि महाज को देना बलवीर गिरि एवं पन्च परमेश्वर निवेदन कर रहा हूं। मेरी समाधि पार्क में नीबु के पेड के पास लगा देना मैं महन्त नरेन्द्र गिरी वैसे तो मैं 13 सितम्बर 2021 को आत्म हत्या करने जा रहा था लेकिन हिम्मत नहीं कर

पाया आज जब हरिद्वार से सूचना मिली कि एक दो दिन में आनन्द गिरी कम्प्यूटर के माध्यम से मोबाइल से किसी लडकी या महिला मेरी फोटो लगाकर के गलत काम करते हुए फोटो वायरल कर देगा मैंने सोचा कहा कहा सफाई दूंगा एक बार तो बदनाम हो जाऊंगा मैं जिस पद पर हूं वह पद गरिमामी पद है। सच्चाई तो लोगो को बाद में पता चल जायेगा लेकिन मैं तो बदनाम हो जाउगा इसलिए मैं आत्म हत्या करने जा रहा हूं जिसकी जिम्मेदारी आनन्द गिरि, आधा प्रसाद तिवारी एवं उनका लडका संदीप तिवारी की होगी मैं महन्त नरेन्द्र गिरि आज मेरा मन आनन्द गिरि के कारण विचलित हो गया हरिद्वार से ऐसी सूचना मिली आनन्द कम्पयूटर के माध्यम से एक लडकी साथ मेरी फोटो जोडकर गलत काम करते हुए बदनाम करेगा। आनन्द गिरि का कहना है महाराज यानि मैं कहा तक सफाई देते रहेगे मैं जिस सम्मान से जी रहा हूं अगर मेरी बदनामी हो गयी तो मैं समाज में कैसे रहूंगा इस अच्छा मर जाना ही ठीक है। आज मैं आत्म हत्या कर रहा हूं जिसकी पूरी जिम्मेदारी आनन्द गिरि, आधा प्रसाद तिवारी जो पहले प्रभारी व उनको मैंने निकाल दिया और संदीप तिवारी S/O अधा प्रसाद तिवारी की होगी वैसे मैंने पहले ही आत्म हत्या करने जा रहा था लेकिन हिम्मत नहीं कर पा रहा था एक आईडीयो कैसेट आनन्द गिरी जारी किया था जिससे मेरी बदनामी हुई आज हिम्मत हार गया और आत्म हत्या करा हूं 2500000 पच्चीस लाख रूपया अदित्य मिश्रा से एवं 2500000 पच्चीस लाख शैलेन्द्र सिंह सेगर रियल एस्टेट से मागता हूं। मेरी समाधी गद्दी में गुरूजी (महन्त भगवान जी) के बगल में निबु के पेड के पास दिया जाय इससे मैं दूखी होकर आत्म हत्या करने का निर्णय लेकर आत्म हत्या करने जा रहा हूं मेरी मौत की जिम्मेदारी आनन्द गिरी अधा प्रसाद तिवारी संदीप तिवारी S/O अधा प्रसाद तिवारी की होगी प्रयागराज के सभी पुलिस अधिकारी एवं प्रशासनिक अधिकारियों से अनुरोध करता हूं मेरे आत्म हत्या के जिम्मेदारी उपरोक्त लोगो के कानूनी कार्यवाही की जाये। जिससे मेरी आत्मा को शान्ति मिले। प्रिय बलवीर मेरे मठ मन्दिर की व्यवस्था प्रयास करना जिस तरह से मैंने किया इसी तरह से करना दि० आशुतोष गिरि दि नितेश गिरि एवं मढी की सभी महात्मा बलवीर गिरि का सहयोग करना परम पूज्य महन्त हरिगोविन्द पुरी एवं से निवेदन है कि मढी का महन्त बलवीर गिरि को बनाना महन्त रबिन्द्र पुरि जी (सजावर मढी) आपने हमेशा साथ दिया मेरे मरने के बाद बलवीर गिरी का ध्यान दीजिएगा सभी को मेरा ओम नमो नारायण महन्त नरेन्द्र गिरी।

6. A video clip titled as "20210920-132921" also recovered from the mobile phone of Mahant Narendra Giri, which was made by deceased-Mahant Narendra Giri himself just before his death on 20.09.2021 whereby he held Anand Giri, Adya Prasad Tiwari and Sandeep Tiwari responsible for committing suicide by him. The transcription of the video clip is reproduced herein under:-

मैं महंत नरेन्द्र गिरी, आनंद गिरी के कारण आत्महत्या करने जा रहा हूं, आनंद गिरी के कारण मेरी बडी बदनामी हुई, गलत आरोप लगाये गये, जो असत्य है। अभी कुछ दिन पहले समाचार आया कि आनंद गिरी मेरी फोटो-कांड किसी लडकी के साथ गलत काम करते हुये मुझे बदनाम करने, करेगा, लोग-बाग, मेरा नाम बडा है, पद बडा है। ये लोग मुझे बदनाम कर देगे, सच्चाई तो बाद में आयेगी, सच्चाई लोग बाद में जानेगे, इसलिए मर जाना ही ठीक है। मैं सभी संत महात्माओं से बाघम्बरी गद्दी के सभी विद्यार्थियों से, सभी कर्मचारियों से, जो मेरे पूर्व विद्यार्थी है उनसे भी क्षमा मांगता हूं। अपनी जीवन लीला समाप्त करता हूं। दुख हमको भी है लेकिन बदनामी से मर जाना ही ठीक है। यही निर्णय मैंने लिया है और आत्महत्या करने जा

रहा हूं। जिसकी जिम्मेदारी आनंद गिरी, हमारे मंदिर के पूर्व पुजारी जिसको में हटा दिया है आध्या प्रसाद तिवारी, उनका लडका संदीप तिवारी क्योंकि ये सब खडयंत्र में शामिल है। आनंद गिरी, आध्या प्रसाद पुजारी जो हमारे यहां तिवारी पुजारी है उनका लडका संदीप तिवारी ये सब खडयंत्र में शामिल है इन लोगो ने मुझे बदनाम करने का प्रयास किया। उसकी जिम्मेदारी आनंद गिरी की होगी, आध्या प्रसाद की होगी, संदीप तिवारी की होगी। मैं बहुत मजबूर हूं इसलिए मैं अब आत्महत्या करने जा रहा हूं।

7. First Information Report of this case was registered on 21.09.2021 at 00:54 hour under Section 306 I.P.C. at Case Crime No. 322/2021, Police Station George-town, district Prayagraj against Anand Giri on the basis of oral complaint / information of informants-Amar Giri and Pawan Maharaj. It has been mentioned in the F.I.R. that on 20.09.2021 as usual at about 12.30 PM, deceased-Mahant Narendra Giri after taking lunch went for rest in his room at "Baghambari Gaddi". He used to take tea at 3.00 PM, but on that date Mahant Narendra Giri had told that he will not take tea and he informs them in case he wishes to have tea. When no information was received from Mahant Narendra Giri by 5.00 PM, complainant telephoned him, but his mobile was switched off. The FIR further alleges that on knocking the door, when no response was noticed, the door was forcefully opened by Sumit Tiwari, Sarvesh Kumar Dwivedi, Dhananjay and other disciples and Mahant Narendra Giri was found hanging from the ceiling fan of the room. To explore the possibility of his life, he was brought down by the disciples by cutting the rope, but by that time Mahant Narendra Giri has left for his heavenly abode. It was also mentioned in the FIR that Mahant Narendra Giri was disturbed for the last few months due to Anand Giri. Some times he himself used to say that Anand Giri keeps troubling and harassing him a lot.

8. On the basis of suicide note and video of Mahant Narendra Giri (deceased), which have been quoted above, involvement of Adya Prasad Tiwari and his son Sandeep Tiwari also came into light along with Anand Giri, therefore, they have also been made accused in this case. After the said incident, Crime Branch of district Prayagraj received an information that Anand Giri surrendered at police station-Galheri, district Saharanpur, thereafter he was brought to Prayagraj and his statement was recorded by the investigating officer of the police. The applicant-Anand Giri and Adya Prasad Tiwari were arrested on 21.09.2021 at 8.15 PM and Sandeep Tiwari was arrested on 22.09.2021 at 19.30 hours from Roadways Bus Stand, Civil Lines, Prayagraj.

9. The statements under section 161 Cr.P.C of the informants Amar Giri and Pawan Maharaj were recorded by the investigating officer of the police on 21.09.2021. Amar Giri supported the contents of F.I.R. and Pawan Maharaj has also supported the F.I.R stating inter alia that Mahant Narendra Giri was disturbed for the last few months due to the behaviour of Anand Giri. He used to say that he has been disturbed by Anand Giri who is making effort to defame him. Suicide note is in the hand writing of Mahant Narendra Giri, wherein he has mentioned that accused Anand Giri, Adya Prasad Tiwari and Sandeep Tiwari under a conspiracy, harassed and trying to defame him by making his obscene morphed video with a girl through computer. The statement

of co-accused Sandeep Tiwari was also recorded on 22.09.2021.

10. Post-Mortem of the dead body of the deceased (Mahant Narendra Giri) was conducted by the Medical Board of five doctors on 22.09.2021 from 07:45 AM to 08:50 AM. Videography of the Post-Mortem was also done by Prayagraj police. The cause of death, as per Post-Mortem report is due to "asphyxia as a result of ante-mortem hanging".

11. Thereafter vide notification dated 23.09.2021 of Ministry of Personnel, Public Grievances and Pension (Department of personnel and Training), Government of India, investigation of this case was transferred to Central Bureau of Investigation, hereinafter referred to as "CBI". Thereafter, CBI re-registered the case at RC8(S)/2021/CBI/SC-III/New Delhi. Investigation of the case has been done by Mr. K.S. Negi, Additional Superintendent of Police CB/SC-III/ New Delhi.

12. Apart from aforesaid suicide note of deceased-Mahant Narendra Giri, details of other relevant audios and videos were recovered during investigation, which have been brought on record of this case and referred during the course of the argument by the learned counsel appearing on behalf of C.B.I. are as under:-

(i)	Video clip dated 19.09.2021 of Mahant Narendra Giri titled as 20210919_19234	recovered from mobile phone of deceased Mahant Narendra Giri	Annexure no.09 to the paper book
	5 (learning how to prepare video)		
(ii)	Video clip dated 19.09.2021 of Mahant Narendra Giri titled as 20210919_201452 (learning how to prepare video)	recovered from mobile phone of deceased Mahant Narendra Giri	Annexure no.21 to the paper book
(iii)	Video clip dated 20.09.2021 of Mahant Narendra Giri titled as 20210920_132907 (before committing suicide)	recovered from mobile phone of deceased Mahant Narendra Giri	Annexure no.21 to the paper book
(iv)	Video clip dated 20.09.2021 titled as 20210920_132921 **(made by the deceased Mahant Narendra Giri before committing suicide making allegation against accused**	Recovered from Samsung mobile phone of deceased Mahant Narendra Giri	Annexure no. 9 to the paper book

	Anand Giri,Sandeep Tiwari and Adya Prasad Tiwari)		
(v)	Audio clip (conversation between Purrushotam Mishra and Ashish Mishra @ Lavkush Mishra) titled as AUD-2021-0522-WA0012	Recovered from mobile phone of Purrushotam Mishra	Annexure no. 17 to the paper book
(vi)	Audio clip (conversation between Mahant Narendra Giri and Anand Giri) titled as 20210523 162514	Recovered from mobile phone of accused Anand Giri	Annexure no. 19 to the paper book
(vii)	Audio clip (conversation between Mahant Narendra Giri and Anand Giri) titled as 20210523 162923	Recovered from mobile phone of accused Anand Giri	Annexure no. 19 to the paper book
(viii)	Audio clip (conversation between Mahant Narendra Giri, Anand Giri and Ravindra Puri) titled as 20210523 163025	Recovered from mobile phone of accused Anand Giri	Annexure no. 19 to the paper book
(ix)	Audio clip (conversation between Anand Giri with two others A& B) titled as 20210618 195140	Recovered from mobile phones of accused Anand Giri	Annexure no. 20 to the paper book
(x)	Audio clip (conversation between Anand Giri, Shri Indu Prakash Mishra and Shri Sushil Mishra) titled as "20200117 191026"	Recovered from mobile phones of accused Anand Giri	Annexure no. 20 to the paper book
(xi)	Audio clip (conversation between Anand Giri, Shri Indu Prakash Mishra and Shri Sushil Mishra) titled as "202001	Recovered from mobile phones of accused Anand Giri	Annexure no. 20 to the paper book

	17 192332"		
(xii)	Audio clip (conversation between Anand Giri, Shri Indu Prakash Mishra and Shri Sushil Mishra) titled as "20200117 192648"	Recovered from mobile phones of accused Anand Giri	Annexure no. 20 to the paper book
(xiii)	Audio clip (conversation between Anand Giri, Shri Indu Prakash and Shri Sushil Mishra) titled as "20200117 193449"	Recovered from mobile phones of accused Anand Giri	Annexure no. 20 to the paper book
(xiv)	Video clip (conversation between Anand Giri and Shri Om Prakash Pandey) titled as "20210620_210747"	Recovered from mobile phones of accused Anand Giri	Annexure no. 20 to the paper book
(xv)	Audio clip (conversation between anand Giri and Shri Sushil Kumar Mishra) titled as "PTT-20210523-WA0087"	Recovered from mobile phones of accused Anand Giri	Annexure no. 20 to the paper book

13. During investigation, statements of about 120 persons were recorded by the investigating officer, out of which relevant statements of Manish Shukla, Sarvesh Kumar Dwivedi, Dhananjay Tiwari, Sumit Tiwari, Sandeep Tiwari, Mahant Ravindra Puri, Purroshotam Mishra, Ashish Mishra, Indu Prakash Mishra, Sushil Mishra, Om Prakash, Balbir Giri, Satuwa Maharaj, Abhishek Mishra, Shailendra Singh, Arvind Kumar, Shailesh Modi and Hasim Ali have been brought on record along with the bail application.

14. Bail application of the applicant-Anand Giri was rejected on 11.11.2021 by learned Special Judge (EC Act), Allahabad.

15. Investigating officer after recording the statement of the witnesses and collecting other material evidences submitted charge sheet dated 20.11.2021 against accused Anand Giri (applicant), Adhya Prasad Tiwari and Sandeep Tiwari for the offence under sections 120 B and 306 IPC with the observation in para 16.40 of the charge sheet that further investigation in respect of other aspects of the case is in progress. Further investigation report, if necessary, along with the opinion of experts shall be filed in due course. Hence investigation in this regard is kept open u/s 173(8) Cr.P.C.

16. Heard Mr. Gopal Swaroop Chaturvedi, learned Senior Counsel assisted by Mr. Vineet Vikram and Mr.

Imran Ullah, learned counsel for the applicant, Mr. Shiv Kumar Pal, learned Government Advocate for the State of U.P., Mr. Anurag Kumar Singh, learned counsel appearing on behalf of the CBI and Mr. Niraj Tiwari, learned counsel for the informants/complainants at length.

Submissions on behalf of accused-applicant

17. Mr. G.S. Chaturvedi learned Senior Counsel appearing on behalf of the applicant made the following submissions:

17.1. Applicant on account of dispute with deceased-Mahant Narendra Giri had left Prayagraj in March, 2021 and shifted to Haridwar and thereafter, he was neither concerned with the deceased nor with the Math "Baghambari Gaddi", at Prayagraj, rather was concentrating at Haridwar with his disciples.

17.2. The last interaction between the applicant and the deceased-Mahant Narendra Giri was on 26 May 2021 in Lucknow, when compromise took place between them and after compromise all the issues were buried, as such there is no proximity between the interaction of the applicant with the deceased and the suicide committed by the deceased on 20 September 2021.

17.3. After 26 May, 2021, there was no conversation between Anand Giri and the deceased-Mahant Narendra Giri. Even on the day of "*Guru* Purnima" on 24.07.2021 also Anand Giri did not come to Prayagraj to meet Mahant Narendra Giri.

17.4. The Investigating Officer in the most superficial manner filed charge-sheet against the applicant only on the basis of suicide note and video made by the deceased before his death, in which no source of information has been disclosed by the deceased that who gave information to him that "tomorrow applicant-Anand Giri, in order to defame him, will viral his morphed obscene video with a girl in an objectionable position".

17.5. Mr.Chaturvedi referring the statement of Mahant Santosh Dass @ Satua Baba emphasized a lot that deceased-Mahant Narendra Giri during his conversation with Mahant Santosh Dass @ Satua Baba also did not disclose the source of aforesaid information received to him against the applicant Anand Giri, therefore, there is no direct evidence against the applicant regarding abetment to commit suicide by the deceased. It is also submitted that in the suicide note and video of Mahant Narendra Giri, imaginary allegations have been levelled against the applicant-Anand Giri.

17.6. It is next submitted that at no point of time the applicant had ever asked Ravindra Puri or any other person to play or show any disputed audio or video in front of the deceased. The applicant had forwarded the audio clip of conversation between Purrushotam Mishra and Ashish Mishra @ Lavkush Mishra titled as "AUD-2021-0522-WA0012" to Ravindra Puri only to demonstrate that the disciples who were living in "Baghambari Math" with deceased-Mahant Narendra Giri were talking in such an indecent language behind him and the persons who were closely associated with Math are not trustworthy.

17.7. The applicant who is presently aged about 41 years is a Religious and Spiritual *Guru* and a Saint by profession. Earlier, he was a member of "Bade/Lete Hanuman Mandir" in Prayagraj and was also a member of Math "Baghambari Gaddi". He has also been actively espousing a series of public causes including 'Ganga Seva Campaign' and has also formed "Ganga Sena" for rejuvenation

of river Ganga which has no concern with Math "Baghambari Gaddi".

17.8. In May, 2019, when the applicant went to Sydney, Australia for a religious program, he was falsely implicated there under conspiracy in two molestation cases and was arrested on 07.05.2019 in order to malign his image and reputation. Referring the letter dated 11.09.2019 of Solicitor of legal firm- "Christopher Levingston & Associates Pty Ltd, Sydney" (filed as Annexure no. 1 to the second supplementary affidavit), it is submitted that charges of molestation against applicant had been dropped and applicant was acquitted by the local court in Parramatta, Australia. Here it is relevant to mention that order of alleged acquittal of the applicant has not been filed by the applicant.

17.9. The prosecution has come-up with a case that applicant was blackmailing the deceased due to which he has committed suicide, however, the CBI has failed to bring on record any audio, video or documentary or electronic evidence which can substantiate the prosecution case.

17.10. There is no direct evidence against the applicant that he got a fake / morphed obscene videos of the deceased with a women prepared through computer and was going to viral the same.

17.11. The deceased has committed suicide due to some other reason, but applicant has been falsely implicated in this case only because of internal rivalry and politics going on in the Math "Baghambari Gaddi", Prayagraj.

17.12. Referring the statement dated 21.10.2021 of one Hashim Ali, it is pointed out that Hashim Ali in his statement has stated that on 12.09.2021 Mahant Narendra Giri called him and asked to format the CCTV camera. Accordingly he formatted the CCTV camera on the direction of deceased-Mahant Narendra Giri. On the strength of said statement, it is argued that deceased deliberately got the CCTV camera formatted, so that after his death anyone else could not know his activities/misdeed.

17.13. Lastly, it submitted that no offence of instigation and abetment is made out against the applicant-Anand Giri, who is languishing in jail since 21.09.2021, therefore he is liable to be released on bail.

18. Here it is relevant to mention that though several other grounds have been taken in the bail application but except the aforesaid submissions, no other point has been pressed by Mr. Chaturvedi, learned counsel for the applicant.

19. In support of his submissions, Mr. Chaturvedi, learned Senior Counsel for the applicant placed reliance upon the following judgments:-

i. Arnab Manoranjan Goswami vs. State of Maharashtra and others, (2021) 2SCC 427

ii. M.Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence (2021) SCC 485

iii. Geo Varghese vs. The State of Rajasthan & Anr. 2021 SCC OnLine SC 873

iv. Gurcharan Singh vs. The State of Punjab 2020 SCC OnLine SC 796

v. The State of West Bengal vs. Indrajit Kundu & Ors. 2019 SCC OnLine SC 1364

Submissions on behalf of C.B.I.

20. Mr. Anurag Kumar Singh, learned counsel appearing on behalf of the C.B.I, by refuting the aforesaid submissions of

Mr. Chaturvedi, learned counsel for the applicant, argued that the facts and circumstances of the case as revealed from the investigation including the suicide note and dying declaration of Mahant Narendra Giri as reflected from the contents of his video titled as "20210920_132921" dated 20.09.2021 irresistibly established that accused persons namely Anand Giri (applicant), Adhya Prasad Tiwari and Sandeep Tiwari hatched a criminal conspiracy to create circumstances with a motive to compel/force the deceased-Mahant Narander Giri to commit suicide so that they may be able to achieve their ill object. Mr. Anurag Kumar Singh stretching his argument referred several facts and materials collected by the investigating officer as mentioned in the charge-sheet and other documents on record, which are as follows:-

20.1. The applicant is named accused in the FIR lodged by Amar Giri and Pawan Maharaj, who have stated in the FIR that the deceased was disturbed due to harassment caused by the applicant, and he (deceased) had himself said this number of times. The first informant Amar Giri has reiterated in his statement recorded under Section 161 Cr.P.C that deceased-Mahant Narendra Giri used to say that the applicant-Anand Giri was persistently harassing him.

20.2. The suicide note of deceased-Mahant Narendra Giri was recovered from the spot of crime by the police which mentioned in details the harassment, false allegation and character assassination by the applicant and his associates due to which deceased-Mahant Narendra Giri was under acute mental agony and committed suicide. Hand writing of deceased on the suicide note has been established by witnesses as well as by Central Forensic Science Laboratory (CFSL), New Delhi.

20.3. In the suicide note of the deceased-Mahant Narendra Giri, it is mentioned that on the date of incident, he received information from Haridwar that his morphed photographs with a woman in compromising position is going to be circulated by the applicant-Anand Giri. Realizing that his reputation would be tarnished by the time the falsity of the allegations and such photographs would be established, he committed suicide.

20.4. After the incident a self-made video clip of the deceased was also recovered from his mobile phone in which also he has clearly mentioned that his image has been tarnished due to false allegations made previously by the applicant and he has also received information recently that the applicant is going to circulate his morphed photographs with a woman in order to malign his image. Mahant Narendra Giri has also stated in the video clip that the truth would come to surface after investigation, but during this period his image would be tarnished due to which he thought of taking this extreme step to commit suicide to avoid loss of his reputation in the society and held Anand Giri (applicant), Adya Prasad Tiwari and Sandeep Tiwari responsible for this extreme step. In the above-mentioned video, Mahant Narendra Giri and his voice was also got identified by various witnesses who had met / talked to the deceased.

20.5. During investigation a conversation between Purushottam Mishra and Lav Kush has been recovered by the investigation officer. In the said conversation, allegations have been made that the deceased had illicit relations with a woman. This conversation was shared by Purshottum Mishra with co-accused Sandeep Tiwari, who forwarded it to the

applicant- Anand Giri and thereafter Anand Giri forwarded it to Mahant Ravindra Puri, the Secretary of Niranjani Akhada knowing fully well that he would bring it to the notice of deceased-Mahant Narendra Giri. This act of the applicant-Anand Giri established that he compelled Mahant Narendra Giri to commit suicide using the conversation as a tool that could tarnish his image. Mahant Ravindra Puri in his statement recorded under Section 161 Cr.P.C has admitted that on 23.05.2021, the applicant forwarded an audio clip of the conversation between Purshottum Mishra and Ashish Mishra @ Lav Kush to him, which he had forwarded to Sumit Tiwari, the Sewadar/disciple of deceased-Mahant Narendra Giri.

20.6. The said conversation had been prepared by Purushottam Mishra, who is a close associate of Sandeep Tiwari, who was appointed as the District president of "Ganga Sena" Prayagraj by the applicant-Anand Giri, which demonstrates that he is a very close confidant of applicant-Anand Giri.

20.7. Purushottam Mishra in his statement under Section 161 CrPC has stated that he had prepared the recording of the conversation with Lav Kush Mishra on the instructions of Sandeep Tiwari. Referring the statement of Ashish Mishra @ Lav Kush Mishra, it is pointed out that he in his statement clearly stated that the allegations made against deceased-Mahant Narendra Giri in his conversation with Purushottam Mishra are totally false.

20.8. The false allegations were circulated by the applicant and his associates which establish the fact that the applicant intended to pressurize Mahant Narendra Giri so that he may succumb to the pressure.

20.9. During investigation, several comments, chats, texts and malicious allegations against deceased-Mahant Narendra Giri which were put on social media by the associates/supporters of Anand Giri on his directions were also collected/recovered by the investigating officer, which are clearly suggestive of ill motive of Anand Giri.

20.10. During triangular conversations between the applicant, Mahant Narendra Giri and Mahant Ravindra Puri of Niranjani Akhada, threat was also extended by the applicant to deceased-Mahant Narendra Giri saying that he was in possession of audio and video clips which, in case, are seen by deceased-Mahant Narendra Giri, he would be shocked. The transcript of this conversation was recovered from the mobile phone of the applicant-Anand Giri. During said conversation, deceased-Mahant Narendra Giri realized that by levelling false allegations against him on social media, the applicant was making an attempt to grab the seat of Head of "Bagambhari Gaddi'.

20.11. There is sufficient crystal clear evidence against Anand Giri to establish that he has committed the offence in question. It is also evident on record that earlier also Mahant Narendra Giri made an attempt to commit suicide.

20.12. During May, 2019, Anand Giri visited Australia and he was arrested on 5th May 2019 in a molestation case, for which he remained in police custody. Mahant Narendra Giri sent huge amount and also used his political connections, as a result thereof, Anand Giri was released from custody and returned to India safely.

20.13. It is further submitted that during pendency of this bail application, the informants filed affidavit dated 03.07.2022 mentioning inter alia that they do not want to make any comment in the matter and want to take F.I.R. back, which clearly indicates that they have been won

over from the side of accused persons. It is also pointed out that in similar manner molestation cases against the applicant-Anand Giri were dropped in Australia on account of withdrawal of complaint by the complainants.

20.14. Lastly, on the strength of aforesaid facts, it is prayed that considering the gravity of the offence where a Head of a Religious Monastic Order has been compelled to commit suicide by the applicant-Anand Giri in order to satisfy his lust for power, the applicant is not entitled to be released on bail. The charge sheet has been submitted in this case and 19.09.2022 is the date fixed before the trial court for framing the charges. The bail application of the applicant is liable to be rejected.

20.15. Anand Giri has put the pious relationship of *"guru"* and *"chela"* on shame because in this case, unfortunately, a *guru* had to commit suicide because of his disciple, which is a very rare case.

21. Learned counsel for the CBI placed reliance upon the following judgments:

i- **Kalyan Chandra Sarkar vs. Rajesh Ranjan Alias Pappu Yadav and another** (2004) 7 SCC 528

ii- **Chenna Boyanna Krishna Yadav vs. State of Maharashtra and Another** (2007) 1 SCC 242

iii- **Praveen Pradhan vs. State of Uttranchal and Another** (2012) 9 SCC 734

iv- **State of Kerala and Others vs. S.Unnikrishnana Nair and Others** (2015) 9 SCC 639.

v- **Ude Singh and Others vs. State of Harayana** (2019) 17 SCC 301

Much emphasis has been given by the learned counsel for the CBI in paragraph 18 of thecase of **State of Kerala and Others vs. S. Unnikrishnana Nair and Others** (Supra), , which is reproduced herein below:-

"18.....we are compelled to recapitulate the saying that suicide reflects a "species of fear". It is a sense of defeat that corrodes the inner sould and destroys the will power and forces one to abandon one's own responsibility. To think of self-annililation because of something which is disagrreable or intolerable or unbearable, especially in a situation where one is required to perform public duty, has to be regarded as a non-valiant attitude that is scared of the immediate calamity or self-perceived consequence....."

Submissions on behalf of informants

22. Mr. Niraj Tiwari, learned counsel, who has been subsequently engaged by the informants submits that now previous counsels who were earlier appearing in this matter on behalf of informants have no instruction. He next submits that now both the informants do not want to oppose the prayer for bail of the applicant- Anand Giri. It is pointed out that informant-Amar Giri has filed affidavit dated 03.07.2022 in this case on his behalf as well as on behalf of another informant-Pawan Maharaj mentioning in paragraph no. 7 that they had not lodged F.I.R against any particular person. Only Bade Maharaj Ji's death was reported. They do not want any action on the First Information Report and want to take it back. They are also ready to give such affidavit before the Trial Court. They also do not want to give reply or make any comment on contents of Paragraph no.1 to 112 of the bail application of accused-Anand Giri.

23. Here it would be apposite to quote the contents of paragraph 7 of the affidavit dated 03.7.2022 filed by the informants, which are reproduced herein under:

"7- यह कि हम शपथकर्तागण/प्रथम सूचनाकर्ता (अमरगिरी एवं पवन महाराज) ने किसी व्यक्ति विशेष के विरूद्ध या नाम विशेष से प्रथम सूचना रिपोर्ट (एफ.आई.आर.) दर्ज नहीं करायी थी, मात्र बड़े महाराज के शरीर पूरे होने की सूचना मात्र दी थी और उक्त घटना दिनांक 20.09.2021 की जो भी वास्तविकता हो उसे हम शपथकर्तागण श्री लेटे हुए हनुमान जी महाराज को सुपुर्द करते है कि वही न्याय करेंगे कारण कि हम शपथकर्तागण ने किसी भी व्यक्ति विशेष को घटना में सम्मिलित या घटना कारित करते नहीं देखा है। इसलिए हम शपथकर्तागण उक्त प्रथम सूचना रिपोर्ट के आधार पर कोई कार्यवाही नहीं चाहते और इसे वापस लेना चाहते हैं, साथ ही इस आशय का हलफनामा/शपथपत्र सम्बन्धित परीक्षण न्यायालय में भी देने को तैयार है।"

Submissions on behalf of State of U.P.

24. Mr. S.K. Pal, learned Government Advocate for the State of U.P. submits that First information Report of this case was lodged on 21.09.2021 on the oral complaint / information of informants Amar Giri and Pawan Maharaj. Thereafter both of them supported the prosecution case in their Statement under Section 161 CrPC before the police as well before the C.B.I. In reply to the contents of paragraph no.7 of the affidavit dated 03.07.2022 of the informants, it is argued that same has been filed for the first time before this Court after submission of charge sheet dated 20.11.2021 against the applicant-Anand Giri and other co-accused, which shows that informants are either under any threat or they have been won over by the accused side. It is also submitted that this is a state case on the basis of F.I.R., which does not depend upon the mercy of the informant, whose status is not more than a witness.

25. Lastly it is vehemently argued that the manner in which affidavit dated 03.07.2022 has been filed by the informants in this case, there is every likelihood of tampering of the evidences and witnesses, in case applicant is released on bail.

The basic principles for considering bail prayer

26. The Apex Court in a plethora of decisions has setteled the factors to be borne in the mind while considering an application for bail are:-

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

(ii) Nature and gravity of the accusation;

(iii) Severity of the punishment in the event of conviction;

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

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

(vi) Likelihood of the offence being repeated;

(vii) Reasonable apprehension of the witnesses being influenced; and

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

"Abetment" and " Abetment of Suicide"

27. "Abetment" and "abetment of suicide" has been defined under Section 107 and 306 of IPC respectively. Before delving into the matter, I deem is appropriate to reproduce Section 107 and 306 of IPC, which reads as under:-

107. Abetment of a thing.

A person abets the doing of a thing, who--

First-- Instigates any person to do that thing; or

Secondly -- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly-- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.--A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing

Explanation 2.--Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.

306. Abetment of suicide.

If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall alsobe liable to fine.

Analysis of case

28. Having heard the submissions of learned counsel for the parties and examined the materials on record in its entirety as well as case diary of this case produced by the counsel for the State and CBI, this Court finds that:-

28.1. Mahant Narendra Giri had taken over as Head of Baghambari Gaddi, Allahpur, Prayagraj in the year 2004, after the death of Mahant Bhagwan Giri who had nominated Mahant Narendra Giri as his successor.

28.2. In the year 2005, accused-applicant Anand Giri joined Baghambari Gaddi as disciple of Mahant Narendra Giri and started living there. Initially applicant Anand Giri was most trusted and favourite disciple of Mahant Narendra Giri.

28.3. From the Kumbh Mela 2008, accused Anand Giri had raised a separate entity namely "Ganga Sena" and started organizing a camp at Magh Mela. Since there was no connection of this Ganga Sena with "Baghambari Gaddi" and no permission for the same was obtained by Anand Giri from Mahant Narendra Giri, therefore, Mahant Narendra Giri was little annoyed with Anand Giri on this count.

28.4. Mahant Narendra Giri vide his will deed dated 07.01.2010 had nominated Swami Balbir Giri as his successor. Later on Mahant Narendra Giri executed another will deed dated 29.08.2011, whereby he nominated Anand Giri (applicant) as his successor in place of Swami Balbir Giri cancelling his first will deed dated 07.01.2010.

28.5. Mahant Narendra Giri had also executed a lease deed dated 12.12.2018 of 744 Sqr. Mtrs. of land of "Baghambari Gaddi" in favour of accused Anand Giri for installation of a petrol pump of HPCL. Having been completed all formalities by means of the application dated 15.12.2018 of Anand Giri, letter of Intent (LOI) was issued in favour of Anand Giri on 09.03.2019.

28.6. In April 2019 applicant-Anand Giri had gone to Sydney, Australia for a period of five weeks. His program was arranged and hosted by Hindu Cosmos Mandir, Oxley Park. During his stay Anand Giri has also been invited by devotees to their home for performing various kind of religious ceremonies / rituals Bhagwad reading. On 5th May 2019 he was arrested there in two molestation cases on the

complaint lodged by two Fiji origin Australian women on the charge of indecent behaviour and remained in police custody for some time. Correspondence made between Government of India, Ministry of Home Affairs, New Delhi and Consul General, Congendia Sydney, Australia reveal that bail was granted to Anand Giri by Mt Druitt Court on certain conditions. As per email dated 15.03.2022 (filed at page No. 21 of the second supplementary counter affidavit dated 05.4.2022 filed by CBI) received to OIA-II Division, MEA, New Delhi from Consul General, Congendia Sydney, Australia, both the complainants made complaint to police that Anand Giri touched them on their private parts in bedroom whereas Anand Giri denied these allegations. Later on complainant submitted application for withdrawal of their complaints against Anand Giri. Thereafter he returned to India. I also find that Ravindra Puri, Balbir Giri and Sarvesh Kumar Dwivedi in their statements have stated that deceased-Mahant Narendra Giri helped a lot for the return of Anand Giri in India. Sarvesh Kumar Dwivedi also stated that Mahant Narendra Giri had sent huge amount to Australia, whereas there is denial of this fact from the side of the applicant. Here it is relevant to note that applicant has neither filed copy of complaint nor withdrawal application of the complainants nor the judgement of the alleged acquittal of Anand Giri.

28.7. After arrest of Anand Giri in molestation case in Australia, Mahant Narendra Giri was very upset and he realized that on account of the act and conduct of Anand Giri, the reputation of "Math" "Baghambari Gaddi" had been deteriorating on international level, therefore on 04.06.2020, Mahant Narendra Giri had executed a third will deed vide which he again nominated Swami Balbir Giri as his successor mentioning that Anand Giri has frequently visiting to foreign countries for participating in different programs. He had raised a separate entity namely "Ganga Sena" which has a different motive than that of "Baghambari Gaddi". Mahant Narendra Giri had also mentioned in his will deed that Anand Giri had involved himself in anti-religious activities in foreign countries due to which the reputation of Math "Baghambari Gaddi", "Shri Bade/Lete Hanuman Temple" and that of Mahant Narendra Giri had been deteriorating on international level.

28.8. Anand Giri had started construction of his own Ashram at Shyampur, Haridwar in the name & style of "Vikram Yog Peeth" and he being a member of "Baghambari Gaddi", had not taken permission of Mahant Narendra Giri. On 01.04.2021, Anand Giri had fixed the date of inauguration of his Ashram at Haridwar. He came to Niranjani Akhada and invited all the saints available there, but did not invite Mahant Narendra Giri. Due to non-invitation from accused Anand Giri, Mahant Narendra Giri was so disappointed that he had warned all the saints who were present there that if anyone would go to attend the said function, they need not return to Niranjani Akhada.

28.9. In the first week of April, 2021, Mahant Narendra Giri was diagnosed with CORONA and he was admitted to AIIMS, Rishikesh for treatment on 12.04.2021. On 13.04.2021, Anand Giri visited AllMS, Rishikesh to see Mahant Narendra Giri but Mahant Narendra Giri was so annoyed with him that he declined to meet Anand Giri. While accused Anand Giri was leaving the Hospital, he told Sumit Tiwari, who was attending the ailing Mahant Narendra Giri at that time that he

had seen Mahant Ji who would not survive and would die in few days. Thus, before his death, Mahant Ji should nominate him as his successor of "Baghambari Gaddi", Prayagraj.

28.10. After recovery from CORONA, Mahant Narendra Giri returned to Prayagraj on 24.04.2021. After a few days of quarantine, Mahant Narendra Giri had started meeting to his followers. During one such meeting Mr. Indu Prakash Mishra, Sushil Mishra and Om Prakash Pandey met Mahant Narendra Giri. During their discussion, Mahant Narendra Giri had disclosed that relations between him and Anand Giri had gone bad to worse and Anand Giri is disturbing him a lot.

28.11. On 12.05.2021, Mahant Narendra Giri wrote a letter to the Panch Parmeshwar of Niranjani Akhada, Haridwar, mentioning therein the ill-deeds are being committed by accused Anand Giri as well as allegation of misappropriating the funds of Gaddi and temple and requested them to expel Anand Giri from "Niranjani Akhaa" alleging that he had already expelled accused Anand Giri from "Baghambari Gaddi", Prayagraj as well as from "Shri Bade/Lete Hanuman Ji Temple", Prayagraj.

28.12. Thereafter on 13.05.2021 accused Anand Giri was expelled from Niranjani Akhada, Haridwar for a period of three years, which was formally announced on 14.05.2021.

28.13. After expulsion of accused Anand Giri from Niranjani Akhada, a war of words started by Anand Giri and his associates through print/electronic/social media etc. making allegations against deceased-Mahant Narendra Giri. Thereafter relation of Anand Giri with Mahant Narendra Giri further worsen. Investigating officer has collected those materials during investigation.

28.14. During that period Purushottam Mishra on 22.05.2021 having talked to his relative Ashish Mishra @ Lav Kush, over phone recorded the said conversation and sent the same to co-accused Sandeep Tiwari, who transmitted the said conversation on 22.05.2021 to applicant- Anand Giri. On 23.05.2021, Anand Giri forwarded the said conversation to Mahant Ravindra Puri, Secretary, Niranjani Akhada, Haridwar, stating that the said conversation had been received by him from the disciple of Mahant Narendra Giri and further told Mahant Ravindra Puri that he may bring the same to the knowledge of Mahant Narendra Giri. As told by applicant- Anand Giri, Mahant Ravindra Puri forwarded the said conversation to Sumit Tiwari with the direction to play the same before deceased-Mahant Narendra Giri. Accordingly Sumit Tiwari did the same. During investigation of the case on 02.10.2021, the data of mobile phone of Purshottam Mishra was extracted in a Hard Disk and during scrutiny, aforesaid audio clip "AUD-20210522-WA0012-sizing 1.63 MB" pertaining to conversation between Purshottam Mishra and Ashish Mishra @ Lav Kush Mishra was noticed. Transcription of this audio was prepared, which has been filed as Annexure No. 17 to the bail application. Perusal of the same reveals that vulgar, filthy and abusing language have been used for the deceased-Mahant Narendra Giri and his character was also assassinated making allegations inter alia that Mahant Narendra Giri has illicit relation with the mother of his disciple Manish Shukla, that is why Manish Shukla became very rich with Mahant Narendra Giri's money. The aforesaid conversation also indicates the conspiracy against Mahant Narendra Giri. Both Purushottam Mishra and Ashish Mishra @

Lav Kush, have admitted the aforesaid conversation between them in their statement before the C.B.I. when statement of Ashish Mishra alias Lav Kush Mishra was recorded, he stated that aforesaid allegation against Mahant Narendra Giri was false.

28.15. Co-accused Sandeep Tiwari after sending the recorded conversation between Purushottam Mishra and Ashish Mishra @ Lav Kush on 22.05.2021 to Anand Giri, having guilty mind and fear against him left Prayagraj in the night of 23.05.2021 for Dewas, Madhya Pradesh along with Shri Ved Prakash Pandey and Shri Manoj Dwivedi. While leaving Prayagraj, accused Sandeep Tiwari took a bag of accused Anand Giri which was kept with him. On 24.05.2021, they reached at Dewas, Madhya Pradesh in the noon. From the residence of Rajmata Gayatri Raje Panwar, MLA, Dewas, accused Sandeep Tiwari collected a parcel for handing over the same to Anand Giri. Thereafter, accused Sandeep Tiwari alongwith his above two friends left Dewas and they reached Haridwar in the morning of 25.05.2021 and met accused Anand Giri because the date of compromise between Mahant Narendra Giri and accused Anand Giri had already fixed for 26.05.2021. The above act of co-accused Sandeep Tiwari reflects that he was in guilty mind and was afraid of legal action against him if Mahant Narendra Giri would have reported about the conversation to police.

28.16. In the evening of 23.05.2021, accused Anand Giri came to Mahant Ravindra Puri at Niranjani Akhada, Haridwar and asked him to convince Mahant Narendra Giri to revoke his expulsion from Niranjani Akhada. Thereafter on 23.05.2021 on insistence of accused applicant Anand Giri, Mahant Ravindra Puri from his mobile number 9548565816 talked to Mahant Narendra Giri on his Mob. No. 9415340862 at around 16:24 hours for revocation of expulsion of accused Anand Giri. This conversation was recorded by accused Anand Giri in the Niranjani Akhada at Haridwar from his I-phone mobile keeping the mobile phone of Mahant Ravindra Puri on speaker mode. During triangular conversation which held on 23.5.2021 amongst accused Anand Giri, Mahant Ravindra Puri and deceased-Mahant Narendra Giri, accused Anand Giri mounted pressure on Mahant Narendra Giri to revoke his expulsion immediately and threatened Mahant Narendra Giri to defame him by circulating his objectionable videos and audios, which are in his possession. Anand Giri also said that if he sends those videos and audios to him, he would be stupefied. The wordings of Anand Giri were *'MAI AAPKO BHEJUGA TO AAPKE PAIRO KI ZAMEEN KHISAK JAYEGI, AISE AISE VIDEO AUDIO MERE PASS HAI'*. The said conversion indicates that Anand Giri had expressed his intention that in case of non revocation of his expulsion immediately, he will not sit silent. During the said conversation, it was settled that a decision to revoke expulsion of Anand Giri from Niranjani Akhada would be taken in next ten days. The said audio recordings containing the conversation between Mahant Narendra Giri, Mahant Ravindra Puri and accused Anand Giri were also recovered from the mobile of accused Anand Giri during investigation. Here it is relevant to mention that Mahant Ravindra Puri in his statement during investigation has also disclosed inter alia that Mahant Narendra Giri used to tell him time and again during the conversation that Anand Giri used to harass him.

28.17. On going through the transcript of audios titled as "20200117-

191026, 20200117-192332, 20200117-192648 and 20200117-193449" of triangular conversation between the accused-Anand Giri and his two associates namely Indu Prakash Mishra and Sushil Kumar Mishra, which have been filed at page No. 247 to 260 of paper-book, I find that Indu Prakash Mishra and Sushil Kumar Mishra were also deeply concerned with the dispute between the accused-Anand Giri and deceased Mahant Narendra Giri. Indu Prakash Mishra and Sushil Kumar Mishra were in touch with both Anand Giri as well as in Mahant Narendra Giri and they were working as a middleman/liaisoner between Anand Giri and Mahant Narendra Giri. Unhealthy conversations between them indicate that there was dispute / exasperation for supremacy and post as well as power and management relating to property of "Baghambari Gaddi".

28.18. On 26.05.2021 a meeting between Mahant Narendra Giri and Anand Giri was arranged by Indu Prakash Mishra and Sushil Kumar Mishra at Lucknow. Anand Giri along with co-accused Sandeep Tiwari, Ved Prakash, Manoj Dwivedi, Prashant Shukla, and Aviral Tiwari @ Shibu reached Lucknow from Haridwar. Mahant Narendra Giri along with Sushil Mishra and O.P. Panday also reached Lucknow from Prayagraj. A compromise took place between Mahant Narendra Giri and Anand Giri in the house of Indu Prakash Mishra at Lucknow and compromise note was also prepared by Sushil Kumar Mishra. In the said compromise note, accused Anand Giri had taken back all the allegations raised against Mahant Narendra Giri in the print/electronic media and Mahant Narendra Giri had forgiven his disciple keeping in view the relations between *Guru* and Chela. Indu Prakash Mishra and Sushil Kumar Mishra played a pivotal role in this regard. A video of said compromise was recorded by Sushil Kumar Mishra and thereafter it was circulated on social media.

28.19. On 30.05.2021, Purushottam Mishra alongwith Adhya Prasad Tiwari visited Shri Bade/Lete Hanuman Mandir for tendering apology from Mahant Narendra Giri, but due to sudden provocation, abusive arguments took place between Mahant Narendra Giri and co-accused Adhya Prasad Tiwari. Thereafter Mahant Narendra Giri removed him and his elder son Dilip Tiwari from the post of priest of "Shri Bade/Lete Hanuman Mandir". He had also taken back flower-garland shop from Adhya Prasad Tiwari, which was being run by his son co-accused Sandeep Tiwari.

28.20. Due to vacation of flower shop which was allotted to co-accused Adhya Prasad Tiwari, he was so frustrated that accused Adhya Prasad Tiwari talked to Indu Prakash Mishra to persuade Mahant Narendra Giri to return the said shop to him, but he advised Adhya Prasad Tiwari to remain silent for the time being.

28.21. On 24.07.2021, on the occasion of "*Guru* Purnima" Anand Giri did not turn up. Due to absence of accused Anand Giri even after compromise, the differences further widened up between Mahant Narendra Giri and accused Anand Giri.

28.22. On 11.09.2021, Mahant Narendra Giri asked Sarvesh Dwivedi @ Bablu to bring Sulphate "*Sulphas*" from the market for use in food grains which Sarvesh Dwivedi had purchased from a shop namely M/s New Agro Seeds Company, Alopibagh, Prayagraj.

28.23. Between 10.09.2021 and 12.09.2021, Mahant Narendra Giri had held a discussion with his disciple Vasudev Shukla and Abhyuday Tiwari about the

effects of consumption of sulphate and the time taken in death when someone consumes sulphate. He also enquired from them, if the medical treatment is received by the person who consume sulphate, can he survive.

28.24. On 12.09.2021, Mahant Narendra Giri had again planned to visit Haridwar. He had to meet to several property dealers such as Mr. Shailendra Singh, Mr. Shailesh Modi, Mr. Arvind Kumar @ Babli, etc., but due to bad weather he could not go there. On the same day, Mahant Narendra Giri had asked one Mr. Hashim Ali, who had installed CCTV at Baghambari Gaddi, to come at "Baghambari Gaddi" to format/delete the CCTV footages stored in DVR. Hashim Ali did the same accordingly, however, due to some technical issue, CCTV footages of one DVR could not be deleted.

28.25. On 18.9.2021, Mahant Narendra Giri had enquired from few persons whether the video/photo of one person could be edited showing face of other person with the help of computer.

28.26. On 19.09.2021, Mahant Narendra Giri asked Sarvesh Dwivedi @ Bablu to bring nylon rope from the market for fixing the same on the roof of first floor of his living room for drying the clothes. Accordingly, Sarvesh Dwivedi went to market and purchased 50 metre nylon rope of 08 Gauge from M/s Indira Traders, Tularambagh, Prayagraj. In the evening, when Mahant Narendra Giri was sitting outside the guest room, he told Sarvesh Kumar Dwivedi to bring a piece of rope after cutting the same from the bundle of nylon rope. Mahant Narendra Giri had also briefed him about the length of rope to be cut from the bundle.

28.27. In the evening of 19.09.2021, Mahant Narendra Giri had surprisingly asked one Suraj Pandey regarding process of recording video in the mobile phone. Suraj Pandey taught Mahant Narendra Giri about the same and also taught him how videos are deleted from mobile phone. The video in which Mahant Narendra Giri was seen learning how to make videos, was also recovered from his mobile phone.

28.28. On 20.09.2021, Mahant Narendra Giri also told Manish Kumar Shukla and Abhishek Mishra that he is very disturbed as he had received reliable information that Anand Giri is going to release his edited video showing him (Mahant Narendra Giri) with some female in objectionable position.

28.29. Record reveals that on the day of incident, Mahant Narendra Giri, on 20.09.2021 at around 7.00 AM, before committing suicide, lastly talked to Mahant Santosh Dass @ Satua Baba of Varanasi and also informed him that he had received a reliable information that Anand Giri had made a video by computer and in that video he has shown him (Mahant Narendra Giri) doing wrong with a woman and Anand Giri says that he will make that video circulate/viral. Mahant Narendra Giri further told Mahant Santosh Dass alias Satua Baba that Anand Giri had shown the said video to two persons of Haridwar and one person of Prayagraj.

28.30. Here it would be relevant to reproduce the statement of Mahant Santosh Dass alias Satua Baba which are as under:-

बयान महन्त सन्तोष दास @ सतुआ s/o महन्त जमुना दास जन्म तिथि 14-7-1984 निवासी सी०के० 10/48 मनकर्णिका घाट वाराणसी उ०प्र०)मूल निवासी पुत्र श्री स्व० शोभाराम तिवारी ग्राम मसौरा कला. पो० मसौरा खुर्द थाना कोतवाली सदर जिला ललितपुर

उ०प्र० धारा 161 सी०आर०पी०सी० के अन्तर्गत दर्ज।

मैं उपरोक्त हूं एवं बयान करता हूं कि मैं सन् 1999 में काशी आया था, मैंने सम्पूर्ण नन्द संस्कृत विश्व विद्यालय से आचार्य की शिक्षा गृहण की है। सन् 2009 में मैंने अपने गुरू मंहत जमुना दास से शिक्षा गृहण की एवं इसी वर्ष मैं उत्तराधिकारी घोषित हुआ 2010 में हरिद्वार कुंम्भ मेले के दौरान मुझे मेरे गुरूजी ने महामण्डलेश्वर घोषित किया, 29.11.2012 को गुरूजी स्वर्ग सिधार गये तब से मैं महामण्डलेश्वर कार्यरत हूं।

मैं हर वर्ष माघ मेला प्रयागराज जाता हूं वहां पर व वहां पर सतुआ बाबा सेवा शिविर लगाता हूं जो कि खाक चौके पर लगता है, सन् 2013 में मेरी मुलाकात महन्त नरेनद्र गिरी जी महाराज से माघ मेले के दौरान हुई। वह बहुत कम बात करते थे।

सन् 2016 में मैं बागम्बरी गद्दी गया था उस समय मैं वहा पर 6-7 दिन तक रूका था। महन्त नरेन्द्र गिरि रोज सुबह हनुमान मन्दिर जाते थे इस दौरान हमधर्म से सम्बन्धित बाते करते थे इतना मेल हो गया था कि हम दोनो के पिता पुत्र से सम्बन्ध हो गये थे।

मेरे श्री अखिलेख यादव पूर्व मुख्य मन्त्री एवं श्री शिवपाल यादव से अच्छे सम्बन्ध बहुत समय से रहे है।

मैं आगे बयान करता हूं कि कुम्भ मेला 2021 के दौरान महन्त नरेन्द्र गिरी जी व आनन्द गिरि के आपसी सम्बन्ध बहुत खराब हो गये थे। इसके बाद लगभग मई मध्य में महन्त नरेन्द्र गिरि जी का मुझे फोन आया तथा उन्होने मुझसे पूछा कि आनन्द गिरि से मेरी कब से बात नहीं हुई है। मैंने महन्त जी से कहा कि काफी समय से बात नहीं हुई है। महन्त जी ने मुझसे पूछा कि क्या अखबार नहीं पढते हो वह (आनन्द गिरि) उनपर अनरगल मिथ्या आरोप लगा रहा है कहता है बच्चो पर बहुत पैसा खर्च कर रहे है उनके मकान बनवा रहे है। महन्त नरेन्द्र गिरी जी ने मुझे कहा कि कोराना बीमारी के दौरान बच्चो ने ही उनकी सेवा की है।

मैंने आनन्द गिरि जी से फोन से बात की तो आनन्द गिरि से बात की तो आनन्त गिरि बोले की उन्हे अखाडे से निकाल दिया है, वह जमीन उससे वापस मांग रहे है, एक बार मठ की जमीन बेचे है अगर वह जमीन वापस कर देगे तो उसे भी महन्त जी बेच देगे। आनन्द गिरि से पूछने पर कि वह क्या चाहता है तो उसने बताया कि गद्दी की गरिमा बची रहे वह यह चाहता है।

मैंने फोन पर महन्त नरेन्द्र गिरि जी से बात की तो उन्होने कहा कि आनन्द गिरि झूठ बोल रहा है।

मुझे इस बात की जानकारी है कि दि० 26.5.2021 को भी इन्दू प्रकाश मिश्रा द्वारा महन्त नरेन्द्र गिरि व आनन्द गिरि के बीच सुलह कराई गई थी। उस समय एक वीडियों जारी किया गया था वह वीडियों मैंने भी देखा था व देखने के बाद मैंने महन्त नरेन्द्र गिरि जी से फोन से बात की थी। इसके उपरान्त मेरी महन्त नरेन्द्र गिरि व आनन्द गिरि से कोई भी बात नहीं हुई।

दि० 20.9.2021 को लगभग सात बजे सुबह महन्त नरेन्द्र गिरि जी का फोन आया, वह बोले कि सतुआ बाबा आप उनको भूल गये हो। काफी दिनो से फोन नहीं किए। वह मुझसे बोले कि मुख्यमंत्री जी आये थे कहा है अगर उनसे मिले तो बात करवा देना। मैंने कहा महन्त जी ठीक है कोशिश करूंगा।

महन्त नरेन्द्र गिरि आगे मुझसे बोले कि आनन्द गिरि से क्या मेरी बात हुई है महन्त नरेन्द्र गिरि बोले की कोई उनको बताया है कि आनन्द गिरि ने कम्प्यूटर से एक वीडियों बनाया है उस वीडियों में उन्होने महन्त नरेन्द्र गिरि को किसी महिला के साथ गलत काम करते हुए दिखाया है तथा कहता है किवह उसे बाइरल करेगा, मैंने उनसे पूछा कि वह वीडियों कहा है तो महन्त जी बोले कि वह उस बीडियों को हरिद्वार में जिनके नाम महन्त नरेन्द्र गिरि ने मुझे

नहीं बताये दो लोगो को दिखाया है तथा एक व्यक्ति को जो प्रयागराज का रहने वाला है उसे भी दिखाया है उस वीडियों में उसने कम्प्यूटर से उनका चेहरा जोडा है।

मैंने महन्त नरेन्द्र गिरि जी कहा कि वे पुलिस में एक शिकायत दे दे। उनकी तो पुलिस में जान पहचान है। महन्त जी बोले कि वह हमेशा मान-सम्मान से जिये है। जब तक पुलिस की जांच होगी तब तक तो काफी बदनामी हो जायेगी। मैंने उनसे कहा कि वह अखाडा परिषद के अध्यक्ष है उन्होने कोई गलती नहीं की है। इस पर उन्होने कहा कि दो दिन पहले तक वह बहुत अधिक तनावग्रस्त थे अब कोई तनाव नहीं है वह जांच के लिए प्रार्थना पत्र दे देंगे। दि० 20.9.2021 को समय 10.43 प्रातः उनका एक फोन आया जिसे मैं उठा नहीं पाया, फिर लगभग 11.00 बजे उनका फोन आया उन्होने मुझसे पूछा कि किया मैंने मुख्यमंत्री जी को बताया कि नहीं कि वह उनसे बात करना चाहते है, इस पर मैंने उनसे कहा कि मेरी बात नहीं हो पाई क्योंकि उनके साथ काफी सुरक्षा लगी है तथा वह काफी व्यस्त थे।

इनके बाद शाम को मुझे उनके देहान्त की सूचना मिली। दि०21.9.2021 को मैं प्रयागराज गया तथा पूरे दिन वहां पर रहकर शाम को वापस वनारस आ गया।

28.31. A suicide note as mentioned above was recovered from the place of incident. During investigation the handwriting of Mahant Narendra Giri on the suicide note was also identified by witnesses namely Amar Giri, Pawan ji Maharaj, Manish Shukla and Sumit Tiwari and others. As per CFSL report dated 03.01.2022 also the said suicide note was written by Mahant Narendra Giri. In the suicide note Mahant Narendra Giri had categorically held applicant- Anand Giri, co-accused Adhya Prasad Tiwari and Sandeep Tiwari responsible for taking extreme step to end his life.

28.32. The videos titled as "20210920_132907" and "20210920_132921" made by Mahant Narendra Giri have also been recovered from his Samsung Mobile phone. These two videos were made by deceased just before his death. First video of the deceased titled as "20210920_132907" is regarding learning of making video. In second video titled as "20210920_132921", Mahant Narendra Giri was seen holding Anand Giri, Adhya Prasad Tiwari and Sandeep Tiwari responsible for his suicide as Anand Giri was going to release an edited video showing him (Mahant Narendra Giri) with some female in objectionable position.

28.33. Here it is relevant to mention that on going through the transcript of audio titled as "20210618-195140" of triangular conversation" between the accused-Anand Giri and his two associates A & B, which has been filed at page no. 242 to 245 of paper-book, I find that during said conversations they used vulgar language related to debauchery, womanizing and sex also. Such conversations and using vulgar language do not suit to "religious *guru*s", his close associates and "sages". Such vulgar conversations cannot be expected from a man who claims himself to be a sage or religious/spiritual *guru* in real sense. This reflect his dual personality in the guise of wearing a religious cloak. This Court is of the view that the conduct of any person should be in accordance with dignity of his position. The higher is the position, the grater is the responsibility. A man is also known by the company he keeps in the society.

28.34. In any religion, "religious *guru*s" have a special position and respect in the eyes of the people, because of their special spiritual knowledge about the

religion concerned, scriptures, purity, grace and other virtuous qualities. Most of the people touch their feet in their honor due to spiritual preceptor and vibrant. They must have a pure and pious mind with ethical perfection and must be intensely virtuous, because in a civilized society, generally it is presumed that spiritual *guru* is free from greed, fraud and lust and the people who have blind faith in them are spiritually inspired from them extending their full faith and devotion and in their company they feel themselves spiritually elevated. A real *"guru"* inspires spiritual devotion in others and it is presumed that their presence purifies all, ergo high responsibility lies upon them towards the society in order to maintain the public confidence.

Conclusion

29. After analyzing the case in hand, I find that the crux of the case is that Mahant Narendra Giri vide his will deed dated 29.08.2011 had nominated Anand Giri (applicant) as his successor, but after arrest and involvement of Anand Giri in molestation cases in Australia as mentioned above, Mahant Narendra Giri had executed a fresh will deed dated 04.06.2020, vide which he removed the accused-applicant Anand Giri from his successor and again nominated Swami Balbir Giri as his successor. Thereafter Mahant Narendra Giri making several allegations, expelled Anand Giri from "Baghambari Gaddi", Prayagraj as well as from "Shri Bade/Lete Hanuman Ji Temple", Prayagraj and subsequently Anand Giri was also expelled from "Niranjani Akhada" for a period of three years on the persuasion of Mahant Narendra Giri. Co-accused Adhya Prasad Tiwari was head priest at " Shri Bade/Lete Hanuman Mandir" and is closely associated with Anand Giri. Other priest including informant Pawan Shukla and Dileep Tiwari, elder son of Adhya Prasad Tiwari were also kept for worship and they were also given monthly salary. There are shops of flower-garland, Prashad, Sweet, Rudraksha etc. in the premises of "Shri Bade/Lete Hanuman Ji temple". Temple is managed by the Mahant of "Baghambari Gaddi", Prayagraj. There are thirteenth Akhadas of saints in India. Niranjani Akhada is also one of them. According to old customs and traditions, as per will of late Mahant of "Bhaghambari Gaddi", his successor is declared by Niranjani Akhada. Mahant Narendra Giri had given the flower-garland shop on rent to co-accused Adhya Prasad Tiwari, whose management was looked after by his younger son co-accused Sandeep Tiwari. From the said shop, co-accused Adya Prasad Tiwari and Sandeep Tiwari made a lot of money. Mahant Narendra Giri had removed Adhya Prasad Tiwari and his son Dileep Tiwari from the post of Priest and flower-garland shop was also taken back from Adhya Prasad Tiwari because of their involvement in conspiracy and raising voice against him and given flower-garland shop to his another disciple Sumit Tiwari. Therefore, accused persons namely Anand Giri, Adhya Prasad Tiwari and Sandeep Tiwari along with their other associates in collusion with each other adopting different modus-oparandi hatched a criminal conspiracy and mounted pressure upon Mahant Narendra Giri making his character assassination etc. and created in-conducive circumstances with a motive to compel Mahant Narendra Giri to revoke expulsion of accused Anand Giri from Niranjani Akhada, to return the shop of accused Adhya Prasad Tiwari and his son accused Sandeep Tiwari and to restore their position back. In furtherance of the same, they got the objectionable audio dated 22.05.2021 prepared by

Purshottam Mishra on the direction of Sandeep Tiwari and further got it circulated with an oblique motive to tarnish the reputation of Mahant Narendra Giri. During triangular conversation which held on 23.5.2021 amongst accused Anand Giri, Mahant Ravindra Puri and Mahant Narendra Giri (deceased), accused Anand Giri mounted pressure on Mahant Narendra Giri to revoke his expulsion immediately and threatened Mahant Narendra Giri to defame him by circulating his objectionable videos and audios which are in his possession, which mounted immense mental pressure on him and compelled him to think about committing suicide.

30. Here it would be apposite to mention that the meaning of suicide requires no explanation. It is an act of self-killing. Suicidal ideation and behaviour in human beings are complex and multifaceted. Every human has different concept and perspective about his life. No standard or straightjacket formula can be laid down with regard to sensitivity of each individuals, because different people behave differently in same situation. Each person has his own idea of self esteem and self respect. Sometime a comment passed against a person on lighter side are taken very seriously by such persons, who are hyper-sensitive while other persons, who are not so sensitive, behave differently, they ignore even serious comment made against them and try their best to face the situation. Each individual's suicide-ability pattern depends on his inner consciousness of mental pain, fear and loss of self respect. These factors are crucial and exacerbating contributor to an individual's vulnerability to end his life, which may either be an attempt for self-protection or escapism from intolerable self. Therefore in the matters of suicide each case has to be decided on the basis of its own facts and circumstances. If the accused kept on mental torture the deceased by words, deeds or conduct, which may provoke, urge or encourage the deceased to commit suicide is an abetment. It is the basic principle of criminal jurisprudence that a man may tell a lie, but circumstances do not. Even an indirect act of incitement to the commission of suicide would constitute the offence of abetment of suicide under Section 306 of the IPC. The factum of abetment/instigation differs from case to case. Even spectrum of harassment is quite varied as it can be ranged from physical, verbal, mental or even emotional. Where the accused by his acts or continued course of conduct creates such circumstances that deceased was left with no other option except to commit suicide, an instigation may be inferred.

31. Under the facts of the case as mentioned above, I find that there was a proximate between the unfortunate incident of suicide of Mahant Narendra Giri and acts of the accused persons and their other concerned associates. The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Where the death by suicide is a logical culmination of a continuous harassment or mental pain, each step directly or indirectly connected with the end of life of the deceased are relevant. The facts having a bearing in this case cannot be ignored particularly suicide note and video made by the deceased just before committing suicide and, therefore, I am not inclined to accept the submission of Mr. G.S. Chaturvedi, learned senior counsel for the applicant that there was no proximate link between the suicide of the deceased and acts of the accused persons.

32. Though Mahant Narendra Giri has died because of hanging, but facts of the case reflect that he was hyper-sensitive man and considering his post and position in the society that he was President of "All India Akhada Parishad", Mahant / Head of Shri Math "Baghambari Gaddi" and "Shri Bade/Lete Hanuman Ji Temple, Prayagraj" was very much depressed on account of the reason that if Anand Giri makes his edited obscene video with a girl viral, then he will not be able to show his face in the society and feels himself humiliated among his known persons and in the society on account of his character assassination by the accused persons and to avoid defamation and insult in the eyes of society, his followers and devotees, he has committed suicide. The said facts are corroborated by the suicide note written by the deceased and video made by the deceased just before his death as well as other attending circumstances mentioned above. The deceased in his suicide note and video has disclosed the reasons and other compelling circumstances implicating Anand Giri, which prevailed upon him for committing suicide. At this stage, there is no reason to disbelieve the suicide note and video made by the deceased just before his death. Normally it is presumed that no one tells a lie while dying by committing suicide. Thus, abetment of suicide by Anand Giri and his associates, cannot be ruled out at this stage. The submission of Mr. G.S. Chaturvedi that no offence for abetment against Anand Giri is made out, is not liable to be accepted. Further, the contention of Shri Chaturvedi that Mahant Narendra Giri called Mr. Hashim Ali and asked to format the CCTV camera so that after his death anyone else could not know about his activities/misdeed, has no leg to stand inasmuch as there may have been various reasons including technical one for getting the CCTV camera formatted, which does not have any bearing on the fact of the case at this stage.

33. The next submission of Mr. G.S. Chaturvedi that deceased-Mahant Narendra Giri, neither in the suicide note nor during his conversation with Mahant Santosh Das @ Satua Baba disclosed that as to who gave information to him that tomorrow applicant-Anand Giri will viral his edited obscene video with a girl, is concerned, the same is immaterial and submission of Mr. Chaturvedi in this regard is also not liable to be accepted, because suicide note cannot be taken to be encyclopedia of each and every minute details. Merely by non-disclosure of the source of information by the deceased in the suicide note, the same cannot be disbelieved, because the contents of suicide note depend upon the mental balance of the person concerned at the time of writing the suicide note. Deceased-Mahant Narendra Giri during his last conversation dated 20.09.2021 at about 07:00 AM with Mahant Santosh Das @ Satua Baba also clearly made allegation against Anand Giri. It is also possible that deceased-Mahant Narendra Giri may not have intentionally disclosed the name of the informer, who gave information to him about the act and intention of accused-Anand Giri so that after his death the informer may not be harassed by the accused and his associates in future.

34. The materials collected by the C.B.I. during investigation, tend to show that on account of acts of the applicant and co-accused, the deceased was put under tremendous pressure to do something which he was perhaps not willing to do. The conduct of the applicant and his accomplices was such that the deceased because of fear of his slander was left with

no other option, but to end his life. The manner in which the deceased committed suicide, prima facie, indicates that the same is the outcome of cumulative effect of series of acts of accused persons as mentioned above. So far as information gathered by deceased from Haridwar that tomorrow Anand Giri will make his edited obscene video with a girl viral, as mentioned in the suicide note and video made by him just before his death also appear that the same was of definite nature (not imaginary or inferential one), therefore, Mahant Narendra Giri committed suicide. As such, prima-facie case for abetment and instigation is made out against the applicant Anand Giri, hence the provisions of Section 107 IPC are attracted.

35. On the basis of aforesaid analysis of the case, the submission of Mr. G.S.Chaturvedi, learned senior counsel that the applicant is innocent is not liable to be accepted at this pre-trial stage.

36. The further detailed discussion relating to the incident need not be referred to herein since the allegations and the defence thereto is still open to be urged by the parties in the trial Court.

37. So far as judgments relied upon by the learned counsel for the applicant are concerned, there is no dispute about the proposition of law laid down therein, but the same are not helpful to the applicant because the same are distinguishable on facts of this case. It is well settled that every case turns on its own facts. Even one additional or different fact may make a big difference between the conclusion in two cases, because even a single significant detail may alter the entire aspect.

38. So far as affidavit dated 03.07.2022 of the informants is concerned, I find that first information report of this case was lodged on 21.09.2021 on the oral complaint / information of informants Amar Giri and Pawan Maharaj, who are also witnesses, out of five witnesses of the inquest proceeding. Statement under Section 161 CrPC of Amar Giri and Pawan Maharaj were recorded by the then investigating officer of police on 21.09.2021 and both of them supported the contents of F.I.R. During investigation by CBI, their statements were again recorded in which also they did not dispute their statements recorded by the police. Perusal of order-sheet of this case shows that without issuing any notice to informants namely Amar Giri and Pawan Maharaj, four counsel namely Alok Kumar Dubey, Saumitra Dwivedi, Rishi Shankar Dwivedi and Vinay Prakash Shukla filed their Vakalatnama dated 21.03.2022 on behalf of the informant Amar Giri and they have appeared on several dates to oppose the prayer for bail of the applicant, but on 25.07.2022, when matter was taken up, it was informed by those learned counsel that now they have no instruction to appear in the matter because the informants have engaged new counsel Mr. Niraj Tiwari on 02.07.2022 and got an affidavit dated 03.07.2022 filed through him stating inter-alia that they do not want to oppose the bail application and to say anything. On perusal of the same, I find that the said affidavit dated 03.07.2022 has been filed after six months eleven days of submission of charge sheet dated 20.11.2021 against the applicant-Anand Giri without any explanation of delay. In the affidavit informants taking U-turn stated inter alia that they had not lodged F.I.R. against any particular person. Only Bade Maharaj Ji's death was reported. They do not want any action on the First Information Report and want to take it back, which itself indicates

that something is fishy in the matter and possibility of winning over the informants from the accused side cannot be ruled out.

39. In view of the above, this Court is prima-facie satisfied and finds force in the submission of learned counsel for the State and C.B.I. that in case, applicant is released on bail, there is every likelihood of winning over the other witnesses and tampering the evidences.

40. As a fallout and consequence of aforesaid discussion, considering the facts, materials on record and other attending circumstances of the case, which are relevant for the purpose of deciding this bail application, submissions advanced on behalf of parties, complicity of the applicant, gravity of the offence and severity of the punishment as well as possibility of tampering the evidences and winning over the witnesses as noted above, I do not find any good ground to grant bail to the applicant at this stage.

Result

41. The bail application lacks merit and is accordingly **rejected.**

Observation and direction

42. It is clarified that the observations, if any, made herein above are strictly confined to the disposal of the bail application and shall not be construed to have any reflection on the ultimate merits of the case.

43. However, considering the detention period of the applicant-Anand Giri alias Ashok Kumar Chotiya in jail since 21.09.2022, it is directed that the trial Court shall make all endavour to conclude the trial of the applicant expeditiously without granting unnecessary adjournment to either of the parties. Applicant-Anand Giri shall co-operate with the trial and either of the parties shall not seek unnecessary adjournment.

44. Office is directed to send a copy of this order forthwith to the concerned court below for compliance.

CRIMINAL MISC. BAIL
APPLICATION No. - 51323 of 2021

1-Heard learned counsel for the parties.

2-This application has been moved on behalf of the State/opposite party no.1 seeking correction in paragraph no. 43 of the order dated 09.09.2022 mentioning therein that the applicant-Anand Giri alias Ashok Kumar Chotiya is in jail since 21.09.2021, but due to typographical error, the date of detention of the applicant has wrongly been transcribed as 21.09.2022 in place of 21.09.2021.

3-Having regard to the submission of learned Government Advocate for the State, it is directed that in third line of paragraph no. 43 of the order dated 09.09.2022, the date of detention of the applicant be read as "21.09.2021" in place of 21.09.2022.

4- This order shall be treated as a part of the order dated 09.09.2022.

5- The correction application is allowed.

(2022) 9 ILRA 35
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Jail Appeal No. 81 of 2019

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

Counsel for the Appellant:
Sri Raj Kumar Sharma (A.C.)

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

(A) Criminal Law - Jail Appeal - Indian Penal Code, 1860 - Sections 452/307/504/506 - Catching hold - proof of life threatening injury is not required for the offence under Section 307 I.P.C. - rather it is the intention of the accused which matters - which can be ascertained from surrounding circumstances as well as the injury sustained, nature of the weapon used and the severity of the blows etc. - testimony of the injured witnesses has a great evidentiary value and unless the compelling reasons are present, the statement of the injured witnesses cannot be discarded lightly. (Para -20,22)

Two incised wounds on the body of the injured - attracts the second part of Section 307 I.P.C. - entire series of events show that there was a clear intention to commit murder - accused first threatened the injured then went away - thereafter again came armed with a knife in his hand - gave two repetitive blows on the abdomen of the incised wounds.**(Para -25)**

HELD:-Trial court rightly convicted accused under Section 307 I.P.C. read with Section 452, 504, 506 I.P.C. . Conviction order of the trial court is upheld. **(Para - 24)**

Jail appeal dismissed. (E-7)

List of Cases cited:-

St. of M.P. Vs Mansingh, (2003) 10 SCC 414

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

1. Heard Shri Raj Kumar Sharma, learned amicus curiae for the appellant and Shri S.K. Ojha, learned A.G.A. for the State.

2. The present jail appeal has been filed against the judgment and order dated 27.02.2019 passed by Additional Sessions Judge, Meerut in Session Trial No. 277/2017, crime No. 390/2016, under Sections 452/307/504/506 I.P.C., P.S. Hastinapur, District Meerut whereby the appellant has been convicted under Sections 307 I.P.C. to undergo seven years simple imprisonment with a fine of Rs. 2000/-, under Section 452 I.P.C. to undergo two years of simple imprisonment with a fine of Rs. 1000/-, under Section 504 I.P.C. to undergo two years of simple imprisonment with a fine of Rs. 1000/- and under Section 506 I.P.C. to undergo two years of rigorous imprisonment with a fine of Rs. 1000/-, with default provisions.

3. The prosecution case as per the written report is that the brother-in-law of Raju son of the informant Kanwar Pal came since few days to do the agricultural work. Santram (accused-appellant) who is from the village of the informant and is a scoundrel person by threatening to Raju, he used to take money for drinking liquor. Today on 21.10.2016 in the evening Santram demanded money for liquor and when Raju did not gave money, then Sant Ram threatened him to teach a lesson. After sometime at around 6:20 PM, Raju, the complainant and his son Kanwar Pal were

talking inside the house, then Sant Ram came abusing inside the house with a knife in his hand forcibly and by telling that he will not leave Raju alive today, he after catching hold of Raju with an intent to kill attacked from knife in his abdomen. In a pursuit to save by the complainant, the second blow was inflicted by the appellant in the stomach of Raju and as a result thereof his intestine came out. While raising alarm, the complainant tried to catch, the accused Santram turned and ran hurriedly and in this process, in the iron gate his head crushed, still he ran away. Raju was taken from ambulance. After this a written report given by the complainant Vijay Pal and on the basis of that chik F.I.R. was registered on the same day.

4. The injured Raju was examined at Community Health Centre, Hastinapur, Meerut. He received incised wound 9 cm x 2 cm depth on the left side of abdomen, 12 cm below left nipple. The second injury was also an incised wound 2 cm x 5 cm, bone depth right side of chest 13 cm below right nipple. These injuries were kept under observation. Doctor opined that the injury caused by a sharp edged object and bleeding was fresh. A supplementary report was prepared wherein x-ray of chest and ultrasound were done which were found to be normal. The investigating officer after taking examination of the prosecution witnesses prepared the site plan and after completing the investigation has submitted the charge sheet under Section 452/307/504/506 I.P.C. Learned trial court vide order dated 21.06.2017 has framed the charges on the appellant-accused under Section 452/307/504/506 I.P.C.

5. PW-1 in his examination-in-chief has reiterated the prosecution version written in the written report clearly stating that Santram with a knife in his hand came inside the house and with an intent to kill caused two blows on the stomach of Raju and prior to that on the same day i.e. 21.10.2016 Santram demanded money from Raju for drinking liquor and when Raju refused to pay, Santram after extending threats went away. In the cross, he has stated that he had not seen Santram abusing and threatening Raju. He has also stated that money was not demanded in front of him. It has been further stated that the incident took place in his house and when he came out from the house he saw Santram running after assaulting Raju with knife, however, had not seen Santram stabbing Raju. He has further stated that apart from him and his son there was no one else.

6. PW-2 is Raju (injured witness) has stated that on 21.10.2016 in the evening Santram demanded money from him for drinking liquor which he refused to give and then Santram threatened him to teach lesson and went away. After some time, at about 6:20 PM, while he was sitting with PW-1 and his son inside their house and were talking, then Santram armed with knife abusing forcibly came inside the house and told him that he will not leave him leave him alive today. After saying this, with an intent to kill, he attacked upon him with knife which came in his stomach and he got injured. After raising alarm, the accused-appellant Santram ran away. In the cross, he has stated that he was attacked by Santram twice in the stomach. He has lastly stated that after some time Rishipal also came there.

7. PW-3 Kanwar Pal, in chief has supported the prosecution case and while reiterating the prosecution version, he has also said that in the evening around 6 PM

Santram came inside his house and started demanding money from Raju for drinking liquor. Upon refusal by Raju, he went away abusing. After some time he came armed with knife and abusing forcibly entered into their house and told Raju that today he will not leave him alive and gave two knife blows in the stomach of Raju. Upon alarm being raised, the villagers came and Rishipal also came. In the cross, he has stated that he did not see Santram talking to Raju and when he came out, Rishipal was coming to his house.

8. PW-4 Vijay Kumar is a formal witness who has proved chik F.I.R. and primary GD.

9. PW-5 is Rishi Pal Singh in whose presence at the time of assault has been denied by PW-1, PW-2 and PW-3 and all three witnesses have said that he came after assault was already made.

10. PW-6 is doctor Satish Chandra who has medically examined the injured. He further stated that the injuries have come from sharp edged weapon, however, are simple in nature. He has also said that two incised wounds were found on the body of the injured and such injury may not cause death.

11. PW-7 Gaurav Gupta who conducted the operation of the injured and prepared a supplementary report. He has also stated that on the basis of supplementary report, he could not say that on which part of the stomach, the injured sustained injuries. He has denied the suggestion that the injuries could not have caused death. He further denied suggestion that the injuries were simple in nature.

12. PW-8 is the investigating officer who has conducted the investigation and has supported the prosecution case. The statement of the accused under Section 313 Cr.P.C. were recorded where his defence was of denial and while denying the incident he has stated that he has been falsely implicated due to enmity.

13. Learned counsel for the appellant submits that there is inconsistency in the statement of the prosecution witnesses. The medical report does not corroborate the prosecution version and nature of the injury does not attract the offence under Section 307 I.P.C.

14. Learned A.G.A. has opposed this contention submitting that grievous injury is not a sin qua non for bringing home the charges under Section 307 I.P.C.

15. Perusal of the site plan which is exhibited as Exh. Ka-4 prepared by the investigating officer, shows that the occurrence has been committed inside the house of Vijay Pal Singh (PW-1). The testimony of the injured witness Raju corroborates the prosecution case who has clearly said that he had been assaulted twice by the appellant. PW-1 in his chief, though has claimed himself to be eye witness of the occurrence, however, in his cross, he has again said that the incident took place inside his house and he did not see Santram talking to Raju or abusing or threatening him rather when he came out, he only saw Santram running after stabbing Raju. Thus, PW-1 though has not seen the appellant stabbing Raju, however, he saw him running after stabbing Raju. PW-1 has corroborated the testimony of PW-2. Likewise PW-3 Kanwar Pal, in the examination-in-chief, has claimed himself to be the eye witness, however, in the cross he has stated that he did not see Santram stabbing Raju rather he has stated that after hearing alarm when he came out, Santram was gone. He has stated that he has not

seen Santram stabbing Raju, thus, PW-3 is also not the eye witness of the incident, however, he was very much present in the house and had heard the alarm and when he came out, he saw that Raju has held his stomach and there were two wounds of knife on his stomach and thus his presence cannot be doubtful. PW-3 has supported the prosecution version.

16. The presence of PW-5 Rishipal has been denied at the time of occurrence by PW-1, PW-2 and PW-3, therefore, his testimony is of no relevance.

17. PW-6 Doctor Satish Chandra Bhaskar has corroborated the prosecution version and has proved the two incised wounds sustained by the injured and has further corroborated that these injuries could have come from sharp edged weapon. Doctor Satish Chandra Bhaskar has conducted operation as well as ultrasound and x-ray of the injured.

18. The cumulative reading of the statement of PW-1, PW-2 and PW-3 shows that the incident took place on 21.10.2016 around 6 PM which has been committed in two parts. In the first part, the money was demanded by the appellant from the injured Raju which was denied and upon this the appellant has threatened the injured. In the second part of the incident, the appellant returned and entered into the house of PW-1 with a knife in his hand and gave two blows in the stomach of the injured, as a result thereof, he got injured. The testimony of the injured witness PW-2 is intact and has supported the prosecution case which is corroborated by the testimony of the doctor PW-6 and also of PW-1 and PW-2.

19. Law in this regard is settled; the testimony of the injured witness alone is sufficient to prove the charge under Section 307 I.P.C., whereas in this case apart from the testimony of the injured witness, there is corroborative medical evidence in form of injury report and the testimony of PW-6, coupled with the testimony of PW1 and PW-3 who were very much present in the same house, it is further corroborated by the testimony of the investigating officer who has prepared the site plan.

20. The testimony of the injured witnesses has a great evidentiary value and unless the compelling reasons are present, the statement of the injured witnesses cannot be discarded lightly as held by the Apex Court in the case of ***"State of M.P. v. Mansingh, (2003) 10 SCC 414".***

21. On due consideration to the argument advanced by the parties as well as perusal of the record, so far as the contention of the learned counsel for the appellant that the injury sustained by the injured was simple in nature and therefore no offence under Section 307 I.P.C. is made out is concerned, it will be appropriate to extract Section 307 I.P.C.:-

307. Attempt to murder.--Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to 1[imprisonment for life], or to such punishment as is hereinbefore mentioned. Attempts by life convicts.--2[When any person offending under this section is under sentence of 1[imprisonment for life], he may, if hurt is caused, be punished with death.

Perusal of the definition shows that an act done by the accused with an intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of murder. The next part of Section 307 I.P.C. refers to a heavier punishment in case hurt is caused pursuant to such act. Language of the section makes it clear that mere sustaining injury is not required to attract offence under Section 307 I.P.C., however, in case hurt is caused by such act, the punishment can be severe. Likewise it is not necessary that the injury should be such from which under normal circumstances death may be caused. In State of Maharashtra v Balram Bama Patill (1983)2 SCC 28, the Supreme Court held that it is not necessary that a bodily injury sufficient under normal circumstances to cause death should have been inflicted. Relevant portion of para 9 of Balram Bama Patill's case is reproduced as under :-

"9...To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof."

(Emphasis supplied)

In State of M P v Saleem (2005)5 SCC 554, the Supreme Court held as under:

"13. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt."

In Jage Ram v State of Haryana (2015)11 SCC 366, it has been held that to establish the commission of an offence under Section 307 , it is not essential that a fatal injury capable of causing death should have been inflicted. To reproduce:

"12. For the purpose of conviction under Section 307 IPC, the prosecution has to establish (i) the intention to commit murder; and (ii) the act done by the accused. The burden is on the prosecution that the accused had

attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under Section 307 IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given, etc."

In Md. Umar Ali and others Vs. State of Bihar and others, the Patna High Court held as under:-

"19. It is well settled that evidence of injured eye witness cannot be discarded in toto on the ground of inimical disposition towards the accused or improbabilities of narrating the details of actual attack. His evidence has to be scrutinized with caution taking into account the factum of previous enmity and tendency to exaggerate and to implicate as many as possible. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be interested. A witness is interested only when he derives some benefit from the result of the litigation. If evidence of injured witness if otherwise reliable and trustworthy then it carries more weight and cannot be thrown away merely because it is not corroborated by any independent witness. Little discrepancies cannot make evidence of injured witness unacceptable, when his evidence as a whole has a ring of truth. "

22. Hence from the discussion herein made above as well as the law laid down by the Apex Court in the case of Balram Bama Patil (supra) it is evident that proof of life threatening injury is not required for the offence under Section 307 I.P.C. rather it is the intention of the accused which matters and which can be ascertained from surrounding circumstances as wellas the injury sustained, nature of the weapon used and the severity of the blows etc. In this case the accused first threatened the injured then went away and thereafter again came armed with a knife in his hand and entered into the house of PW-1 and gave two repetitive blows on the abdomen of the injured. The fact is that the accused after extending threat again came on the same day and gave two blows to the injured. Not only this while entering into the house of the injured witness PW-2 he has also told that he will not leave PW-2 alive today and thereafter gave two blows on the vital part of the body i.e. abdomen. The entire series of events show that first threat was given by the appellant to the injured and secondly after some time the appellant came prepared with knife in his hand and again said that he will not leave PW-2 alive today and after saying this gave two blows to the accused, coupled with the injury report of the injured PW-2 prepared by the doctor PW-6 Dr. Satish Chandra Bhaskar who has said that two incised wounds by a sharp edged weapon have been sustained by the injured has duly corroborated by the prosecution version read with testimony of PW-1 and PW-3. All these attending circumstances show that there was a clear intention to commit murder. The presence

of two incised wounds on the body of the injured attracts the second part of Section 307 I.P.C.

23. In this case the contention of learned counsel for the appellant that the injuries were not grievous rather were simple has no force; the injuries found to be caused by a sharp edged weapon and they were kept under observation, x-ray and ultrasound was done; the accused had clear motive for committing the crime as he often used to take money from PW-2 for drinking liquor and on the date of occurrence since the money was refused by PW-2, the accused committed the offence after extending him threat and breaking into the house of PW-1.

24. In view of the above observation, I am of the opinion that the trial court has rightly convicted the accused under Section 307 I.P.C. read with Section 452, 504, 506 I.P.C. and therefore the jail appeal is dismissed and accordingly, the conviction order of the trial court is upheld.

25. On the question of sentence, learned amicus curiae appearing for the appellant submits that condition of the appellant is very poor and he could not arrange a lawyer so that he can apply bail in the trial court during trial. He was arrested on 28.11.2016 and against the maximum sentence of seven years approximately about 5 years 9 months as per custody certificate have been incarcerated by the appellant and therefore, it is submitted that looking to the fact that the appellant has no prior criminal history, he has already incarcerated more than five years in jail, the sentence of the appellant may be reduced to the period undergone by the appellant.

26. Learned AG.A. though has opposed the appeal, however, could not dispute the fact that the appellant has already undergone 5 years and 9 months approximately in jail and he is in custody since 28.11.2016.

27. On due consideration to the argument advanced by the learned counsel for the parties as well as considering the the financial position of the appellant, the sentence and fine imposed by the trial court vide its judgment and order dated 27.02.2019 is reduced to the period already undergone by the appellant.

28. Let a copy of this judgment be transmitted to the learned trial court as well as concerned Jail Superintendent for compliance. Lower court record be sent back to the lower court.

I appreciate the assistance rendered by Shri Raj Kumar Sharma, learned Amicus Curiae, and we direct the State Government to pay ₹ 20,000/- as honorarium.

(2022) 9 ILRA 41
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 163 of 2013
&
Criminal Appeal No. 18 of 2013

Gaya Prasad ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Aalok Kumar Srivastava, Sri Gautam Kumar Banerji, Sri Kailash Prakash Pathak, Sri Kamta Prasad, Sri Sandeep Kumar

Counsel for the Respondent:
Govt. Advocate, Sri Ashutosh Upadhya

(A) Criminal Law - Indian Penal Code, 1860 - Sections 34 & 304 (1) - The Code of Criminal Procedure, 1973 - Section 313 - criminal justice jurisprudence - not retributive but reformative and corrective - 'doctrine of proportionality' - undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system - 'Proper Sentence' - Sentence should not be either excessively harsh or ridiculously low - Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account - balance between reform and punishment - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.(Para -19,20,24)

Appellant in jail for more than 14 years - convicted for commission of offence under Section 304 Part-I read with Section 34 IPC - major offence - sentenced for life imprisonment along with fine - no common intention to do away with the deceased or injure him - single blow - caused injury to deceased - parties are inter related - no premeditated action.(Para - 11,25,26)

HELD:-No accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream. Ends of justice would be met if sentence reduced to period of 10 years imprisonment for offence. (Para -21,25)

Criminal appeals partly allowed. (E-7)

List of Cases cited:-

1. Surain Singh Vs St. of Punj., 2017 LawSuit (SC) 374

2. Atul Thakur Vs St. of H.P. etc. , 2018 0 Supreme (SC) 46

3. Ramroop Vs St. of U.P., Jail Appeal No.4722 of 2015

4. Virender Vs St. of Haryana, Criminal Appeal No.1339 of 2010

5. Ezajhussain Sabdarhussain & anr. Vs St. of Guj., 2019 0 Supreme (SC) 163

6. Mohan Singh & anr. Vs St. of Punj., AIR 1963 SUPREME COURT 174

7. Mukesh Vs The St. of M.P., 2022 0 Supreme (SC) 33

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

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

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

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

12. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

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

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

15. Raj Bala Vs St. of Haryana, (2016) 1 SCC 463

16. Khokan @ Khokhan Vishwas Vs St. of Chhattisgarh, Criminal Appeal No.121 of 2021

17. The St. of U.P. Vs Subhash @ Pappu, Criminal Appeal No.436 of 2022

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

1. Heard Sri Kamta Prasad for the accused appellant - Gaya Prasad Tiwari and

Sri Kameshwar Singh for Mukundi Singh. Sri Vikas Goswami and Sri N.K. Srivastava for the State.

2. By way of these appeals, the appellants-Gaya Prasad Tiwari and Mukundi Singh have challenged the judgment and order dated 22.12.2012 passed by Addl. Sessions Judge, Court No.2, Hamirpur in Case Crime No.572/2008, S.T. No.234/2008, State Vs. Gaya Prasad Tiwari and another whereby appellants were convicted under Section 304 (1) read with Section 34 and awarded sentence of life imprisonment under Section 304 (1) read with Section 34 IPC coupled with fine of Rs. 10,000/- and in case of default of payment of fine, appellants would undergo one year additional sentence.

3. The appellant - Mukundi Singh has been enlarged on bail by this Court and during the trial also he was on bail. Gaya Prasad Tiwari is in jail for more than 14 years.

4. The brief facts of the case as culled out from the record and proceedings and the F.I.R. are that a first information report was lodged by one Krishna Kumar Diwedi on 9.4.2008 at 7:30 a.m. against appellants being registered as Case Crime No.572 of 2008 for commission of offence under Section 304 IPC with regard to the incident dated 8.4.2008 at 11:30 p.m.

5. S.I. Siya Ram took up the investigation and kept investigation into motion. The Investigating Officer visited the spot, prepared site plan, recorded statements of the eye witness and witnesses and after completing investigation submitted charge sheet against both the accused.

6. The matter being triable by court of sessions the learned Magistrate committed the case to court of sessions.

7. The learned trial court summoned the accused and framed charge under Section 304 Part-I read with Section 34 IPC, which was read over to the accused. The accused denied the charge and claimed to be tried.

8. The prosecution so as to bring home the charge, examined 5 witnesses, who are as under:-

1	Krishna Kumar	P.W.1
2	Ram Teerath	P.W.2
3	Dr. R.K. Misra	P.W.3
4	Siya Ram	P.W.4
5	Mahendra Singh	P.W.5

9. The following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-14
2.	Written report	Ext. Ka-1
3.	Recovery memo of blood stained and plain earth.	Ext. Ka-4
4.	Post mortem report	Ext. Ka-2
5.	Site-plan	Ext. Ka-6
6.	Site-plan (II)	Ext. Ka-3
7.	Report of Vidhi Vigyan Prayogshala	Ext. Ka-16
8.	Panchayatnama	Ext. Ka-9
9.	Charge Sheet	Ext. Ka-8

10. After completion of prosecution evidence, both the accused were examined under Section 313 Cr.P.C. The accused did not examine any witness in defence.

11. Learned Counsel for the appellants submits that the punishment is

too harsh as there was a single blow which caused injury to deceased. The parties are inter related. There was no premeditated action so as to do away with the deceased. There was an altercation, it is the say of the prosecution witness that Gaya Prasad Tiwari went in home and brought a sharp edged weapon from the house and inflicted the blow to the deceased. The witnesses also have in their occular version opined that had proper treatment being made available to the deceased in time, the deceased would have survived. The role assigned to Mukundi Singh was to see that the deceased fell to ground from the motorcycle he was driving. Learned Counsel has relied on the following judgements:-

(i) Surain Singh Vs. State of Punjab, 2017 LawSuit (SC) 374;

(ii) Atul Thakur Vs. State of Himachal Pradesh etc. etc., 2018 0 Supreme (SC) 46; and

(iii) Ramroop Vs. State of U.P., Jail Appeal No.4722 of 2015, decided on 22.11.2021.

so as to contend that the accused have been falsely implicated and in alternative there was no premeditated action whereby the trial court convicted the accused with aid of section 34 of I.P. Code.

12. The learned Counsel Sri Kameshwar Singh submits that there were no injury marks on the body of deceased which would show that the deceased was assaulted and that Mukundi Singh had caught hold of the deceased. The version of PW2-Ram Teerath does not find place in the evidence of PW1-Krishna Kumar, neither are these facts mentioned in the F.I.R. Learned Counsel has relied on the following judgements to press the submission that if there are contradiction in the testimony, the accused be given benefit of doubt:

(i) Virender Vs. State of Haryana, Criminal Appeal No.1339 of 2010, decided on 16.12.2019;

(ii) Ezajhussain Sabdarhussain and another Vs. State of Gujarat, 2019 0 Supreme (SC) 163;

(iii) Mohan Singh and another Vs. State of Punjab, AIR 1963 SUPREME COURT 174; and

(iv) Mukesh Vs. The State of Madhya Pradesh, 2022 0 Supreme (SC) 33.

13. It is further submitted by Sri Kameshwar Singh that this is not a case where there is common intention to do away with the deceased said to be presented when incident occurred. It is further submitted that out of 4 eye witnesses, none has tried to save the deceased and the prosecution has misreadibly failed and they have not purposely examined these witnesses. It is further submitted that he seeks clean acquittal of the accused, who is wrongly roped in this case as it is stated in the F.I.R. that the deceased came on the motorcycle and Mukundi Singh pulled him and the deceased fell down. If the vehicle was already there, there was no question for searching the vehicle to take the injured to the hospital. The version of witness causes doubt about prosecution case. The F.I.R. is lodged after a considerable delay. PW1-Krishna Kumar has remained silent as far as catching hold of the deceased by Mukundi Singh is concerned.

14. Sri Vikas Goswami, learned A.G.A., has submitted that the punishment is just and proper and no retributive theory is required to be applied as the injury was on the very vital part of the body of the

deceased and Mukundi Singh is also equally liable as there was common intention to commit the offence and to do away with the accused.

15. Learned A.G.A. Sri N.K. Srivastava submits that as far as cross-examination of PW2 is concerned, nor in the statement recorded under Section 313 of Cr.P.C. of accused, this aspect has been answered or rebutted that the accused had not caught hold of the deceased just because this aspect is not mentioned in the F.I.R. It will not prove fatal to the accused. The oral testimony of PW2 cannot be discarded. It is further submitted that the evidence of the doctor clinches the issue and the accused with common intention inflicted injury to the deceased.

16. After advancing aforesaid arguments, learned counsels for the appellants alternatively submitted that if this Court in appeal holds the accused guilty, it may consider the alternative prayer for reduction of the sentence as the sentence of life imprisonment and fine awarded to the appellants by the trial court is very harsh and not commensurate to the injury caused.

17. While coming to the conclusion that the accused are the perpetrators of the offence, whether sentence of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters requires to be considered from the aspect of injuries of deceased. The post-mortem reveals that there were following injuries on the dead body.

18. This Court would refer to the following precedents, namely, ***Mohd. Giasuddin Vs. State of AP,*** [AIR 1977 SC 1926], which explains rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court in the said decision as follows:

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

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

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

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

22. While going through the record and the testimony of the witnesses specially the FIR and the medical evidence, the guilt of the accused is proved to the hilt and we are unable to disagree with the learned court below in recording the finding of guilt of the accused.

23. The evidence of doctor who had performed the post mortem as narrated herein-above also fortified that the injuries were possible by knife used by appellant - Gaya Prasad. Section 34 of I.P. Code reads as under:-

"Acts done by several persons in furtherance of common intention. *--When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."*

24. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose

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

25. Learned AGA also admitted the fact that appellant - Gaya Prasad Tiwari is languishing in jail for the last more than 14 years. The accused-appellants are convicted for commission of offence under Section 304 Part-I read with Section 34 IPC, which is a major offence and is sentenced for life imprisonment along with fine. In our opinion, ends of justice would be met if sentence is reduced to the period of 10 years imprisonment for the aforesaid offence.

26. Gaya Prasad Tiwari is punished for period undergone rigorous imprisonment. The fine of Rs. 10,000/- is reduced to Rs. 5,000/- to him. As far as Mukundi Singh is concerned, we hold that looking to the factual data and as ingredient of Section 34 I.P. Code are not proved as there was no common intention to do away with the deceased or injure him. We are fortified in our view by the decision of the Apex Court in Khokan @ **Khokhan Vishwas Vs. State of Chhattisgarh, Criminal Appeal No.121 of 2021, decided on 11.2.2021 and The State of Uttar Pradesh Vs. Subhash @ Pappu, Criminal Appeal No.436 of 2022, decided on 1.4.2022.**

27. Once we hold that there was no common intention, role of person has to be evaluated and the act the accused had committed would have to be viewed in the light of evidence against the accused. It cannot be said that Mukundi Singh was not present and there was no overt act committed by him. The deceased succumbed is not negated in the statement under Section 313 Cr.P.C. However, as long period has elapsed, we reduce the punishment of Mukundi to sentence undergone but enhance the fine from Rs. 10,000/- to Rs. 15,000/-. The fine be deposited within 3 months from his release from jail failing which he shall be incarcerated for further 2 years.

28. Hence, the sentence awarded to the appellant-Gaya Prasad Tiwari and Mukundi Singh by the learned trial-court is modified as above under Section 304 Part-I read with Section 34 IPC and fine as above mentioned.

29. Accordingly, both the appeals are **partly allowed** with the modification of the sentence, as above.

30. The Jailer to release the accused if not wanted in other offence. Mukundi Singh is on bail. Jailor of concerned jail to do the needful as per jail manual.

31. Record be sent back to the court below.

32. This Court is thankful of all the Counsels for ably assisting this Court ad getting these old appeals disposed off.

(2022) 9 ILRA 47
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2022

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Jail Appeal No. 358 of 2018

Ramesh Yadav ...Appellant

Versus

State ...Respondent

Counsel for the Appellant:
Sri Amit Kumar Srivastava

Counsel for the Respondent:
A.G.A.

(A) Criminal Law - Jail Appeal - Indian Penal Code, 1860 - Sections 302, 307 & 324 - Voluntarily causing hurt by dangerous weapons or means - Culpable homicide – Murder - 'culpable homicide' is genus and 'murder' its specie - All 'murder' is 'culpable homicide' but not the vice-versa - 'culpable homicide' sans 'special characteristics of murder, is 'culpable homicide not amounting to murder' - it is the degree of probability of death which determines whether a culpable homicide is of a gravest nature or of lowest degree.(Para -47,48)

Accused appellant killed his mother – attacked from the blunt side of the axe - one wound from sharp edged side of the axe - upon the hand of the deceased - accused was not of unsound mind – no intention to cause death of his mother – assumed - knowledge - from the attack of axe such bodily injury would be caused which would likely cause death.

HELD:-Criminal act of accused is not an act of murder but it is an act of culpable homicide not amounting to murder punishable under Section 304 IPC. Conviction and sentence under Section 302 IPC modified under Section 304, Part I IPC but set aside under section 307 IPC and maintained under section 324 IPC.

(Para - 52,56,59)

Jail appeal allowed. (E-7)

List of Cases cited:-

1. Rotash Vs St. of Raj., 2007 CrLJ 758

2. Krishnan & anr. Vs St. rep. by Inspector of Police, AIR 2003 SC 2978

3. Motilal Vs St. of UP, AIR 2010 SC 281

4. Mohd. Maqbool Vs St. of J & K, 2010 AIR SCW 3194

5. M'Naughten, (1843) 8 Eng Rep. 718

6. Someswar Bora Vs St. of Assam, (1981) CrLJ (NOC) 51 (Gau)

7. Amrit Bhushan Gupta Vs U.O.I., AIR 1977 SC 608

8. Dahyabhai Chhaganbhai Thakkar Vs St. of Guj., AIR 1964 SC 1563

9. Nanhe Khan Vs St. (Delhi Administration), (1986) 2 Primes 328 (Del)

10. Tolaram Vs St. of Raj., 1996 CrLJ 8 (Raj)

11. Jagroop Singh Vs St. of Har., AIR 1981 SC 1552

12. Prabhu Vs St. of M.P. , AIR 1991 SC 1069

13. Afrahim Sheikh Vs St., AIR 1964 SC 1263

14. Chahat Khan Vs St., 1973 CrLJ 36 (SC)

15. Vasanta Vs St., 1983 CrLJ 693 (SC)

16. Mahavir Prasad Vs St. of Raj. AIR 1991 SC 272

17. St. of A.P. Vs Rayavarpu Punnayya, 1977 (1) SCR 601

18. Jeevan Vs St. of Raj. 1996 CrLJ 3929

19. Nashari Naik Vs St. of Orissa, 1998 CrLJ 3948

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

1. This appeal has been preferred by the convicted accused Ramesh Yadav against the judgment and order dated 05.06.2017 passed by the Additional Sessions Judge/FTC, Bhadohi, Gyanpur.

2. By the impugned judgment, the learned trial court awarded following sentences to the accused:-

(I). Under Section 302 IPC rigorous imprisonment of life sentence and a fine of Rs.10,000/-;

(II) Under Section 324 IPC rigorous imprisonment of three years;

(III) Under Section 307 IPC rigorous imprisonment of ten years and a fine of Rs.10,000/-.

3. In brief, facts of the case are that on 16.02.2016 informant Banarsi son of Ram Nath resident of Mavaiya, PS Gyanpur, District Bhadohi moved a written tahrir (Ex.Ka-1) that his son Ramesh Yadav today at about 12 O'clock had badly injured his wife Sukhraji Devi from a sharp edged weapon. He has admitted his wife for treatment in Gyanpur Government Hospital.

4. On the basis of written tahrir (Ex.Ka-1) a chick FIR (Ex.Ka-19) in Case Crime No.24 of 2016 under Section 324 IPC was registered and entered in GD (Ex.Ka-18). After death of injured Sukhraji Section 302 IPC was added through paper Ex.Ka-8.

5. PW-6, SSI Ram Adhar Yadav, Investigating Officer visited the place of occurrence and prepared map (Ex.Ka-6) recorded the statement of the informant and other witnesses and after finding sufficient evidence submitted the charge-sheet (Ex.Ka-14) under Sections 324, 307, 302 IPC against the accused. The case was committed to the Court of Sessions on 12.05.2016 and was transferred to the Court of Additional Sessions Judge/FTC, Bhadohi who framed the charges on 26.05.2016 from which the accused denied and requested for trial.

6. The **witnesses** who have been examined from the side of the prosecution are: (i) PW-1, Banarsi, informant; (ii) PW-2, Meena Devi, an independent witness; (iii) PW-3, Bindu Devi, sister of the accused; (iv) PW-4, Om Prakash, an independent witness; (v) PW-5, Dr. Girish Chand Rawat who examined the deceased before her death and also PW-3, Bindu Devi (injured); (vi) PW-6, Ram Adhar Yadav, Investigating Officer; (vii) PW-7, Raghvendra Singh, the then SO of PS Gyanpur; (viii) PW-8, Amar Bahadur Singh, autopsy doctor; and (ix) PW-9, Jitendra Kumar, Constable.

7. The **documentary evidences** which have been produced from the prosecution side are: (i) Ex.Ka-1, tahrir of the informant; (ii) Ex.Ka-2, inquest; (iii) Ex.Ka-3, recovery memo; (iv) Ex.Ka-4 and 5 both photocopy of injury report; (v) Ex.Ka-6, map; (vi) Ex.Ka-7 and 8, certified copies of GD; (vii) Ex.Ka-9, police Form-13; (viii) Ex.Ka-10, photonash; (ix) Ex.Ka-11, letter to CMO; (x) Ex.Ka-12, letter to RI; (xi) Ex.Ka-13, photonash; (xii) Ex.Ka-14, charge-sheet; (xiii) Ex.Ka-15, arrest memo; (xiv) Ex.Ka-16, letter to Director, FSL, Varanasi; (xv) Ex.Ka-17, *post mortem* report; (xvi) Ex.Ka-18, carbon copy of GD dated 16.02.2016 regarding lodging of FIR; (xvii) Ex.Ka-19, chick FIR; and (xviii) Paper No.Ka-27, report of FSL which is not exhibited but being public document it is admissible and exhibitable under Section 293 CrPC.

8. **The applicant has taken following grounds:-**

(i) that the judgment is against the fact and law;

(ii) that there are material contradiction in the evidence of eye-witnesses which has not been considered by the lower court, therefore, the impugned

judgment and order is not sustainable on this ground alone;

(iii) that the excessive punishment has been provided which is against the rules established by law;

(iv) that the learned trial court has convicted the appellant relying on inadmissible evidences and has ignored admissible evidences;

(v) that the prosecution has not been successful in proving the prosecution story beyond doubt;

(vi) that the prosecution could not establish the place of occurrence and the person who committed the offence;

(vii) that the lower court has not appreciated the evidenced in accordance with law, therefore, the judgment of conviction dated 05.06.2017 be quashed and appeal be allowed.

9. In brief, evidences of PWs are reproduced herein below:

9.1. PW-1, Informant - Banarsi, father of the accused appellant and husband of the deceased has deposed that on 16.02.2016 at about 12 O'clock his wife Sukhraji Devi was washing clothes at the well. Ramesh, hiding an axe, reached there and asked to clean his clothes, she replied that today she was busy in some domestic work, she would clean the clothes tomorrow. Hearing this, Ramesh started attacking at her from the axe. Her daughter Bindu Devi came there to save her mother, Ramesh also caused injuries to her 2-3 times from the axe. Both the injured were admitted in Gyanpur Government Hospital thereafter he reached police station for lodging an FIR. This witness has proved paper no.5 (tahrir), Ex.Ka-1. He further deposed that Investigating Officer had recorded his statement. He had pointed out the place of occurrence to Investigating Officer. District Hospital, Gyanpur referred the patient to BHU thereafter Sukhraji Devi was admitted to BHU and Bindu (daughter of the informant) was admitted in a private hospital by her in-laws.

9.2. After treatment Bindu Devi got recovered while wife of the informant died. Doctor of BHU had informed him that there was no hope, get her discharged and keep at the home. On 02.03.2016 after discharging from BHU when he was carrying his wife to his house and reached near *Raja Ka Talab*, she died. He reached police station with dead body where inquest proceeding was conducted and the dead body was sent for *post mortem*. Next day autopsy was done thereafter he completed the last rituals. This witness has also confirmed his signature and proved the inquest (Ex.Ka-2).

9.3. PW-2, Meena, an independent eye-witness, deposed that at about 12 noon when she was washing clothes at the well, Om Prakash (PW-4) was taking bath there and Sukhraji Devi (mother of the accused-appellant) was also washing clothes there, Ramesh Yadav reached at the well and asked his mother to clean his clothes. His mother replied that she would wash his clothes tomorrow then Ramesh took out a *tangari* from his shawl and started beating her. Thereafter Banarasi transported Sukhraji and Bindu to District Hospital, Gyanpur. Sukhraji died at the 16th day from the date of occurrence. Investigating Officer had visited the spot. He had recovered the axe/*tangari* in presence of her and Om Prakash from the house of the accused and had sealed in a white cloth. This witness confirmed her thumb impression and signature of Om Prakash on recovery memo of the axe, Ex.Ka-3. According to her, the Investigating Officer had recorded her statement.

9.4. PW-3, Bindu Devi, daughter of the informant and the deceased and sister of the accused-appellant deposed that on the day of incident at about 12 O'clock when her mother Sukhraji Devi was washing clothes at the well, Meena and Om Prakash were also washing clothes and were taking bath, her brother Ramesh Yadav reached at the well and asked her mother to wash his clothes. She replied that she would wash his clothes tomorrow not today. Thereafter Ramesh took out an axe from his sweater and started beating therefrom. When she arrived to save her, he also caused her several injuries on her head and back from the axe. Thereafter her father took her and her mother at the District Hospital, Gyanpur where both were treated. Seeing serious condition of her mother, Dr. Shahi referred her mother to BHU Trauma Centre where she was admitted. He referred the witness for treatment in a private hospital therefore her husband admitted her at Orai Private Hospital where she remained for three days and was discharged 4th day. Her mother died at 16th day of the occurrence due to injury caused by her brother, Ramesh Yadav from the axe. According to this witness, she was also washing clothes at the well and the Investigating Officer had recorded her statement.

9.5. PW-4, Om Prakash has deposed that on 16.02.2016 at about 12 O'clock he was taking bath at the well. Apart from him his elder mother, Sukhraji Devi and Bhabhi Meena Devi were also washing clothes and were taking bath. At the same time Ramesh came covering himself with a shawl in which he had hidden an axe. He asked Sukhraji Devi to clean his clothes, she replied that weather is not good, let it be done tomorrow. Then Ramesh took out an axe and started beating Sukhraji. When Bindu, sister of Ramesh, came to save her, Ramesh also started hitting her with the axe. On shouting of those people they also started shouting by grabbing hold the axe, on this Ramesh ran away and went to his house. Sukhraji and Bindu were brought to Gyanpur Government Hospital for treatment where treatment was started. Due to serious condition, doctor referred Sukhraji to BHU Trauma Centre, Varanasi. Bindu was treated at Orai Private Hospital and Sukhraji was admitted in BHU for about 15 days. There as the condition became serious, the doctor discharged her on 02.03.2016. Sukhraji was being brought to her house, she died on the way. Then body of Sukhraji was brought to Gyanpur Police Station where *panchayatnama* of the dead body was written by police. *Panchayatnama* was read over by inspector and after listening, he made signature on *panchayatnama* (Ex.Ka-2). On the spot inspector had sealed the axe in white cloth and prepared recovery memo. He signed the recovery memo and Meena Devi put thumb impression on it. Inspector also taken his statement.

9.6. PW-5, Dr. Girish Chandra Rawat deposed that he was working on the same post on 16.02.2016. On 16.02.2016 Bindu wife of Rajesh Yadav, daughter of Banarasi - informant, aged about 30 years, was medically examined at about 10:30 a.m. after identification. She was brought by Mukesh Yadav. He found following injuries on her body:

"(i) LW 3 x 2 cm, blood was coming from the wound. The wound was on the occipital bone on scalp.

(ii) LW 7 x 2 cm, there was bleeding from the spinal back on T-10 to L-1 lowers of spine. According to this witness all injuries can be caused by a hard and blunt object. All injuries referred for X-Ray and radiologist."

9.7. After that Sukhraji Devi was medically examined by this witness and he found following injuries on body of the injured Sukhraji:

"(i) LW 5 x 6 cm and the oozing blood was present in the upper part of the right temporal bone at scalp.

(ii) Sliced cut wound 7 x 5 cm at the left shoulder blood was oozing and humerus bone was visible.

(iii) LW 8 x 6 cm at the left knee upon deep bone from which blood was oozing."

9.8. According to PW-5, the aforesaid injuries were caused by some hard and blunt object. All injuries were sent for X-Ray and to the radiologist. All the injuries were fresh. Seeing the serious condition of the patient she was referred to BHU, Varanasi. This witness had proved the photocopy of injury report of Bindu Devi and Sukhraji Devi after seeing the injury report register of District Hospital (which was summoned in the Court) and had proved the same as Ex.Ka-4 and Ex.Ka-5.

9.9. PW-6, Ram Adhar Yadav, the Investigating Officer deposed that on 16.02.2016 he was appointed Investigating Officer of Case Crime No.24 of 2016, under Section 324 IPC, Police Station Gyanpur, District Bhadohi in which he copied the FIR GD memo, District Hospital Report GD, statement of informant and Dr. Girish Chandra Rawat. He, on the pointing out of the informant, inspected the place of occurrence and prepared the map. After search accused was found at his house. His statement was recorded. He admitted his guilt. At his pointing out an axe was recovered and the recovery memo was prepared in front of witnesses, Om Prakash and Meena Devi. On the basis of grievous hurt and on the statement of doctor on 16.02.2016 he added Section 307 IPC. On 02.03.2016 after death of the injured, Sukhraji Devi, Section 302 IPC was also added. This witness has proved map and GD, Ex.Ka-6, Ex.Ka-7 and Ex.Ka-8. He also confirmed his writing and signature at recovery memo (Ex.Ka-3) and *panchayatnama* (Ex.Ka-2), this witness has also proved police Form-13, photonash, letter to CMO and RI and *challannash* and confirmed his writing and signature on on the papers Ex.Ka-9 to Ex.Ka-13. The truss of the axe was opened and it has been exhibited as material Ex.-1. Further investigation was given to SHO, Raghvendra but it was again given to him on 29.03.2016. He recorded the statement of FIR writer Constable Santosh Kumar Mishra and Constable *Moharrir* Jitendra Kumar. He prepared *parcha* no.11 and recorded the statement of Bindu Devi and submitted charge-sheet under Sections 324 and 302 IPC on 03.04.2016. This witness has proved charge-sheet Ex.Ka-14. Through supplementary GD No.1 he submitted that charge under Section 307 IPC is also made out, it was left mistakenly while submitting the charge-sheet so he requested that charge-sheet be treated under Section 307 IPC also.

9.10. PW-7, Raghvendra Singh, Inspector PS Gyanpur deposed that on 16.02.2016 after lodging the FIR in Case Crime No.24 of 2016, under Sections 324 and 307 IPC against Ramesh Yadav, investigation was entrusted to SSI Ram Adhar Yadav. After death of the injured on 02.03.2016, the investigation was taken back by him and *parcha* no.3 was prepared by him on 04.03.2016. After preparing *parcha* no.4, the axe, used in commission of the crime, was sent to FSL, Ram Nagar, Varanasi through Constable, Anil Yadav. On 07.03.2016 he prepared *parcha* no.5, on 09.03.2016 *parcha* no.6 and copied the statement of the witnesses and *post mortem*

report. On 15.03.2016 he prepared *parcha* no.16 and wrote the statement of the informant and the witnesses. On 16.03.2016 he prepared *parcha* no.8 by which he again wrote the statement of the witnesses thereafter he was transferred. Further investigation was completed by SSI Ram Adhar Yadav. This witness has proved paper no.18-A as Ex.Ka-16.

9.11. PW-8, Dr. Amar Bahadur Singh has done *post mortem* of the deceased Sukhraji Devi aged about 58 years on 03.03.2016 at 10:30 am. This witness found that decomposition in body had not even started. In the *post mortem* report following injuries have been mentioned:

"(i) There was a stitched injury in the upper part of the left hand whose length was 12 cm.

(ii) 7 cm stitched wound adjacent to the neck on the left shoulder.

(iii) On the side of left arm there was the stitched wound whose length was 13 cm.

(iv) The injuries sustained on the left palm whose length was 7 cm from ring finger to the palm.

(v) There was a stitched wound of 13 cm size on the left thigh, which was 12 cm above the side of the knee.

(vi) Three parallel stitched wound on the right side of the head on the parietal region of 8 cm, 6 cm and 3 cm with broken bones respectively.

(vii) This witness found that alimentary tube and urinary tube were attached. Cause of death due to septicaemia on account of spread of poison in the body due to access to herbs. The membrane had shrivelled. The brain was shrunken. The membranes of the lungs were filled with pus. Death was within one day. Cause of death was septicaemic shock. He cannot say from which weapon injuries were caused to the deceased. He admitted that viscera was not sent for examination. According to this witness septicaemia affects the body 24 hours from the time of injuries, it depends upon which bacterium getting involved in the infection.

9.12. PW-9, Jitendra Kumar, Constable *moharrir* deposed that chick FIR in Crime No.24 of 2016, under Section 324 IPC was prepared by Constable, Santosh Kumar Mishra. The case was entered in Rapat No.22 at 01:50 p.m. on 16.02.2016 by him in GD. He has proved its copy Ex.Ka-18 and the chick FIR Ex.Ka-19 to be prepared by Constable *moharrir*, Santosh Kumar Mishra through his secondary evidence. According to him his statement had been recorded by the Investigating Officer. In cross-examination he denied that GD regarding lodging the case was false and manufactured.

10. After closer of prosecution evidence, statement of the accused has been recorded under Section 313 CrPC in which the witness had denied the allegations. Oral and documentary evidences produced by the prosecution, the recovery memo and charge-sheet etc. have been denied. He was stated to produce defence evidence but no oral or documentary evidence has been produced in defence. In the last he deposed that he was innocent and had been falsely implicated. He has not said himself to be a person of unsound mind nor had claimed exemption from trial under Chapter XXV CrPC.

11. This appeal is decided as under:-

11.1.(I). In this case according to the informant the accused appellant committed the crime at about 12 O'clock in the day of 16.02.2016. The informant

moved tahrir, Ex.Ka-1 same day at 01:50 p.m. after admitting the injured in hospital, distance between place of occurrence and police station is 4 kms. Therefore, there is no delay in lodging the FIR. In the FIR the informant has named his son Ramesh Yadav as accused who injured and killed his wife Sukhraji Devi from an axe. He has proved the tahrir Ex.Ka-1 and inquest Ex.Ka-2. In tahrir the informant has not endorsed that accused had also injured his daughter, Bindu Devi but in oral examination he has deposed that when Bindu Devi went to save her mother, accused also attacked on her and caused 2-3 injuries from the same axe and both were admitted in District Hospital, Gyanpur. From the circumstances, it transpires that the informant was in haste and as his wife and daughter were seriously injured, therefore, in harried manner he briefly informed the police writing few words about the incident. The FIR is an instrument only to accelerate the police machinery and to start the investigation. It is not an encyclopedia, **Rotash Vs. State of Rajasthan, 2007 CrLJ 758.** In **Krishnan and another Vs. State rep. by Inspector of Police, AIR 2003 SC 2978** it is held that the FIR filed immediately after occurrence rules out any possibility of deliberation to falsely implicate any person. In **Motilal Vs. State of UP, AIR 2010 SC 281** it is held that FIR need not contain every minute detail about the occurrence. It is not necessary that name of every individual present at the scene of occurrence is required to be stated in the FIR. In **Mohd. Maqbool Vs. State of Jammu and Kashmir, 2010 AIR SCW 3194** it is held that FIR is not substantive piece of evidence, it can only be used to corroborate its maker.

11.2. It is noteworthy that in this case the informant is the father of the accused, deceased Sukhraji is his mother and another injured is his real sister. It is also pertinent to mention that informant has only one son i.e. accused Ramesh Yadav as the another son Mukesh had died prior to the incident due to cancer. Any enmity among the accused-appellant, deceased, informant and sister, Bindu Devi is not established, therefore, it is concluded that the FIR has correctly been lodged by the informant against the accused.

11.3.(II). In this case no major issue or motive appears to be present among the parties. As per scene of the occurrence the accused reached to his mother at the well hiding an axe and explored the reason of causing the incident by asking to wash his clothes and when she replied to wash his clothes tomorrow, he attacked from the axe. It appears that the cause of committing the crime was something else. From the evidence of PW-2, Meena Devi it transpires that the accused also used to beat his wife and children due to which his wife leaving him had gone to her parental house with her child. PW-3, Bindu Devi, sister of the accused has also admitted that wife of the accused lives in her parental house.

11.4. It appears that the accused-appellant Ramesh Yadav is not a person of cool mind and due to his aggressive behaviour his wife had left him and is living with her parents. Admittedly, the deceased was the mother-in-law of his wife. Accused might would be thinking that his wife had left him due to the shortcomings of his mother. Therefore, inventing the reason of attack he might have killed his mother.

11.5. In cases based on direct evidence there is no need to prove the **motive**. Here the prosecution has not put any substantive or reasoned motive but has put the mere fact that when deceased

ignored to wash clothes of the accused-appellant same day, he started attack at her with the axe. The fact that at the time of occurrence the deceased was washing clothes at the well and there PW-2, Meena Devi, PW-3, Bindu Devi and PW-4, Om Prakash were also present, is proved beyond any doubt. In this case the informant has named his sole real son alone.

11.6.(III). In this case the place of occurrence is the well shown from Letter-A in the map, Ex.Ka-6. At this point there is no difference in the evidence of PWs-1 to 4 and the Investigation Officer, therefore, it is concluded that this occurrence took place at place-A as alleged by the prosecution and the place of occurrence has not been changed.

11.7.(IV). It is a day-light occurrence based on direct evidence of PW-1, Banarsi, father of the accused-appellant and husband of the deceased; PW-2, Meena Devi, an independent eye-witness; PW-3, Bindu Devi, daughter of the deceased and sister of the accused; PW-4, Om Prakash an independent eye-witness. There is no difference in the evidence of eye-witnesses PWs-1 to 4. Thus it is established that it is a case based on direct evidence and the evidence of the witnesses proved the prosecution case beyond reasonable doubt.

11.8.(V). In this case occurrence occurred on 16.02.2016 whereas the deceased died at *Raja Ka Talab* on 02.03.2016 when she, after discharge from Trauma Centre, BHU on account of no hope of her survival, was on the way of her home. Thereafter he directly reached concerned police station with the dead body where inquest (Ex.Ka-2) was conducted. In inquest injury on the back side of the head, on left shoulder, on left thigh and cutting wounds on forehead and left finger were noted. They also opined that these injuries were cause by son Ramesh from the axe.

12. The inquest is not substantive piece of evidence. It is only a paper to know the *prima facie* reason of unnatural death of any person whose dead body is scheduled for *post mortem*. It is found that there is no infirmity in the inquest.

13. The *post mortem* report is not a substantive piece of evidence but it is essential to know the actual cause of death. In *post mortem* report (Ex.Ka-17) dated 03.03.2016 conducted after 15 days from the date of occurrence PW-8, Dr. Amar Bahadur Singh has opined that deceased, Sukhraji Devi had died due to septicaemic shock. He on the internal and external examination of the dead body found 6 injuries, 7th injury was alimentary and urinary tube attached in the body which cannot be said to be an injury. It appears that the septicaemia developed in injuries caused by the accused. The injuries had not occurred in any accident or usual course of life. From the evidence of PW-1, informant - Banarsi, it is confirmed that due to injuries caused by the accused there was no hope of life or survival of the deceased, therefore, she was discharged to spend few days/hours at her home, but she died on the way before reaching her home.

14. Learned counsel for the appellant has argued that it is not a case of Section 302 IPC but it is a case of Section 304, Part II IPC which shall be dealt with later on.

15. Recovery of axe and its memo Ex.Ka-3 has been proved by Pws-2, 3 and 6. Such injuries can be caused from an axe and from its blunt object.

16. Mainly, from the accused side two arguments are advanced: firstly, that at the time of occurrence the accused was a

person of unsound mind so the act done by him is protected under Section 84 IPC and is no offence as it falls under the general exceptions; and secondly, that it is not a case under Section 302 IPC but it is a case under Section 304, Part II IPC.

17. First of all, it would be proper to discuss the facts regarding Section 84 IPC. According to learned counsel for the appellant, at the time of occurrence the accused was a person of unsound mind. Section 84 IPC is as under:-

"84. Act of a person of unsound mind.--*Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."*

18. This provision has been made with the reason that a person of unsound mind is incapable of forming *mens rea* that is, criminal intent. In the case of **M'Naughten, (1843) 8 Eng Rep. 718,** the accused, Daniel M'Naughten suffered from a delusion that Sir Robert Peel, the then Prime Minister of Britain had injured him and in order to take revenge, he mistook Edward Drummond, the Secretary to the Prime Minister, for Sir Robert Peel and shot him dead. When charged of murder, the accused took the defence of insanity. The medical evidence testified that he was under a morbid delusion which carried him away beyond the powers of his self-control. The jury found him "not guilty by reason of insanity". Following principles were laid down in the aforesaid case:-

"1. Every person is supposed to be sane and to possess sufficient decree of reason to be responsible for his crimes, until the contrary is proved.

2. In order to establish the defence of insanity, it must be clearly proved that at the time of committing the crime, the person was so insane as not to know the nature and quality of the act he was doing, or if he did know it, he did not know what he was doing was wrong.

3. The test of wrongfulness of the act is in the power to distinguish between right and wrong, not in the abstract or in general, but in regard to the particular act committed."

19. In several cases the rule of M'Naughten case have been followed in India, therefore, the reference has been made.

20. The Gauhati High Court in **Someswar Bora Vs. State of Assam, (1981) CrLJ (NOC) 51 (Gau)** held that in order to seek protection under Section 84, it must be established that "the accused, at the time of committing the offence, was labouring under such defect of reason from disease of mind, as not to know the nature and quality of the act he was doing, or that he did not know what he was doing was wrong".

21. In the case of **Amrit Bhushan Gupta Vs. Union of India, AIR 1977 SC 608** the term unsoundness of mind or insanity denotes a state of mind in which the accused is incapable of knowing the nature of his act and that what he is doing is wrong or contrary to law.

22. In the case of **Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat, AIR 1964 SC 1563** it is held that the criminal law recognises only legal insanity as a defence under Section 84 IPC

and not all kinds of medical insanities. Legal insanity is one which completely impairs the cognitive faculty of the mind, to such an extent that a person is incapable of knowing the nature of his act or what he is doing is wrong or contrary to law.

23. But, in this case no medical treatment papers or medical expert have been produced and examined and during the course of trial no application was moved to exempt the accused-appellant from the trial. In this respect Section 328(i) CrPC is important which is noted herein below:-

*"**328. Procedure in case of accused being lunatic.**--(1) When a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be examined by the civil surgeon of the district or such other medical officer as the State Government may direct, and thereupon shall examine such surgeon or other officer as a witness, and shall reduce the examination to writing.*

(2) Pending such examination and inquiry, the Magistrate may deal with such person in accordance with the provisions of section 330.

(3) If such Magistrate is of opinion that the person referred to in sub-section (1) is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case."

24. In this case accused-appellant had not moved any application in the trial court that he being a person of unsound mind cannot defend himself, cannot understand the language of charge, cannot reply under Section 313 CrPC and surprising that no such ground is taken in appeal, therefore, such plea cannot be raised now. Despite that learned counsel for the appellant has argued the point.

25. However, in this regard the details available on the file are cited:

25.1.(I). That in FIR PW-1, informant - Banarsi has not mentioned that his son accused, Ramesh Yadav was a person of unsound mind.

25.2.(II). That the Investigating Officer has not found the accused-appellant a person of unsound mind and none of the witnesses stated to the Investigating Officer that Ramesh was a person of unsound mind.

25.3.(III). That there is no medical report on record to prove that the accused-appellant was ever or particularly at the time of incident, a person of unsound mind. At the time of framing charge on 26.05.2016 the accused-appellant has not moved any application that being a person of unsound mind, he is unable to understand the charge levelled against him and he is unable to face the trial. No application under Chapter XXV CrPC was moved.

25.4.(IV). That during the examination of the witnesses and at the time of recording statement under Section 313 CrPC the accused-appellant or his counsel (amicus curiae) has not claimed him to be a person of unsound mind.

25.5. PW-1, informant - Banarsi, husband of the deceased and father of the accused-appellant has not deposed in examination-in-chief that accused-appellant is a person of unsound mind and was also a

person of unsound mind at the time of commission of crime. During the cross-examination this witness has deposed that he had admitted the accused-appellant in Varanasi for treatment of his mental illness and the treatment was going on since before one year. Accused-appellant, Ramesh lived well at home and used to eat and drink. When the informant gave him medicine, the accused-appellant used to throw it. His second son was a cancer patient and he was busy in his treatment, therefore, he could not make proper treatment of the accused. According to this witness, he took much pains for treatment of accused but he could not be cured. He further deposed that for the treatment of accused his younger son Mukesh used to go to Varanasi. Except the above questions no other suggestion regarding unsoundness of the accused-appellant has been given by the amicus curiae. This witness has also not produced any document regarding mental illness and treatment of the accused-appellant.

25.6.(V). PW-2, Meena Devi has also not deposed in her examination-in-chief that the accused was suffering from any kind of unsoundness but when the amicus curiae asked her regarding unsoundness of the accused, she replied that long ago father of the accused Ramesh had got him treated at Varanasi. Accused Ramesh used to beat his wife and children also, due to which his wife left him with her child and went to her parental home. This witness has not deposed that at the time of incident the accused was suffering from unsoundness of mind.

25.7.(VI). PW-3, Bindu Devi, sister of the accused-appellant and daughter of the deceased has not deposed in her examination-in-chief that accused was unsound at the time of occurrence. Learned amicus curiae for the accused, Ramesh has not asked any question and has not given any suggestion regarding unsoundness of the accused before, after or at the time of occurrence. This witness has simply replied that at the time of occurrence her brother was not doing any job.

25.8.(VII). PW-4, Om Prakash has also not deposed in his examination-in-chief that accused was a person of unsound mind before or after or at the time of incident. Neither any question regarding the soundness of the accused has been asked nor any suggestion has been given by the amicus curiae.

26. In **Nanhe Khan Vs. State (Delhi Administration), (1986) 2 Primes 328 (Del)** no question was put to the witnesses about the mental condition of the accused at the time of occurrence nor the accused took plea in examination under Section 313 CrPC, it was held that plea of insanity before the Appellate Court was not available. Here from all the witnesses even from PW-3, Bindu Devi, sister of the accused no question regarding insanity has been asked from the side of the accused and no plea has been taken under Section 313 CrPC or in appeal.

27. Similarly in **Tolaram Vs. State of Rajasthan, 1996 CrLJ 8 (Raj)** the accused killed his wife by bolting the door from inside and then tried to escape. He raised plea of insanity for the first time in appeal. It was held that the plea was not tenable.

28. On the basis of above discussion it is concluded that neither it is proved that accused was a person of unsound mind at the time of commission of crime or before or after the incident nor any ground of unsoundness had been taken during the investigation, trial and in appeal.

Whether the accused has also committed the crime under Section 307?

29. Initially the FIR was lodged under Section 324 IPC but after death of the deceased, Sukhraji Devi Section 302 IPC was added and the charge sheet was submitted under Sections 324, 307, 302 IPC.

30. So far as the injuries occurred to the injured PW-3, Bindu Devi is concerned there were two lacerated wounds which are as under:-

"(i) 3 x 7 cm on the head;
(ii) on the back of the injured in the area of 7 x 2 cm with oozing blood."

31. It has been proved that all the injuries were caused by blunt side of *kulhadi.* Such injuries may occur from the blunt side of the axe.

32. According to PW-5, Dr Girish Chandra Rawat, such injuries have been caused by hard and blunt object. Both the witnesses were referred to some other medical institutions. PW-3, Bindu Devi was treated in Aurai.

33. Section 324 IPC is being reproduced as under:-

"324. Voluntarily causing hurt by dangerous weapons or means.--*Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."*

34. Considering the oral, medical and documentary evidence on record, this Court is in conformity with the conclusion of the lower court that accused had also committed the crime under Section 324 IPC for which he has been convicted and sentenced for 03 years rigorous imprisonment. This Court confirms the order of conviction passed under Section 324 IPC by the lower court.

35. The accused has also been charged under Section 307 IPC under which the lower court had convicted the accused for 10 years rigorous imprisonment and fine of Rs.10,000/-. Since injured, Sukhraji Devi had died and a charge has been framed under Section 302 IPC, the charge under Section 307 IPC remains for the crime committed against the victim PW-3, Bindu Devi.

36. According to this Court, there is no evidence on record that from the injury no.1 any bone of head had been broken and from injury no.2, the spine was cut down. It cannot be said that the injuries caused to the victim PW-3, Bindu Devi was with such intention or knowledge or under such circumstance that accused by that act would have caused her death. Therefore, this Court is of opinion that considering the nature of injuries and the fact that after 3-4 days the victim, Bindu Devi had been discharged, accused cannot be said to be guilty of an offence under Section 307 IPC. In this regard evidence of PW-5, Dr. Girish Chandra Rawat is also material, who, in

cross-examination, admitted that though he had referred the injured, Bindu Devi for further treatment and no X-Ray was done in his hospital. No X-Ray report was produced before him for preparation of supplementary medical report. Victim Bindu Devi has also not supplied her X-Ray report and the report of the radiologist for giving supplementary medical report. This witness has not given opinion that injury caused to the victim PW-3, Bindu Devi is of what nature, simple, grievous or fatal. Therefore, treating the injuries caused to the victim Bindu Devi to be simple in nature, this Court is concluding that only case under Section 324 IPC has been proved against the accused in respect of the injuries caused to the victim Bindu Devi and on the basis of above discussion no case under Section 307 IPC is proved.

Whether it is a murder or culpable homicide?

37. Now the question remains as to whether the crime committed by the accused-appellant against the deceased Sukhraji Devi is an offence under Section 302 IPC or Section 304 IPC.

38. In this regard Sections 299 and 300 IPC are reproduced herein below:-

*"**299. Culpable homicide.**--Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

***300. Murder.**--Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--*

(Secondly)--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

(Thirdly)--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

(Fourthly)--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

39. The ingredients of Section 299 IPC are:--

(1) Causing of death of a human being;

(2) Such death must have been caused by doing an act or omission:

(i) There should be intention to cause death; or

(ii) With the intention of causing death, some bodily injury must have been caused which is likely to result in death; or

(iii) It should be with the knowledge that by such act, the doer is likely to cause death.

40. The three explanations appended to Section 299 IPC describe three situations when presence or absence of certain factors in causing death are treated as committing the offence of culpable homicide.

1. Act or omission.--On the basis of fact it can be decided that an act or omission of the accused is covered under the definition of culpable homicide or not

and whether death is direct result of such act or omission.

2. Intention.--Intention or *mens rea* is an essential ingredient of offence of culpable homicide which can be determined on the basis of fact and circumstances of the case. In **Jagroop Singh Vs. State of Haryana, AIR 1981 SC 1552** the Supreme Court held that while deciding cases involving the offence of culpable homicide, the weapons used by the accused, the injuries caused by him to the victim and their gravity etc. along with his *mens rea* should also be taken into consideration. In **Prabhu Vs. State of Madhya Pradesh , AIR 1991 SC 1069** the causing of injuries to daughter-in-law was held to be sufficient cause for her death, therefore, the husband and in-laws were convicted for the offence of culpable homicide under Section 299 IPC.

3. Intentionally causing such bodily injury as is likely to cause death.--Whether the injuries caused to the victim were sufficient for causing death of the victim can be inferred from the nature of injuries and act of the accused. Where the injury is caused on vital part of the body, therefore, death is more likely to result than an injury caused on a non-vital part of the body. An injury may be simple, grievous or superficial. The nature of weapon used by the accused is also taken into consideration while deciding his guilt **[Jagroop Singh (supra)]**. Lethal weapons such as gun, pistol, revolver, sword, spear, dagger etc. may prove more fatal than the non-lethal weapons such as *lathi*, stick, bamboo, fist-blow etc. Whether the bodily injury caused by the accused was likely to cause death has to be decided objectively keeping in view the facts and circumstances of the case. In this case, accused had attacked his deceased mother with the blunt part of the axe not from the sharp edged part of the axe.

4. With knowledge that he (accused) is likely to cause death by such act.--Clause third of Section 299 IPC provides that causing death with the knowledge that the accused by such act is likely to cause death makes him liable for culpable homicide. In this connection, where such probability is almost **certain** then fourth clause of Section 300 IPC would be applicable making the accused liable for murder. As soon as it is proved that the incident was not accidental or due to rashness but was caused deliberately, the accused shall be convicted for the offence of culpable homicide under Section 299 IPC, **Afrahim Sheikh Vs. State, AIR 1964 SC 1263.**

41. In **Chahat Khan Vs. State, 1973 CrLJ 36 (SC)** it was held that though on the basis of single *lathi* blow generally it cannot be gathered that accused had knowledge that he can cause death of the victim but if accused is hitting the deceased with the single *lathi* blow using full force with a calculated design that it should cause the death of the victim, he will be held guilty of culpable homicide.

42. In **Vasanta Vs. State, 1983 CrLJ 693 (SC),** the accused attacked the deceased with a knife on his chest which seriously injured his heart and lungs causing his death. He was held guilty of culpable homicide under Section 299 IPC.

43. The Explanation-2 of Section 299 IPC being explicit, leaves no room for the accused to argue that death could have been

prevented on the injured or affected victim getting medical treatment timely which would have saved the life of the victim (deceased) and the death is direct result of the act of the accused, it would be no defence for him to contend that the life of the deceased could have been saved by proper medical treatment.

44. In this case informant, PW-1 immediately transported both the injured to the hospital. On reference to BHU he then and there admitted the victim to the Trauma Centre, BHU. Therefore, it cannot be said that no timely medical treatment was provided to the deceased. Unfortunately, septicaemia developed and due to septicaemic shock she died.

45. In **Mahavir Prasad Vs. State of Rajasthan, AIR 1991 SC 272** though accused had caused simple injury to the victim but subsequently victim died of septicaemic anxiety due to improper medical treatment and negligence of the doctor, it was held that the person causing injury cannot be convicted of culpable homicide not amounting to murder under Section 304 IPC. In the case in hand, several injuries were caused by the accused out of which injury no.1 shown in Ex.Ka-5 was on upper region of right temporal bone of scalp. Doctor advised for X-Ray and radiological opinion but the patient was referred to Trauma Centre, BHU for X-Ray, further investigation and management where she was under treatment upto 02.03.2016. No medical papers of Trauma Centre, BHU have been produced. Autopsy doctor found six stitched wounds. Injury no.6 was containing three parallel stitched wounds on the middle portion to right parietal region i.e. 8cm, 3cm and 6cm length, respectively. On the basis of variation of injuries this judicial precedent cannot be applied in favour of the accused.

46. While drawing a distinction between clause (2) of Section 299 IPC and clause 'Third' of Section 300 IPC, the Supreme Court in **State of Andhra Pradesh Vs. Rayavarpu Punnayya, 1977 (1) SCR 601.**

47. Elaborating the scheme of the Penal Code relating to culpable homicide, the Supreme Court observed as follows:-

"In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not the vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder, is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment proportionate to the gravity of this generic offence, the IPC practically recognises three degrees of culpable homicide. The first is, what may be called "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree", which is punishable under Section 304, Part I. Then, there is "culpable homicide of the third degree", which is the lowest type of culpable homicide and is punishable under Section 304, Part II.

The question to be considered by the Court is whether the accused has done an act by doing which he has caused death of another. The question whether it is murder or culpable homicide will on proof of such casual connection between the act of the accused and the resultant death."

48. In other words, it is the degree of probability of death which determines whether a culpable homicide is of a gravest nature or of lowest degree. The word "likely" used in Section 299(2) conveys a sense of probability as distinguished from mere possibility. The expression "bodily injury.....sufficient in ordinary course of nature to cause death", used in clause 'Thirdly' of Section 300, connotes that death will be the most probable result of the injury having regard to the ordinary course of nature.

49. Some relevant judicial precedents are referred herein below:-

I. In **Purna Padhi Vs. State of Orissa, 1992 CrLJ 687** the deceased by the two accused sustained multiple injuries by sharp cutting weapons. The injury on the right foot of the victim led to the amputation of the right foot from the level of the ankle. The victim was removed to hospital where 18 days after the occurrence the deceased died due to ureamia. As to the injury on the foot the High Court held the offence committed could not be said to be murder. But no doubt by causing the foot injury alongwith others with weapon like *farsa and bhujali*, the assailants must have intended to cause such bodily injury as was likely to cause death and the offence thus attracts the mischief of part I of Section 304, IPC, the accused were convicted under Section 304, Part I IPC.

II. In **Subran Vs. State of Kerala, 1993 CrLJ 1387 (SC)** the accused inflicted the injuries on non-vital part of the deceased which were not found to be sufficient in the ordinary course of nature to cause death but it was proved that he inflicted the injury with a knowledge that with these injuries the victim was likely to die. It was held that this case would fall under Section 299 IPC and will be punishable under Section 304, Part I.

III. In case of **Jagwshar Singh Vs. State of Bihar, 1968 Cr App R (SC) 73** it is held that when the injury eventually produced the diseases i.e. tetanus, peritonitis, septicaemia etc. resulting in death, the accused must be held to have committed culpable homicide.

IV. In **Balbir Singh Vs. State of Haryana, 1996 CrLJ 2663 (P&H)** the accused in a sudden fight caused injuries to deceased who died 17 days after the date of occurrence. Singh act of the accused was not preplanned, he was convicted under Section 304 IPC. Though the facts of this case are slightly different as the accused in this case reached at the well hiding axe in his clothes.

V. In **Jeevan Vs. State of Rajasthan 1996 CrLJ 3929** facts of both the cases are almost similar. In cited case the accused was charged for causing the murder of the deceased by the blunt side of the axe and deceased had died three days after the incident. It was held that he had no intention to cause death but he had knowledge that death was likely to be caused. Hence conviction under Section 302 IPC was altered to one under Section 304 IPC.

VI. **Nashari Naik Vs. State of Orissa, 1998 CrLJ 3948** the accused caused *lathi*es blows and one accused used cycle chain to cause death of the deceased. It was held that accused using *lathi*es were guilty under Section 304 IPC and other under Section 323 IPC for using cycle chain.

50. In this case though the accused had used axe but he attacked from the blunt side of the axe. Except one wound from sharp edged side of the axe upon the hand of the deceased, remaining injuries are

caused from the blunt side of the axe which shows that he had no intention to kill the deceased.

51. In this case following points are material to decide as to whether death of the deceased is culpable homicide not amounting to murder or murder. For determining this question following facts and evidences must be looked into:-

(I) Prior to this incident, the accused has never abused, beaten or meted any kind of ill-treatment upon his parents;

(II) He caused injuries to his mother but mainly from the blunt side of the axe, not from the sharp edged side.

(III) When sister of the accused intervened, he caused 2-3 injuries to her from the blunt side of the axe due to which she had become unable to further defend her mother. Therefore, the accused had again opportunity to attack upon the deceased but he did not make any further attempt to kill his mother.

(IV) Except this fact that he used to beat his wife, there is no other instance that the accused had committed any offence against any one.

(V) That there is no supplementary report of doctor to establish that injuries were grievous or fatal in nature. The deceased was referred to BHU Trauma Centre where septicaemia developed and pus were found in some parts of her body. P.M. doctor opined that due to septicaemic shock deceased had died, though septicaemia developed during the course of treatment due to the injuries caused by the accused.

52. Considering the over all facts and circumstances of the case this Court comes to the conclusion that the criminal act of accused is not an act of murder but it is an act of culpable homicide not amounting to murder punishable under Section 304 IPC.

53. There are two Parts of Section 304 IPC. Under Part I an accused may be punished if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death.

54. Under Part II an accused may be punished if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

55. In this case the accused had used axe in commission of crime though except one injury from the sharp edged side of the axe rest of the injuries are caused from the blunt side of the axe to the deceased. It could not be proved that accused was a person of unsound mind and also that there was any proper reason due to which he had intention to cause death of his mother. Therefore, it can be assumed that the accused was having knowledge that from the attack of axe such bodily injury would be caused which would likely cause death. Therefore, the criminal act of accused towards the deceased is covered under the later portion (or of causing such bodily injury as is likely to cause death) of Section 304, Part I IPC.

56. On the basis of above discussion the conviction and sentence passed by the lower court under Section 302 IPC is liable to be modified under Section 304, Part I IPC and under which 10 years rigorous imprisonment and fine of Rs.5,000/- would certainly meet the ends of justice.

57. The appeal in respect of conviction and sentencing under Section 302 and 307 IPC is allowed.

58. The conviction and sentence awarded under Section 302 IPC is set aside. The accused Ramesh Yadav is convicted under Section 304, Part I IPC and ten years rigorous imprisonment and fine Rs.5,000/- is awarded. In case of non-payment of fine he shall undergo one year additional rigorous imprisonment.

59. The conviction and sentencing under section 307 IPC is set aside and the conviction and sentence order passed under section 324 IPC is maintained.

60. All the sentences shall run concurrently. The incarceration period of the accused shall be adjusted in accordance with existing law.

61. A copy of this order be sent to the lower court concerned along with the record of the lower court and a copy also be sent to the concerned Jail Superintendent for necessary compliance.

(2022) 9 ILRA 65
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Appeal No. 436 of 1991

Mohan Lal & Anr. ...Petitioners
Versus
State of U.P. ...Opposite Party

Counsel for the Petitioners:
Sri B.N. Rai, Sri Prabhat Kumar, Sri Siddharth Niranjan, Sri Dharm Niranjan, Sri Dharam Pal Singh (Sr. Counsel)

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 313 & 374 (2) – Appeals from convictions - Indian Penal Code, 1860 - Section 394 - voluntary causing hurt in committing robbery - testimony of inimical witnesses cannot be accepted without corroboration - rule of corroboration is not a mere formality, it becomes more vital when the witnesses are found interested one's .(Para - 20)

Enmity between informant and appellants - appellant no.1 & appellant no.2 resident of same village - belonging to rival party of informant - no criminal antecedents - no recovery of any robbed material - witnesses inimical to appellants – statement of P.W.1 - three witnesses won over - prosecution unable to stand on its own legs - Investigation taken up in a very lethargic and lackadaisical manner – no independent witnesses examined by prosecution - delay in lodging of FIR proved fatal - chowki barely 3 kilometers from village - medical examination of informant after a delay of one and a half day also falsifies its story.**(Para -7,20,21,22,23)**

HELD:-Trial Court overlooked discrepancies in the prosecution case. Impugned judgement and order found devoid of merits and liable to be set aside.**(Para -24)**

Criminal appeal allowed. (E-7)

List of Cases cited:-

Sukhar Vs St. of U.P., (1999) 9 SCC 507

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Mr. Dharam Pal Singh, learned Senior Counsel assisted by Sri Siddharth Niranjan, learned counsel for the appellants and Sri Vinod Kumar Singh Parmar, learned AGA for the State.

2. Present Criminal Appeal under Section 374(2) of the Cr.P.C. has been preferred by accused-appellants Mohan Lal and Sanjay Kumar against the judgment

and order dated 5.3.1991 passed by Special Judge, D.A.A. Kanpur Dehat in Special Sessions Trial No.33 of 1990 (State Vs. Mohan Lal and Another), whereby accused-appellants were convicted u/s 394 IPC and sentenced to three years rigorous imprisonment.

PROSECUTION STORY:

3. On the basis of written report dated 29.9.1989 (Ex.Ka-1), an FIR was lodged by informant Pratap Singh s/o Raghuveer Singh with the allegation that in the night of 28/29.9.1989 at about 11:45 PM, when the informant was sleeping along with his family members in his house, four miscreants are stated to have climbed up to the roof of his house and started stealing the articles. Two of the miscreants are stated to have taken the boxes of his daughter-in-law with them to the roof of the house and the other two miscreants were in the courtyard of the house. The informant and the inmates woke up on hearing the noise and one of the miscreants at the roof is stated to have thrown bricks upon the informant injuring him on his head. Two miscreants i.e. the appellants herein were apprehended in the courtyard itself by the informant with the help of his sons and people of locality, namely, Dharam Pal, Madan Singh, Chatrapal Singh etc. A list of the looted articles was also given by the informant. The FIR of the said incident was lodged by the informant at the Police Station Gajner, Kanpur Dehat on the very next date i.e. 08:30 AM and had taken the two apprehended accused persons to the police station along with him.

4. The arrested accused persons were kept in the hawalat in the police station and a quilt was provided to them. Investigation was taken up by S.I. Jagroop Singh who after recording the statement of the witnesses, preparing the site plan etc., filed a charge-sheet against the appellants u/s 394 IPC.

TRIAL

5. During trial, the prosecution chose to examine the two witnesses of fact i.e. PW-1 Pratap Singh and PW-2 Dhirendra. The Investigating Officer S.I. Jagroop Singh was examined as PW-3.

6. PW-1 Pratap Singh has corroborated the prosecution story as per the FIR and has stated that the appellants were caught by him and other inmates of the family with the help of other members of the locality. He has also stated that there was an enmity between the appellants and the informant as the appellants belong to the group of the present Gram Pradhan and the informant belong to the other party opposed to the Gram Pradhan. He has proved the written report as Ex.Ka-1.

7. PW-2 Dhirendra is the son of the informant. He has corroborated the prosecution story but has also admitted the fact that there was an enmity between the informant and appellants.

8. PW-3 S.I. Jagroop Singh has proved other documents although Constable Amar Singh is their scribe i.e. FIR and G.D. of institution of FIR i.e. G.D. No.15/8:30 AM dated 29.9.1989. The formal proof of the injury report was dispensed with by the defense counsel so it also stood proved. The charge-sheet was exhibited as Ex.Ka-4 and the injury report dated 30.9.1989 at 11:30 AM was exhibited as Ex.Ka-5.

9. The statement of the accused-appellants was recorded u/s 313 Cr.P.C. in which both the accused persons have stated that they have been falsely implicated due

to previous enmity between the parties as the appellants were ardent supporters of the present Gram Pradhan.

RIVAL CONTENTIONS

10. At the outset, Sri Dharam Pal Singh, learned Senior Counsel has stated that the FIR is delayed by about 9 hours and there is no explanation of said delay. It is an admitted fact as it transpires from the statement of PW-1 that the police station is 8 kilometers away from the place of occurrence and the inordinate delay of 9 hours itself falsifies the prosecution story. He has also stated that it has come up in the statement of the PW-1 that there is a police chowki at a distance of 3 kilometers away from the village and during the said intervening 9 hours, the informant or any other members of the family or of the vicinity did not care to inform the police personnel posted at the police station or the said chowki. A false explanation to the said delay has been given by the informant that out of fear, he did not go to lodge the FIR while he has stated in his statement itself that a lot of people of the locality have gathered and even two of his sons were also in the house at the time of the said offence. There is nothing on record to suggest that how the said fear factor was overcome by the informant.

11. Learned Senior Counsel has also stated that no weapon of crime or incriminating material has been recovered from the possession of the appellants. No stolen/robbed property has been recovered from their possession. Even no attempt has been made by the Investigating Officer to ascertain the identity of the other accused persons who had run away and are stated to have assaulted the informant by brick and taken away the booty.

12. Learned Senior Counsel has further stated that PWs-1 and 2 are the interested witnesses as indicated in their statements as there was a political rivalry between the informant and the appellants. The enmity is a double-edged sword as it may be the cause of offence but may also be cause of false implication. There is no possibility of a person to rob a person in the same village and that too, without muffled faces. The witnesses are interested witnesses, their sole interest was to get the appellants convicted to settle political scores.

13. Learned Senior Counsel has further stated that no independent witness has been produced by the informant as prosecution witness. The three eye witnesses named in the FIR i.e. Dharam Pal Singh, Madan Singh and Chatrapal Singh have not been examined.

14. Learned Senior Counsel has further stated that a perusal of G.D. of institution of crime i.e. G.D. No.15/8:30 AM dated 29.9.1989, which is exhibited as Ex.Ka-3, categorically indicates that the informant along with the appellants had gone to the police station with four more persons who are Sudhir Singh, Munna Singh, Ashok and Upendra but none of these witnesses have been examined as prosecution witnesses which clearly indicates that the prosecution story is false and lacks any credence. Learned Senior Counsel has further stated that in the aforesaid G.D. Ex.Ka-3, nothing has been recovered from the possession of the appellants except their clothes.

15. Learned Senior Counsel has also pointed out that as per the statement of the witnesses, the appellant no.1 Mohan Lal was wearing a vest, although in the

villages, in the fag end of month of September, it is quite cold in the night and even Ex.Ka-3 itself indicates that a quilt was provided to them at the police station. It further falsifies the prosecution story.

16. Learned Senior Counsel has also stated that the informant has been medically examined after inordinate delay of one and a half day i.e. on 30.9.1989 at about 11:20 AM. The said injury report Ex.Ka-5 categorically indicates that injury no.1 is lacerated wound 1cm x 1cm on the left parietal bone 7cm above left ear. As per opinion of doctor, the said injury is simple in nature and caused by hard and blunt object.

17. Learned Senior Counsel has also stated that in the column of B/B i.e. the person who had taken the injured person to the hospital for examination, there is overwriting of the word "Self" and later on, the name of Homeguard Shyam Lal has been added. It also indicates that the said injury report has been prepared after much delay in connivance with local doctor as such he has not been examined by the prosecution, although said fact finds mentioned in Ex.Ka-3 itself.

18. Learned Senior Counsel has indicated several other contradictions in the statements of PWs-1 and 2. He has further stated that there are various inconsistencies in their statements. The star witnesses, who are stated to have taken the appellants to the police station or who had come on hearing the shrieks of the informant and his family members, have been withheld by the prosecution which categorically shakes the root of the prosecution story.

19. Per contra, Sri Vinod Kumar Singh Parmar, learned AGA has vehemently opposed the criminal appeal on the ground that the enmity between the parties is proved, the appellants have been apprehended within the precincts of the house of informant. Although he could not deny the fact that there is no recovery from the appellants and no independent witness has been examined.

CONCLUSION

20. It is an admitted fact that there was an enmity between the informant and the appellants. The appellant no.1 Mohan Lal is the resident of the same village and the appellant no.2 is the relative of a lady residing in the same village belonging to the rival party of the informant. It is true that in the modern society, it is seen that no independent person dares to depose against the dreaded criminals but herein nothing has come up in the judgement of the Trial Court regarding any criminal antecedents of the appellant. It is also an admitted fact that there is no further criminal history of the appellants during the pendency of the appeal. There is no recovery of any robbed material from the possession of the appellants. The witnesses are inimical to the appellants as stated by the witnesses of fact i.e. PW-1 and PW-2. It has been settled by the Apex Court in **Sukhar Vs. State of U.P.1** that the testimony of inimical witnesses cannot be accepted without corroboration. The prosecution has deliberately withheld the seven independent witnesses, who could have substantiated their version. The rule of corroboration is not a mere formality, it becomes more vital when the witnesses are found interested one's. PW-1 has stated that three of the witnesses have been won over but he is silent on the other four witnesses available, thus, the prosecution is unable to stand on its own legs.

21. Investigation has been taken up in a very lethargic and lackadaisical manner. The Investigating Officer did not even care to

ascertain the whereabouts and identities of other co-accused persons who are stated to have accompanied the appellants. No effort whatsoever has been made by the Investigating Agency to recover the household items allegedly robbed in the said incident.

22. The discrepancies indicated by the learned Senior Counsel in the G.D. of institution of crime (Ex.Ka-3) are vital as none of the independent witnesses have been examined by the prosecution. It is the admitted fact that the instant case was instituted in the absence of PW-3 S.I. Jagroop Singh as he was busy in some other case and he was entrusted the investigation after institution at the police station, therefore, the PW-3 is not the witness of the production of the appellants at the police station. The only other witness, who could have proved the said production of accused-appellants by the informant along with other persons of the village, would have been the Constable 620 CP Amar Singh who has instituted the said FIR at the police station and is also the transcriber of the said G.D. However, Constable Amar Singh has also not been produced before the Court. Withholding of these relevant witnesses does not help the prosecution at all. The prosecution has to prove its own case and has to stand on its own legs. It is true that the instant case is not of identification as the appellants were known to the informant and other persons of the locality but the factum of robbery is not proved by the statements of PWs-1, 2 and 3 either. Withholding of material witnesses i.e. seven in number does not help the prosecution and categorically vitiates the trial.

23. The delay in lodging of FIR has proved fatal in this case as there was a chowki barely 3 kilometers from the village as admitted by the PW-1 in his cross-examination. This also shakes the very version of the prosecution. The medical examination of the informant after a delay of one and a half day also falsifies its story.

24. Considering the aforesaid facts and circumstances of the case and perusing the record of the court below, this Court is of the considered opinion that the learned Trial Court has overlooked the aforesaid discrepancies in the prosecution case. The impugned judgement and order is found devoid of merits and is liable to be set aside.

25. In view of the above, the appeal is allowed. The impugned judgement and order dated 5.3.1991 passed by Special Judge, D.A.A. Kanpur Dehat in Special Sessions Trial No.33 of 1990 (State Vs. Mohan Lal and Another) is set aside.

26. The appellants Mohan Lal and Sanjay Kumar need not surrender. Their bail bonds are cancelled and sureties are discharged.

27. Let a copy of this judgement along with Lower Court Record be returned to the court concerned forthwith for compliance. A compliance report be also sent to this Court.

(2022) 9 ILRA 69
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.09.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Appeal No. 638 of 2021

Annu Tandon & Ors. ...Appellants
Versus
State ...Respondent

Counsel for the Appellants:

Rohit Tripathi, Syed Zulfiqar Husain Naqv

Counsel for the Respondent:
Mrs. Suniti Sachan, Shiv. P. Shukla

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 357 & 359 - appeal under Section 374(2) r.w. Section 389 - Appeals from conviction - Suspension of sentence pending the appeal; release of appellant on bail - The Railways Act, 1989 - Section 174 - Obstructing running of train, etc,, Section 174(a) - by squatting or picketing or during any rail roko agitation or bandh - Even if a peaceful agitation/protest can lead to obstruction of running of any train by squatting or picketing or during any Rail Roko Agitation or bandh - same would amount to an offence under Section 174(a) of the Railways Act. (Para -28)

Appellants - leading protest along with 150-200 Congress workers - having Party flags & banners - standing on railway track - on date, time and place of the incident - slow down train - stop train near railway over bridge - several persons/Congress workers climbed on engine of train - persuaded to come down from engine - railway track cleared - train move - train got detained for 15 minutes - prosecution led cogent and credible evidence - protesters staged protest on railway track and stopped train - not a ''Rail Roko' Agitation - incident would amount to picketing . **(Para -27)**

(B) Constitution of India - Article 19 - right to protest, is part of fundamental rights - rights for demonstration, agitation and staging protest - not an absolute right - subject to reasonable restriction - not permitted to violate a law enacted by the legislation while exercising their right of protest, freedom of speech and expression. (Para - 30)

HELD:-Offence under Section 174(a) of Railways Act clearly established against appellants. Trial court not committed any error of law or jurisdiction or evidence in convicting for offence under Section 174(a) of the Railways Act. Sentence of two years of simple imprisonment, is excessive. Detaining train for 15 minutes, there was no damage to private and public property by protesters by and large it was a peaceful and symbolic protest. Judgement and order passed modified to the extent that appellants are sentenced with fine only.**(Para - 29,30,31,32)**

Criminal appeal partly allowed. (E-7)

List of Cases cited:-

Mazdoor Kisan Shakti Sangathan Vs U.O.I. & anr. , (2018) 17 SCC 324

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

1. The present appeal under Section 374(2) read with Section 389 Cr.P.C. has been filed by the appellants against the judgement and order dated 18.3.2021 passed by the Special Judge, MP/MLA/Additional Sessions Judge, Court No.19 in Session Case No.578 of 2020, State Vs. Smt. Annu Tandon and others, arising out of Case Crime No.243 of 2017, under Section 174(a) of the Railways Act, 1989, Police Station RPF Post, Unnao, whereby the learned Special Judge has convicted and sentenced the appellants under Section 174 (a) of the Railways Act with simple imprisonment for two years and further under Sections 357 and 359 Cr.P.C. has imposed fine of Rs.25,000/- to each appellant to be deposited with the Railway administration and default of payment of fine, one month additional simple imprisonment.

2. The facts, in brief, are that a complaint was filed by the RPF, Post-Unnao stating that the Station Master, Northern Railways, Unnao on 12.6.2017 at around 11.42 AM gave information to the RPF/GRP, Unnao that Train No.18191 UP was stopped soon before it was about to

reach Platform No.2 by some protesters of the Congress Party having flags and banners in their hands. On the said information, In-charge Inspector, Srinivas Mishra along with Constables Durgesh Kumar Yadav, Dheeraj Kumar Singh and Antesh Kumar Tewari reached to the over bridge, which was on the eastern side of the Unnao Railway Station. The RPF team found that 150-200 people having Congress Party flags and banners in their hands standing under the over bridge. At that time, Train No.18191 UP was coming to Platform No.2. These protesters seeing the train coming, came on the railway track of Platform No.2. The driver of the train finding the crowd standing on the railway track, stopped the train near the over bridge before Platform No.2 at around 11.38 AM. As soon as the train was stopped, some protesters climbed on the engine of the train and raised slogans. GRP/RPF team could, however, persuade them to come down from the engine of the train, and the crowd was also persuaded to leave the railway track. The track was cleared at around 11.50 AM and the train started from the said place at around 11.54 AM to Platform No.2. Altogether, the train was detained by the protesters for 12 minutes.

3. Annu Tandon, appellant no.1, Surya Narayan Yadav, District President of Congress Committee, Unnao and Amit Shukla, City President of Congress Committee, Unnao and Ankit Parihar were leading the protest. There was apprehension of law and order getting disturbed if these people were arrested and, therefore, no arrest was made.

4. Necessary formality was completed at the Post and a complaint was registered against the appellants and 150-200 other unknown persons at Case Crime No.243 of 2017, under Section 174(a) of the Railways Act on 12.6.2017 at 1300 Hours. The said offence was investigated by Sub-Inspector, Srinivas Mishra. Charge sheet was submitted against the appellants under Section 174(a) of the Railways Act. Appellants were summoned. Accused denied the charge and claimed for trial. The prosecution to prove its case produced as many as 22 documentary evidence and examined seven prosecution witnesses.

5. P.W.-1, Hyder Mehndi, who was posted as Station Master, Unnao on 12.6.2017, deposed that Train No.18191 UP, Tata-Chapra Express was reaching to Platform No.2. However, some unknown protesters stopped the train before it could reach Platform No.2, as a result thereof, the rail traffic got interrupted. The incident was registered at 11.42 AM, and a copy of the same was given to the GRP/RPF. He proved the said report, which was marked as Ext.Ka-1.

6. P.W.-2, Dheeraj Kumar Singh, Constable of RPF, deposed that on 12.6.2017 after receiving information regarding stoppage of Train No.18191 UP by the crowd, the police team reached to the place and found that Train No.18191 UP was stopped by 150-200 protesters and some of them, had climbed on the engine of the train. These protesters had Congress Party flags and banners. These protesters were staging the protest under the leadership of Annu Tandon, appellant no.1, Ex-Member of Parliament, Surya Narayan Yadav and Amit Shukla etc., and all these persons were demanding that the City Magistrate, Unnao should come there and accept a memorandum from them, which was in the name of the President of India. With a lot of persuasion by the RPF/GPF personnel, protesters vacated the railway

track and allowed the train to move on. In this process, the train was detained from 11.38 AM to 11.50 AM. He proved the report prepared at the site on which he had put in his signatures and it was marked as Ext. Ka-2. The said report was made entry in the General Diary at 1300 hours on 12.6.2017, and the case was registered against the appellants and others. The said GD entry was marked as Ext.Ka-3. He also proved the statement recorded by one witness and it was marked as Ext.Ka-4.

7. In the cross-examination, P.W.-2 said that he was carrying mobile phone, but did not take photograph. He did not name the protesters and he did not remember other names than the names of appellants no.1 to 3.

8. P.W.-3, Girish Kumar Verma, who was Guard in the said train, deposed that the train got stopped by the protesters before it could reach the platform. He inquired from the Driver, Ajay Kumar, who said that some protest was going on and the protesters had claimed on the engine of the train. The track would get cleared by the GRP and because of the said protest, the train got held up for 15 minutes from 11.39 AM to 11.54 AM.

9. In the cross-examination, P.W.-3 said that he did not get down from the train to see the protest. He saw that some protesters were siting on the railway track and that is why the train was stopped.

10. P.W.-4, Srinivas Mishra, Sub-inspector, RPF, had given a statement in this regard, which was marked as Ext.Ka-4A. He also proved the photocopy of the Guard Memo and it was marked as Ext.Ka-4B. The said witness was cross-examined by the defence.

11. P.W.-4 deposed that as soon as he was informed regarding detention of Train No.18191 UP by 150-200 protesters by the Station Master, Unnao, he along with his team reached to the site. He said that appellant nos.1 to 3 and others were making demand to call the City Magistrate, Unnao to accept the memorandum from them, which was in the name of the President of India. Some of the protesters have climbed on the engine of the train, and some of them were on the railway track. The train was detained from 11.39 AM to 11.54 AM. He got the track cleared by persuading the protesters and the leaders of the Congress Party. After the track was cleared by the protesters, the movement of the train could become possible.

12. In the cross-examination, which took place on 23.1.2019, P.W.-4 said that the incident took place more than two years back and he was not able to remember the protesters, including the three appellants. He said that he recognized appellant no.1, Smt. Annu Tandon as he had seen her photo in the newspaper.

13. P.W.-5, Ajay Kumar (Loco Pilot) deposed that on 12.6.2017 he was the Pilot of Train No.18191 UP from Lucknow to Farrukhabad. When the train was reaching to Unnao Railway Station, he found that some protesters having flags and banners of the Congress Party in their hands were standing near the Railway over bridge. He blew horn for several times, but the protesters did not clear the railway track and then he had to stop the train. As soon as the train was stopped, the protesters climbed on the engine of the train and started raising slogans. He informed through Walkie-Talkie to the Guard and the Station Master, Unnao and, thereafter, the team of RPF/GRP reached at the place of

incident, and they could remove the protesters from the engine and the railway track got cleared. In this incident, the train remained stopped for 15 minutes and the railway traffic got interrupted for 15 minutes. These protesters were having Congress Party flags and banners in their hands. He proved the statement given to the Investigating Officer and it was marked as Ext.Ka-6.

14. P.W.-6, Constable, Aman Kumar deposed that on 12.5.2017 he was posted as Constable at the RPF Post-Unnao. His duty was to maintain the diary from 0800 hours to 1600 hours. At around 1300 hours, In-charge Inspector, Srinivas Mishra with Constables Antesh Kumar, Dheeraj Kumar and Durgesh Kumar came to the office and said that Ex-Member of Parliament of Congress Party, Annu Tadon, Surya Narayan Yadav and Amit Shukla and 150-200 other people had stopped Train No.18191 UP near the railway over bridge at KM .54/35-37. These protesters had climbed on the engine of the train and staged protest. The Ex-Member of Parliament was persuaded to come down from the engine and after the railway track was cleared, the train started to the Railway Station. The train remained stopped from 11.39 Am to 11.54 Am. In-charge, Sub-Inspector got the FIR registered at case Crime No.243 of 2017, under Section 174(a) of the Railways Act on the same day at 1300 hours, which was entered in the General Diary by him. The report which he had brought, proved by him and it was marked as Ext.Ka-7.

15. P.W.7, Vimlesh Kumar Yadav, Sub-Inspector, RPF, in his statement said that he received the investigation report of Crime No.243 of 2017 from the office. He proved the charge sheet, which was marked as Ext.Ka-8, and also proved the documents annexed with the charge sheet, which were marked as Ext.Ka-9 to 22.

16. Accused-appellants in their statement recorded under Section 313 Cr.P.C. said that they were not involved in stopping the train, but the protest was going on in an open area near the railway track. In respect of the statements of the witnesses, they said that they had no knowledge about it. However, they did not produce any defence witness.

17. Learned trial court has held that the prosecution witnesses have proved the presence of the appellants at the time and place of the incident. The witnesses have also said that they were the eye witnesses to the incident. The trial court also held that there was no such a glaring contradiction, which would raise suspicion regarding the prosecution case. It has also held that the prosecution has proved the case beyond reasonable doubt by leading oral and documentary evidence that on 12.6.2017, the accused-appellants had led the protest/Rail Roko Agitation at the Unnao Railway Station and in this sequence, Train No.18191UP was stopped near the railway over bridge and the railway traffic got disrupted for 15 minutes because of the said agitation.

18. The trial court also held that the offence under Section 174(a) of the Railways Act has been proved against the accused-appellants. Therefore, vide impugned judgment and order, the accused-appellants have been convicted for offence under Section 174(a) of the Railways Act and sentenced them as mentioned above. The trial court also held that the Railways had suffered Rs,3,06,0015/- @ Rs.20,402/- per minute loss for 15 minutes disruption of

the railway traffic, therefore, under Sections 357 and 359 Cr.P.C. each accused was fined for Rs.25,000/-, which fine has been deposited by the appellants.

19. Ms. Kamini Jaiswal, learned counsel assisted by Sri Rohit Kumar Singh and Sri Rohit Kumar Tripathi, appearing for the appellants has submitted that the protest was staged at the open space near the railway track by the appellants and other Congress workers, and it was not the Rail Roko Agitation as held by the learned trial court. The Congress workers led by the appellants wanted to give a representation/memorandum to the President of India through the City Magistrate, Unnao regarding the alleged atrocities on the farmers of the Madhya Pradesh by the Bhartiya Janta Party Government of the said State. A protest against the alleged atrocities on the farmers of the Madhya Pradesh, was organized near the railway track in the open space by the Congress workers. The driver seeing the crowd near the railway track, slowed down the train and stopped the train and some protesters allegedly climbed on the engine of the train and after some time, they came down from the train and allowed the train to move.

20. Learned counsel for the appellants has forcefully submitted that it is not the prosecution case that appellants instigated or exhorted the people gathered near the railway track to stop the train, which was going to the Railway Station. The appellants did not ask the protesters to come on the railway track or climb on the engine of the train. She has further submitted that this was neither "Rail Roko' Agitation nor the protest on the railway track, but it was a symbolic protest to hand over the memorandum to the President of India through City Magistrate, Unnao. If some protesters came on the railway track and climbed on the engine of the train, it would not come within the meaning of Section 174(a) of the Railways Act. To organise and hold peaceful protest against the Government, is permitted in democratic polity. It is part of right of freedom of speech and expression. These are fundamental rights guaranteed under Articles 19(1)(a) and 19(1)(b) of the Constitution of India. The appellants and other protesters were exercising the said fundamental right on 12.6.2017 and they were holding the symbolic agitation to raise the issue. This was not a violent protest. For holding a peaceful protest, the appellants could not have been prosecuted for offence under Section 174(a) of the Railways Act.

21. Learned counsel for the appellants has placed reliance on the judgement of the Supreme Court in the case of ***Mazdoor Kisan Shakti Sangathan Vs. Union of India and another,*** (2018) 17 SCC 324 to buttress her submissions. She has also submitted that except for the appellants, charge sheet was not filed against any other person though it was mentioned that the appellants and 150-200 people had assembled and stopped the train and disrupted the railway traffic movement for 15 minutes. She has further submitted that the prosecution has failed to prove by leading the unimpeachable, cogent, credible, reliable and specific evidence to distinguish the case of four appellants from the rest of the crowd, but only the appellants have been prosecuted for offence under Section 174(a) of the Railways Act, and they have been convicted and sentenced vide impugned judgement and order. It is submitted that the offence under Section 174(a) of the Railways Act, is not

attracted in the facts and circumstances of the case. Therefore, the impugned judgment and order passed by the trial court may be set aside and the appellants should be acquitted of the charges.

22. On the other hand, Sri Shiv P. Shukla, learned counsel for the respondent has submitted that it is admitted case that the train was stopped for 15 minutes due to the agitation led by the appellants and other protesters, and the track got cleared after the RPF/GRP team reached there. Appellant no.1 was leading the protest with three other appellants and other Congress workers had obstructed the running of the train for 15 minuted inasmuch as they were on the railway track and they also climbed the engine of the train, which would amount to picketing. The prosecution by cogent and credible evidence had proved the case against the appellants, and there is no ground to interfere with the well reasoned judgement and order passed by the learned trial court, which is based on sound reasoning and appreciation of evidence. He submits that the appeal is liable to be dismissed.

23. I have considered the submissions advanced on behalf of the learned counsel for the parties and perused the record.

24. As mentioned above, the facts are not in dispute inasmuch as on 12.6.2017 the appellants, who were leading the protest along with 150-200 Congress workers were staging a protest with flags and banners of the Congress Party in their hands and demanding that the City Magistrate, Unnao should come there to receive the memorandum in the name of the President of India. It is nobody's case that it was a violent protest. However, the fact remains that Train No.18191 UP was detained by the protesters, including the appellants, and as per the prosecution case, when the train reached near the railway over bridge, the protesters in large number came on the railway track and the driver slowed down the train and stopped it finding large number of protesters on the track. Statement of the Driver (P.W.-4) is cogent and credible piece of evidence, which cannot be brushed aside. Thus, because of the protest by the appellants and other Congress workers, the railway traffic got disrupted for 15 minutes on 12.6.2017 between 11.39 AM to 11.54 AM. The presence of appellants on the date, time and place of incident is not in dispute nor the incident is denied except to say in their 313 Cr.P.C. statements that they were not involved in stopping the train in question.

25. The question which arise for consideration, is whether the said incident would come within the definition of Section 174(a) of the Railways Act or not. Section 174(a) of the Railways Act is in respect of obstruction of running of train, which is clear from the heading of the section itself, which reads as under :-

*"**174. Obstructing running of train, etc.**--If any railway servant (whether on duty or otherwise) or any other person obstructs or causes to be obstructed or attempts to obstruct any train or other rolling stock upon a railway,--*

(a) by squatting or picketing or during any rail roko agitation or bandh; or

(b) by keeping without authority any rolling stock on the railway; or

(c) by tampering with, disconnecting or interfering in any other manner with its hose pipe or tampering with signal gear or otherwise, he shall be punishable with imprisonment for a term which may extend to two years, or with fine

which may extend to two thousand rupees, or with both."

26. Thus, if any Railway servant or any other person obstructs any train by squatting or picketing or during Rail Roko Agitation and Bandh etc., the offence under Section 174(a) of the Railways Act would get attracted. Though the trial court has mentioned that it was a "Rail Roko' Agitation. If the said finding is discarded, even then this Court would be required to consider as to whether the offence under Section 174(a) of the Railways Act was committed by the appellants or not. As per provisions of Section 174(a) of the Railways Act, if running of the train is obstructed by squatting or picketing, this would attract the offence under Section 174(a) of the Railways Act.

27. The Driver of the train in his evidence very categorically said that he found that large number of people having Congress Party flags and banners standing on the railway track on the date, time and place of the incident, and then he had to slow down the train and had to stop the train near the railway over bridge. Large number of people on railway track staging protest would amount to picketing. It has also come in evidence that as soon as the train got stopped, several persons/Congress workers climbed on the engine of the train. Appellant no.1, Smt. Annu Tandon and other appellants were persuaded to come down from the engine of the train and the railway track was cleared. Thereafter, the train could move and in this process, the train got detained for 15 minutes. Therefore, presence of the appellants at the site is not in dispute. The defence has not led any evidence to support their case that the protest was being staged at nearby ground and field, whereas the prosecution had led cogent and credible evidence to say that the protesters staged the protest on the railway track and stopped the train. It was not a "Rail Roko' Agitation, but the incident would amount to picketing, which obstructed the running of Train No.18191 UP on 12.6.2017 between 11.39 Am to 11.54 AM by the protesters, including the appellants.

28. Even if a peaceful agitation/protest can lead to obstruction of running of any train by squatting or picketing or during any Rail Roko Agitation or bandh, the same would amount to an offence under Section 174(a) of the Railways Act. It is no one's case that the protest was violent, but the fact remains that the protesters, including the appellants, had stopped the train for 15 minutes by picketing on the railway track and climbed on the engine of the train when it was stopped.

29. In view thereof, the offence under Section 174(a) of the Railways Act is clearly established against the appellants and the trial court has not committed any error of law or jurisdiction or evidence in convicting them for offence under Section 174(a) of the Railways Act.

30. In a democratic polity governed by a written Constitution, people have rights of protest against the Government's policies, perceived atrocities. The right to protest, is also part of fundamental rights guaranteed under Article 19 of the Constitution of India. The citizens of this country have rights for demonstration, agitation and staging protest. However, this right is not an absolute right, and it is subject to reasonable restriction. If law prohibits or restricts exercise of this right in certain ways and manners, then such a law

would amount to putting reasonable restriction in exercise of the said right. The citizens of this country are not permitted to violate a law enacted by the legislation while exercising their right of protest, freedom of speech and expression.

31. However, so far as the sentence is concerned, this Court finds that awarding the sentence to the appellants for maximum sentence of two years of simple imprisonment in the facts and circumstances of the case, is excessive. In democracy under our Constitution, people have right to protest against Government policies/action/inaction, provided the protest does not lead to commission of an offence by the protesters. Except for detaining the train for 15 minutes, there was no damage to private and public property by the protesters by and large it was a peaceful and symbolic protest.

32. In view thereof, this Court finds that imprisonment of two years is unwarranted in the facts and circumstances of the case and, therefore, the impugned judgement and order dated 18.3.2021 passed by the trial court is modified to the extent that the appellants are sentenced with fine only. The appellants had already deposited the fine of Rs.25,000/- each and, therefore, no further fine is required to be deposited by them. The appellants are on bail. Their bail bonds are cancelled and sureties are discharged.

33. Subject to above modification of the impugned judgement and order, the appeal is allowed in part.

(2022) 9 ILRA 77
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 769 of 1991

Raj Charan & Anr. ...Appellants
Versus
State ...Respondent

Counsel for the Appellants:
Sri Ran Vijay Singh, Ms. Katyayani (A.C.)

Counsel for the Respondent:
A.G.A.

(A) Criminal Law - Jail Appeal - Indian Penal Code, 1860 - Sections 302/34, Section 323/325 r.w. Section 34. & Section 452 - in a murder trial, merely because a witness is interested or inimical, his evidence cannot be discarded unless the same is otherwise found to be not trustworthy - evidence of interested or inimical witnesses is to be scrutinised with care but can not be rejected merely on the ground of being a partisan evidence. (Para -36,37)

Case of direct and clinching evidence - two murders committed - three injured eye witnesses of incident - sons and daughter of the one deceased - two independent witnesses - eye witness of murder - married daughter of another deceased – relatives of both deceased - medical evidence fully supports prosecution evidence - Both incidents occurred in broad day light - prompt first information report lodged by informant - accused persons including the appellants had also motive to commit such offence - incidents and places of incidents not disputed by defence side. **(Para -47)**

HELD:- Trial court rightly concluded that post-mortem reports of both the deceased fully support the prosecution version qua occurrence of both the incidents. Trial court fully satisfied in convicting the appellant. **(Para -54,55)**

Jail appeal dismissed. (E-7)

List of Cases cited:-

1. Kartik Malhar Vs St. of Bihar , 1996 CRL. L.J. 889

2. Shyam Babu Vs St. of U.P. AIR , 2012 SC 3311

3. St. of U.P. Vs. Kishan Chand & Ors. , (2004) 7 SCC 629

4. St. of J&K Vs. S. Mohan Singh & Ors. , (2006) 9 SCC 272

5. Ramashish Rai Vs. Jagdish Singh, (2005) 10 SCC 498

6. Mahender Chawla Vs U.O.I., Writ Petition (Criminal) No. 156 / 2016

7. Kuna @ Sanjaya Behera Vs St. of Orrisa, 2017 SCC Online Supreme Court 1336

8. Veer Singh & ors. Vs St. of U.P., (2014) 2 SCC 455

9. Namdeo Vs St. of Maharashtra, (2007) 14 SCC 150

10. Suresh Chandra Bahri Vs St. of Bihar , 1995 Supp (1) SCC 80

11. Mekala Sivaiah Vs St. of A.P., 2022 SCC Online SC 887

12. St. Represented by Inspector of Police Vs Saravanan @ Anr., (2008) 17 SCC 587

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. This appeal has been preferred by appellants, Ram Charan and Baldev against the judgment and order dated 16th September, 1978 passed by the Sessions Judge, Jhansi in Sessions Trial No. 182 of 1977 State Vs. Zalim and Others), under Sections 302/34 I.P.C. 323/325 I.P.C. read with Section 34 I.P.C. and Section 452 I.P.C., Police Station-Mau, District-Jhansi, whereby all the accused-appellants have been convicted and sentenced to undergo (i) imprisonment for life under Section 302/34 I.P.C. for each of the two murders of Khuman and Halku; (ii) rigorous imprisonment for a period of two years under Section 452 I.P.C., (iii) imprisonment for a period of one year under Section 325/34 I.P.C., and (iv) imprisonment for six months under Section 323 I.P.C. with the observation that all the sentences were to run concurrently.

2. We have heard Mr. Ran Vijay Singh, Advocate and Ms. Katyayani, Advocate, who was earlier appointed as Amicus Curiae on behalf of the appellants and Mr. Arunendra Singh, learned A.G.A. for the State as also perused the entire materials available on record.

3. The prosecution story, as reflected from the records, is as follows:

The deceased, namely, Halku and Khuman were real brothers and were father and uncle of the informant/P.W.-2 Lakhan and they used to do cultivation in village Baragaon. The accused persons, namely, Zalim, Baldua and Ram Charan belong to the same village and their fields were also adjacent to field of Khuman. On 30th September, 1977 at about 10:00 a.m., the accused Khuman, his nephew Lakhan and niece Panna went to their fields. Panna started to cut grass from the *Mendh*. At about 11:00 a.m. on the same day i.e. 30th September, 1977, the accused Zalim and the wives of the accused Baldua and Ram Charan also came there and started to cut grass from the filed of Khuman. Khuman objected them not to cut grass from his field on which all the women started a row and told him that they were cutting grass from their own fields. They started to abuse

Panna, thereupon Khuman objected and asked the women of the house of the accused to go from there. The aforesaid women, thereafter, went away towards the village but at about 01:00 p.m. on the same day i.e. 30th September, 1977, the accused came to the field of Khuman and out of them, the accused Zalim having Pharsa, accused Baldua having Axe (Kulhari) and accused Ram Charan having Lathi asked the deceased Khuman as to why they forbidden the women of their house to cut grass, while they were cutting the same from their own field. The accused persons also started abusing Khuman on which Khuman said that they were cutting grass from his field that is why he objected. Thereupon, the accused attacked Khuman due to which he sustained injuries. Then Lakhan, Panna and Ghasiram tried to save Khuman, they were also beaten by the accused persons and thereafter they ran way towards the village. Because of the said assault, Lakhan, Panna and Ghasiram also sustained injuries. Due to injuries caused by the accused persons, Khuman died on the spot. Thereafter, the accused persons at about 02:00 p.m. reached the house of Halku and at that time, Halku along with ladies of his house was sitting at the entrance of his house. The accused persons entered into entrance and started to beat Halku badly. Thereafter the accused persons dragged Halku to the entrance and took him to a place near the house of Daasau, where they again beat him. Hearing the alarm raised by Halku, witnesses/villagers reached the said place of occurrence. On seeing the said witnesses, the accused persons ran away. As Halku did not die, he was taken by Lakhan along with Panna and Ghasiram to the Police Station but he died on the way of Police Station. Thereafter, Lakhan lodged a report, resultantly, a case was registered. On registration of the said case, the injured were sent for medical examination and investigation was commenced. Panchayatnama (inquest report) of the dead body of Halku was also prepared at the Police Station. The Investigating Officer took Kurta and Pancha (Paijama) of the deceased Halku in his possession and he also recorded the statements of Lakhan, Panna and Ghasiram and thereafter he reached the field of Khuman and found his dead body. The Investigating Officer also prepared Panchayatnama (inquest report). He also took blood stained earth and ordinary earth in his possession from the places where Khuman and Halku were done to death. The dead bodies of both the deceased, namely, Halku and Khuman were also sent for post-mortem.

4. Injured Lakhan (P.W.-2) was examined medically on 25th September, 1977 by Dr. S.K. Jain (P.W.-6) and as per the medical examination report, which is marked as Exhibit-Kha-9, following injuries were found on the body of Lakhan:

"1. contusion 4½ cm. X 2 cm on the top right shoulder-cum-traumatic swelling. 7 cm x 7 cm on the top of shoulder.

2. abrasion 3/4" x 3/4 cm on the back of left index finger, at 2nd phylanx

3. complaint of pain in 3rd middle finger of left hand."

In the said report it has been mentioned that all the injuries are simple in nature, which were caused by blunt object.

5. The injured Ghasiram (P.W.-3) was also medically examined on 30th September, 1977 by Dr. S.K. Jain (P.W.-6) and as per his medical examination report, which is marked as Exhibit-Ka-10, following injuries were found on his body:

"1. Lacerated wound 3/4 cm x 1/2 cm x 1/4 cm on the back of left forearm in its middle-cum-traumatic swelling 14 cm x 10 cm on the left forearm. Advised-X-ray.

2. Complaint of pain in right side chest.

3. Abrasion 2 ½ cm x 1 cm on the lower back right side."

In the said medical examination report, it has been opined by the Doctor concerned that all injuries are simple in nature except injury no.1 for which the injured was referred to District Hospital, Jhansi for X-ray. The Doctor further opined that injuries caused to the injured were by blunt object.

Apart from the above, in the X-ray report of injured Ghasiram (P.W.-3), it has been opined that there is fracture in the middle forearm of injured.

6. On 30th September, 1977, medical examination of injured Smt. Panna was also conducted by Dr. S.K. Jain (P.W.-6) and as per the medical examination report of Smt. Panna, which is marked as Exhibit-Ka 11, following injuries were found on her body:

"1. 6 cm x 1/2 cm abrasion on the back of right arm lower 4 cm above from back of right elbow joint."

The Doctor, who conducted the said medical examination, opined that the injury sustained to injured Smt. Panna is simple in nature which was caused by blunt object.

7. The post-mortem of the dead body of the deceased Khuman was conducted on 1st October, 1977 and in the opinion of the Doctor who conducted the said post-mortem, the cause of death of deceased is due to cranial haemorrhage as a result of head injury. On post-mortem of the dead body of the deceased, following ante-mortem injuries were reported:

"(1). Incised wound 2½" x 1/4" bone deep oblique in direction on front side of head upto the middle, about 4½" above the roof of left ear. (fracture of posterior bone of left side).

(2). Incised wound 3/4" x 1/4" bone deep on the right side of forehead, just above lateral to outer angle of right eye.

(3) Contusion-cum-Traumatic swelling 3" x 2" on right side of head just above root of right ear.

(4) Incised wound 1" x 1/2" x bone deep on the right side of face upto the right ear.

(5) Incised wound 1½" x 1/2" x cutting of bone of middle of right ear.

(6) Contusion 2½" x 1" on the back of head of occipital region.

(7) Lacerated wound 3/4" x 1/4" in the middle of left little finger.

(8). Abrasion 1¼" x 1/4" on the medial side of right elbow joint."

8. On 1st October, 1977, the post-mortem of the dead body of the deceased Halku was also conducted and in the opinion of the Doctor B.D. Magal (P.W.-1), who conducted the said post-mortem, the cause of death of deceased Halku is due to Comma as a result of heart injury. The Doctor (P.W.-1), who conducted the post-mortem of the dead body of the deceased Halku, also reported following ante-mortem injuries:

"(1) Contusion horizontal 1½" x 1½" on the right side of head, 1" above from right eye brow.

(2) Lacerated wound 1/2" x ¼" x bone deep on the right side of head just above injury no.1.

(3) Lacerated wound 1½" x 1/2" x bone deep on the right side of head, about 3" away from root of right ear.

(4) Incised wound 2" x 1/2" x bone deep, oblique in direction, of the left frontal bone on the front of left side of forehead about 1/2" above from middle eye brow bone is cut and pieces entered the brain matter.

(5) Incised wound 1½" x 1/2" bone deep cum cutting of bone on the front of left side of head, about 1/2" above from injury no.4.

(6) Lacerated wound 1" x 1" x skin deep on the back of left ear, mastoid region.

(7) Lacerated wound 1/2" x 1/4" x 1/4" on the back left side of head on the mastoid process.

(8) Abrasion-cum-contusion 1" x 1/2" on the back side of head, 2" above from injury no.7.

(9) Contusion 1" x 1/2" on the top of 1 left shoulder joint.

(10) Abrasion 1/2" x 1/4" on the lateral side of left upper arm, 1" above from left elbow joint.

(11) Incised wound oblique 1½" x 1" bone deep and 1½ on the lateral side of right upper arm, about 4½" below from the right shoulder joint.

(12) Lacerated wound 2" x 1/2"-x1/2" cum-contusion on the right upper arm, 3½ above from the right elbow joint.

13. Contusion 6" x 1" on the right side of upper posterior of back, in scapular region, oblique in direction.

(14). Contusion 4½" x 1" on the right side middle of back and below angle of scapula.

(15). Abraided contusion 2 x 2½ on the back of right palm in the middle.

(16). Contusion 1" x 1/2" on the front of right leg just below the right ankle joint.

(17). Contusion oblique 4" x 1" on the lateral side of right leg. 4" below from right knee joint.

(18). Contusion 4½" x 1" on the lateral side of right leg about 1/4" away from injury no.17."

9. The Investigating Officer prepared Site Plan of the places of occurrence, which were two in number. He also recorded statements of other witnesses. After completion of statutory investigation in terms of Chapter XII Cr.P.C., the Investigating Officer submitted the charge-sheet against the accused persons. The learned Magistrate took cognizance of the offence on the charge-sheet and committed the case to the court of Sessions Judge.

10. On 21st March, 1978, the learned Trial Court framed charges against the accused persons for offences punishable under Section 302 I.P.C. read with Section 34 I.P.C., Section 325 I.P.C. read with Section 34 I.P.C., Section 323 I.P.C. read with Section 34 I.P.C. and also Section 325 I.P.C.

11. In order to prove its case, the prosecution also relied upon documentary evidence, which were duly proved and consequently marked as Exhibits. The same are catalogued herein below:-

"i). First information report was marked as Exhibit Ka -3 ;

ii). The oral information of informant/P.W.-2 Lakhan which was transcribed, was marked as Exhibit Ka-15;

iii). Recovery memo of blood stained cloths of the deceased Halku was marked as Exhibit Ka-20;

iv). Recovery memo of blood stained and plain earth was marked as Exhibit Ka-5;

v). Recovery memo of Bandi was marked as Exhibit Ka-6;

vi). Recovery memo of blood stained and plain earth from house was marked as Exhibit Ka-7;

vii). Recovery memo of blood stained and plain earth was marked as Exhibit Ka-8;

viii). Injury report of informant/P.W.-2 Lakhan was marked as Exhibit Ka-9;

ix). Injury report of injured/P.W.-3 Ghasiram was marked as Exhibit Ka-10;

x). Injury report of injured Smt. Panna was marked as Exhibit Ka-11;

xi). X-ray report of injured/P.W.-3 Ghasiram was marked as Exhibit Ka-13;

xii). Post-mortem report of deceased Khuman was marked as Exhibit Ka-1;

xiii). Post-mortem report of deceased Halku was marked as Exhibit Ka-2;

xiv). Chemical examination reports in respect of both the deceased Halku and Khuman were marked as Exhibits-Ka-37 & 38;

xv). Affidavit of Constable-512 Arjun Lal was marked as Exhibit-Ka-32;

xvi). Affidavit of Constable-594 Rampal Singh was marked as Exhibit-Ka-33;

xvii). Affidavit of Constable-569 Manni Lal was marked as Exhibit-Ka-34;

xviii). Affidavit of Clerk of office of the Chief Medical Officer, namely, Thakur Dutt, was marked as Exhibit-Ka-35;

xix). Affidavit of Clerk of Constable-578 Lalji Singh was marked as Exhibit-Ka-36; and

xx). Site plan prepared by the Investigating Officer qua the place of occurrence i.e. field of Khuman, where he was murdered, was marked as Exhibit-Ka-28;

xxi). Site plan prepared by the Investigating Officer qua the place of occurrences i.e. entrance of the house of Halku and Bara of Dasrau, where Halku was murdered, was marked as Exhibit-29."

12. The prosecution also examined total nine witnesses in the following manner:-

"i). P.W.-1, namely, Dr. B.D. Magal, who conducted the post-mortems of the dead bodies of both the Khuman son of Chilu and Halku son of Chilu.;

ii).P.W.-2, namely, Lakhan son of deceased Halku, who is informant and injured eye witness of the incident;

iii) P.W.-3, namely, Ghasiram, son of deceased Halku, who is also an injured eye witness of the incident;

iv) P.W.-4, namely, Dharmdas son of Paansu, who is an independent eye witness of the incident;

v). P.W.-5, namely, Virendra Singh son of Mulu Singh, who is also an independent eye witness of the incident;

vi). P.W.-6, namely, Dr. S.K.Jain, who medically examined the injured Lakhan (informant/P.W.-2) son of deceased Halku, Ghasiram (P.W.-3) son of deceased Halku and Smt. Panna daughter of deceased Halku;

vii). P.W.-7, namely, Beti Bai, wife of Durjan and daughter of the deceased Halku, who is also said to be an eye witness of the incident;

viii). P.W.-8, namely, Dr. R.C. Gupta, who conducted the X-ray of injured Ghasiram (P.W.-3);

ix). P.W.-9, namely, Head Constable-15 Rajendra Kishor, who had written the chik first information report (Exhibit-Ka-3) on the oral information given by the P.W.-2/informant-Lakhan and proved the same;

x). P.W.-10, namely, Vishwambhar Dayal, Sub-Inspector, who conducted the investigation of murder of both the deceased, namely, Halku and Khuman and proved the inquest reports, blood stained earth etc. whichever have been collected by him."

13. After recording of the prosecution evidence, the incriminating evidence were put to the accused for recording their statements under section 313 Cr.PC. In their statements recorded U/s 313 Cr.P.C. all the accused appellants denied their involvement in the crime. Accused appellants Ram Charan, Baldev and co-accused Zalim specifically stated before the trial court that they have been falsely implicated in this case. The defence did not examine any witness from its side.

14. The trial court after relying upon the evidence adduced by the prosecution and recording its finding, has come to the conclusion under the impugned judgment of conviction that the prosecution has been able to fully prove that all the three accused including the appellants, in furtherance of their common intention, committed the murder of Khuman in his field and the murder of Halku near his house. The trial court has also recorded that it has also been proved that all the accused including the appellants caused simple injuries to injured Lakhan and Panna and caused grievous injuries to the injured Ghasiram. On the cumulative strength of the aforesaid, the trial court has held that all the accused including the present appellants are guilty of offence punishable under Sections 302 I.P.C. read with Section 34 I.P.C. for the murders of both the deceased, namely, Khuman and Halku. All the accused were also found guilty by the trial court for the offences punishable under Sections 323/34 I.P.C. and 325/34 I.P.C. and Section 452 I.PC. As such, the trial court convicted and sentenced all the accused including the present appellants for the aforesaid offences. It is against this judgment and order of conviction passed by the trial court that the present jail appeal has been filed on the ground that conviction is against the weight of evidence on record and against the law and the sentence awarded to the accused-appellants is too severe.

15. Assailing the impugned judgment and order of conviction, learned counsel appearing for the appellants have advanced following submissions:

(i) the informant/P.W.-2,namely, Lakhan, son of one of the deceased Halku was not present at both the places of occurrence;

(ii) there is a distance of half mile between both the places of occurrence i.e. where the deceased Khuman and Halku were said to have been murdered, therefore, it is not possible for the accused-appellants that they have committed both the murders;

(iii) both the deceased, namely, Khuman and Halku were dacoits;

(iv) the blood stained earth recovered by the Investigating Officer from both the places of occurrence has not been proved;

(v) According to the statement of P.W.-4, there was an incident of Maarpeet but no weapon was recovered from all the accused including the present appellants on their pointing out;

(vi) the contents, which were found in the stomachs of both the deceased, namely, Khuman and Halku at the time of post-mortem do not support the prosecution version on the ground that as per the statements of Ghasiram (P.W.-3) and Beti Bai, in the break fast, the deceased Khuman

had taken fish and rice, before leaving his house for field and another deceased Halku had also taken rice and gravy of fish in break fast and the murder of Khuman occurred at about 1:00 p.m. (after noon), whereas the murder of Halku occurred at 02:00 p.m. but as per the post-mortem reports, the stomach of Halku was found empty, whereas in the stomach of Khuman, liquid material was found.

(vii) All the accused including the present appellants were in jail for 13 years i.e. from the date of judgment of conviction i.e. 16th September, 1978 to the date of order of the High Court in the present appeal granting bail to the appellants i.e. 15th May, 1991, without remission and as the date of incident is of the year 1977, now they are very old and weak.

On the cumulative strength of the aforesaid, learned counsel appearing for the appellants submits that the impugned judgment and order of conviction cannot legally sustained and is hereby quashed.

16. On the other-hand, Mr. Singh, learned A.G.A. for the State, supporting the judgment and order of conviction, has made following submissions:

(i) the first information report has been lodged promptly naming the accused persons;

(ii) there is clinching evidence to support the prosecution's case;

(iii) the incidents in which the deceased Khuman and Halku are alleged to have been murdered by the accused persons, occurred in broad day light;

(iv) there are three injured eye witness of the alleged incident;

(v) the independent witnesses, namely, P.W.-4 Daram Das, who saw the incident in which Khuman was murdered and P.W.-5, Virendra Singh, who saw the incident in which Halku was murdered, supported the prosecution story;

(vi) the places of occurrence has not been disputed by the defence;

vii) In the document, which is on record at page-4 of paper book, one of the accused person, namely, Zalim has stated that due to cutting of his crops, which was standing on his field, a quarrel took place on 30th September, 1977 in the afternoon between his side and the side of informant in which he sustained some injuries. For the said incident, a report was lodged by the accused Zalim against the informant Lakhan, Gulma, Bal Kishan and deceased Halku, which has been registered on 30th September, 1977 at 16:45 hours, bearing Chik Gairdastanji No. 377, under Sections 323/434/427 I.P.C. at Police Station--Mauranipur, District-Jhansi. Therefore, it is clear that the incidents as alleged by the prosecution, took place, which has not been disputed by the accused persons.

On the cumulative strength of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct evidence, the impugned judgment and order of conviction does not suffer from any illegally and infirmity so as to warrant any interference by this Court. As such the present jail appeal filed by the accused appellants who committed heinous crimes by murdering two persons, is liable to be dismissed.

17. We have considered the submissions made by the learned counsel for the parties and have examined the original records of the court below as well as the impugned judgment and order of conviction challenged before us.

18. The only question which is required to be addressed and determined in this jail appeal is whether the conclusion of

guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable under law and suffers from no infirmity and perversity.

19. Before entering into the merits of the case set up by the learned counsel for the appellants and the learned A.G.A. for the State qua impugned judgment and order of conviction passed by the trial court referred to above, it is important for us to record statements of the prosecution witnesses in brief.

20. In the examination, PW-1 Dr. B.D. Magal, who conducted the post-mortems of both the deceased, namely, Khuman and Halku, both sons of late Chellu and proved both the post-mortem reports before the trial court, which were marked as Exhibits-Ka-1 and 2, P.W.-2, has specifically stated that he has found various ante-mortem injuries (external injuries) on the dead body of the deceased Khuman, which have already been quoted herein above. He further stated that on internal examination of the dead body of Khuman, he found that there was blood clots below the scalp. The left parietal bone was broken and frontal parietal bone was fractured. The brain membranes were congested and there was blood clots on or below the same. The brain had become soft and very congested and the blood pooled on it. There was 2½ Ounce liquid material in the stomach of the deceased. There was faecal in the small and large intestines. In the opinion of the doctor, the cause of death of Khuman was due to shock and bleeding that resulted from injuries.

21. In respect of deceased Halku, P.W.-1 has stated in his examination-that he found various ante-mortem injuries on the dead body of deceased Halku, which have also been quoted herein above. He further stated that on internal examination of the dead body of Halku, he found that there were blood clots in and near the scalp. The frontal bone was cut and pierced through two places. The membrane was bruised and swollen and there was blood clots on the membrane and below the same. The brain was also hurt. And the pieces of the front bone were inserted in two places in the brain. There was blood clot in his brain. The stomach and intestine of the deceased Halku were empty. In the opinion of the doctor, the cause of death of deceased Halku is due to Haemorrhage, which resulted from injuries.

22. In the examination, Lakhan i.e. informant/P.W.-2 has stated that he is the son of deceased Halku. The field of deceased Khuman is adjacent to the field of the accused persons. On the date of occurrence, P.W.-2, the deceased Khuman, Panna and Ghasiram went to the field of Khuman and when Panna started cutting grass, the women of the house of accused came there and started cutting grass from the field of Khuman and not from their own field. When Khuman objected not to cut grass from his field, the women of the house of the accused started abusing Panna due to which some altercations occurred, thereafter, the Khuman asked them to get away from his field on which they went towards the village. However, at 01:00 p.m. the accused persons, namely, Zalim, who was having Pharsa, Baldev with Axe (Kulhari) and Ram Charan with Lathi came to the field of Khuman and asked Khuman as to why he had asked women of their house to go away on which Khuman replied that as they were cutting grass from his field, he asked them to go away. Thereupon, all the three accused persons started beating Khuman and when Lakhan-

Informant/P.W.-2, Ghasiram-P.W.-3 and Panna tried to save him, they also beat them badly. It is further stated by P.W.-2 that Khuman died on the spot and thereafter, P.W.-2, P.W.3 and Panna went to the village, where, near the Bara of one Desrau, they saw that Halku was lying on the ground in an injured condition. They were told that the accused persons, after dragging Halku out of the entrance of his house, beat him badly. Thereafter the informant-P.W.-2 took Halku in a bullock-cart to the Police Station but on the way Halku also died. Resultantly, the informant/P.W.-2 lodged the first information report.

23. The P.W.-3, namely, Ghasiram, in his examination, corroborating the entire statement of informant-P.W.-2, has stated that the accused beat Khuman badly and when he, P.W.-2 and Panna tried to save him, they were also beaten by the accused persons in which he received fracture. Due to injuries caused by the accused persons, Khuman died on the spot. The P.W.-3 further stated that when he, P.W.-2 and Panna went to the village, near the Bara of one Desrau, they found their father Halku was lying on the ground in an injured condition.

24. P.W.-4 Dharam Das, who is also an independent witness of the incident took place in the field of Khuman, has stated that at the time of occurrence, he along with some other persons, was cutting grass in the filed of one Nand Kishor, which was at a distance of 50 paces from the field of Khuman. At 01:00 p.m. in the afternoon, they heard screaming of Lakhan, Panna and Ghasiram and on hearing the same, they reached the field of Khuman, where they saw that the accused persons were beating Khuman and when Lakhan-P.W.2, Ghasiram-P.W.3 and Panna tried to save him, they were also beaten by the accused persons. He also stated that Khuman had died on the spot and P.W.-3 Ghasiram sustained injuries, which were caused by the accused persons including the appellants.

25. P.W.-5, namely, Virendra Singh, who is resident of the same village and is an independent eye witness, has stated in his examination that on the date of occurrence at about 02:00 p.m. when he was returning from the house of the Pradhan, he heard shouts of the family members of Halku and on hearing the same, he reached near the door of house of Halku and saw that the accused persons, after dragging out Halku from his Entrance of his house and taking him to the Bara, started beating him and thereafter they ran away. P.W.-5 is also the witness of the Panchayatnama of Khuman and recovery of ordinary earth and blood stained earth from the field of Khuman as also from the Bara of Desrau and from the entrance of Halku.

26. P.W.-6 Dr. S.K. Jain, who has medically examined the injured P.W.-2 Lakhan, P.W.-3 Ghasiram and Panna on 30th September, 1977, has found injuries on the body of the aforesaid injured, which have already been quoted herein above. He has stated that except injury no.1 sustained by P.W.-3 Ghasiram, all injuries sustained by all the injured are simple in nature and caused due to blunt object. Qua injury no.1 sustained by P.W.-3, he has advised him for X-ray.

27. P.W.-7, namely, Beti Bai, who is married daughter of the deceased Halku and eye witness of incident in which her father was murdered, has stated in her examination that on the date of incident,

when she along with Halku and some members of her family was sitting in the entrance of her house, accused persons came and started beating Halku and then after dragging him to Bara of Desrau, they again started beating Halku with Pharsa, Kulhari and Lathi. After beating Halku, all the accused persons ran away. Just after, P.W.-2 Lakhan, P.W.-3 Ghasiram and Panna reached there and they took Halku to the Police Station.

28. In the examination, P.W.-8, namely, Dr. R.C. Gupta, has taken X-ray of left forearm of P.W.-3 and found fracture.

29. P.W.-9, Head Constable Rajendra Kishore, who had prepared the chik report (Exhibit-Ka3) and also registered the case in the General Diary. He stated in his examination that he had also received sealed bundles of the earth recovered by the Investigating Officer (P.W.-10) from the field of Khuman, from Bara of Desrau and from the entrance of the house of Halku as well as other sealed bundles of material, which were marked as exhibits.

30. P.W.-10 Sub-Inspector Vishwambhar Dayal, who was posted at Police Station-Mauranipur, District Jhansi where the case was registered, has stated in his examination that the dead body of the deceased Halku had been brought to the Police Station by the informant-P.W.-2 Lakhan and he prepared the Panchayatnama (inquest report) of the dead body. He also recovered blood stained kurta and pancha (paijama) from the dead body of Halku and prepared the recovery memo (Exhibit-Ka-20). He further stated that he sent the dead body of Halku for post-mortem and recorded statements of informant-P.W.2, Panna and Ghasiram-P.W.-3. Thereafter he went to the field of Khuman and found the dead body of Khuman on his field. After preparing panchayatnama (inquest report), P.W.-10 sent the dead body of Khuman for post-mortem. After inspection, he prepared the site plan (Exhibit-Ka-20). P.W.-10 had also recovered the blood stained and ordinary earth from the places of occurrence, like field of Khuman, Bara of Desrau and entrance of the house of Halku. After collecting necessary evidence and recording statements of witnesses, he had submitted the charge-sheet against all the accused persons.

31. From the testimony of the aforesaid ten prosecution witnesses, it is apparently clear that there are two injured eye witnesses of murder of the deceased Khuman, namely, Lakhan and Ghasiram (P.W.-2 and P.W.-3), whereas Panna, who was also injured eye-witness of murder of the deceased Khuman, had not been adduced as prosecution witness. Apart from the above, there are two independent eye-witnesses, namely, Dharam Das and Virendra Singh (P.W.-4 and P.W.-5), Dharam Das is an independent eye-witness of the murder of Khuman and Virendra Singh is an independent eye-witness of murder of Halku. Apart from the above, Beti Bai (P.W.-7), daughter of the deceased Halku, is also an eye-witness of the decreased Halku. All the aforesaid witnesses have fully supported the prosecution story.

32. For examining the correctness or otherwise of the judgment and order of conviction, the version of prosecution as well as defence and the submissions made by the learned counsel for the parties, it is necessary for us to refer certain case laws laid down by the Apex Court on the subject.

33. In the case of **Kartik Malhar V State of Bihar** reported in 1996 CRL. L.J. 889, the Apex Court has held as under:-

"We may also observe that the ground that the witness being a close relative and consequently, being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case, AIR 1953 SC 364 in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witnesses."

34. In the case of **Shyam Babu V State of UP AIR** reported in *2012 SC 3311*, the Apex Court has held as under:-

"Where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the Court to discard the statement of such related or friendly witnesses. There is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend etc"

35. The Apex Court in the case of **State of U.P. Vs. Kishan Chand & Others** reported in *(2004) 7 SCC 629*, has opined that just because the witnesses are related to the deceased would be no ground to discard their testimony, if otherwise, their testimony inspire confidence. In the given facts of the present case, they are but natural witnesses. The Apex Court has further opined that the testimony of an injured witness has its own relevance and efficacy. The fact that the witnesses sustained injuries at the time and place of occurrence lends support to their testimony that the witnesses were present during the occurrence. The injured witnesses were subjected to lengthy cross-examination but nothing could be elicited to discredit their testimony (Reference-paragraph nos. 9 and 10 of the aforesaid judgment of the Apex Court).

36. The Apex Court in the case of **State of Jammu and Kashmir vs. S. Mohan Singh & Others** reported in (2006) 9 SCC 272, the Apex Court has observed that it is well settled that in a murder trial, merely because a witness is interested or inimical, his evidence cannot be broadly discarded unless the same is otherwise found to be not trustworthy. In the said case, the view of the Apex Court was that the evidence of these two witnesses is credible more so when witness Ram Lal received injuries. For ready reference, relevant paragraph of the said judgment reads as follows:

"Other two eyewitnesses are the informant Ram Lal and his brother Babu Ram. Ram Lal is father of deceased Yush Paul Singh whereas witness Babu Ram is uncle of deceased Yush Paul Singh. These two witnesses have supported the prosecution case disclosed in the first information report in all material particulars and consistently stated that respondent No. 1 caught hold of the

deceased and respondent No. 2 inflicted injuries upon him with knife. We have been taken through the evidence of these two eyewitnesses in extenso. Their evidence is quite consistent, natural and both the witnesses have stood the test of lengthy cross-examination broadby the defence. Out of these two witnesses, Ram Lal was the informant and an injured witness as the doctor who examined him on the date of occurrence itself found that he received injuries by hurling of stone. Nothing could be pointed out on behalf of defence to show that the evidence of these two eyewitnesses is not credible, excepting this that they were interested witnesses. The High Court was not justified in disbelieving them on the sole ground that they were interested persons. ***It is well settled that in a murder trial, merely because a witness is interested or inimical, his evidence cannot be discarded unless the same is otherwise found to be not trustworthy. In the present case, we are of the view that the evidence of these two witnesses is credible more so when witness Ram Lal received injuries....."***

(Emphasis added.)

37. From the above mentioned pronouncements of the Apex Court, it is apparently clear that the evidence of interested or inimical witnesses is to be scrutinised with care but can not be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in relying on the said evidence. It is well settled that interested evidence is not necessarily unreliable evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. In **Ramashish Rai Vs. Jagdish Singh,** reported in *(2005) 10 SCC 498*, it was observed that the requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double- edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence. A survey of the judicial pronouncements of the Hon'ble Apex Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

38. In the present case, it is no doubt true that eye-witnesses of the incident in which Khuman was murdered, namely, (I) the informant/P.W.-2 Lakhan, P.W.-3 Ghasiram and Panna are sons and daughter of the deceased Halku respectively and nephews and niece of the deceased Khuman respectively. Similarly, another eye witness of the incident in which Halku was murdered, namely, ,Beti Bai (P.W.7) is married daughter of the deceased Halku but

their credibility is not affected on the ground that they are relatives of both the deceased. Even otherwise, P.W.-2, P.W.-3 and Panna themselves had sustained injuries, thus, their presence at the spot, where Khuman was murdered, is established,

39. In the present case, there are two independent eye witnesses, namely, P.W.-4 Dharam Das and P.W.-5 Virendra Singh, both are villagers of the village of the accused persons and prosecution side. P.W.-4 is an eye witness of the incident in which Khuman was murdered and the injured i.e. P.W.-2, P.W.-3 and Panna were caused injuries by the accused persons at the field of Khuman. P.W.-5 is an eye witness of the incident in which Halku was murdered near Bara Dasrau. P.W.-5 is also witness of Panchayatnama of Khuman. In their testimony, both the independent witnesses have explained about their presence at the places of occurrence.

40. The Apex Court in the case of **Mahender Chawla V Union of India, Writ Petition (Criminal) No. 156 / 2016 decided on 5 December, 2018** it was observed as under:-

"Witnesses are important players in the judicial system, who help the judges in arriving at correct factual findings. The instrument of evidence is the medium through which facts, either disputed or required to be proved, are effectively conveyed to the courts. This evidence in the form of documentary and oral is given by the witnesses. A witness may be a partisan or interested witness, i.e., a witness who is in a near relation with the victim of crime or is concerned with conviction of the accused person. Even his testimony is relevant, though, stricter scrutiny is required while adjudging the credence of such a victim. However, apart from these witnesses or the witnesses who may themselves be the victims, other witnesses may not have any personal interest in the outcome of a case. They still help the judicial system. ....."

41. It has again been observed by the Apex Court in the case of **Kuna @ Sanjaya Behera V State of Orrisa,** reported in *2017 SCC Online Supreme Court 1336* that the conviction can be based on the testimony of single eye witness if he or she passes the test of reliability and that is not the number of witnesses but the quality of evidence that is important.

42. Again the Apex Court in the case of **Veer Singh & others V State of UP, reported in (2014) 2 SCC 455** observed as under:-

"Legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is not the number of witnesses but quality of SC 42/17 STATE V GULFAM @ SAJID FIR NO 323/16 5/21 their evidence which is important as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. Evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided Under Section 134 of the Evidence Act. As a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable."

43. Further in **Namdeo V State of Maharashtra, reported in** *(2007) 14 SCC 150*, the Apex Court held as under:-

"In the leading case of Shivaji Sahebrao vs. State of Maharashtra, (1973) 2 SCC 793, this Court held that even where

a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. "It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs."In Anil Phukan Vs. State of Assam, (1993) 3 SCC 282 : JT 1993 (2) SC 290, the Court observed; "Indeed, conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect."

44. The medical evidence adduced by the prosecution fully supports the prosecution version. In the present case, two murders (Khuman and Halku) were committed and three persons (P.W.-2, P.W.-3 and Panna) were alleged to have been caused simple and grievous hurt. From the statements of P.W.-2, P.W.3, P.W.-4, PW.5 and P.W.-7, it is clear that at the time of both the incidents, the accused persons, namely, Zalim, Baldev and Ram Charan were having Pharsa, Axe (Kulhari) and Lathi respectively. From the post-mortem reports of the deceased Khuman and Halku, it is apparent that the aforesaid weapons were used in committing such offence. In the injuries caused to P.W.-2, P.W.-3 and Panna by the accused persons, said weapons were used as is evident from the injury reports of the said injured.

45. So far as the motive is concerned, after perusal of the evidence adduced from the prosecution side, we are of the considered opinion that the prosecution has proved the same. In the present case, motive arises when P.W.-2, P.W.-3 and injured Panna went to the field of their uncle, namely, Khuman (now deceased), where he was present and Panna started cutting grass from the field of her uncle and at that time, the women of the house of the accused also came to the field of the deceased Khuman. When the women of the house of the accused persons also started cutting grass from the field of Khuman, he objected not to cut grass from his field due to which an altercation took place between them. Khuman also asked them to get away from there. Thereafter the women of the house of the accused persons went towards village and they told the entire incident to the accused persons. Since the women of the house of the accused persons were forbidden to cut grass and they were scolded and reprimanded by the Khuman, all the accused persons first murdered Khuman and thereafter Halku to take revenge for this. The motive in the present case is also proved from the document, which is on record at page-4 of paper book, in which one of the accused person, namely, Zalim has stated that due to cutting of his crops, which were standing on his field, a quarrel took place on 30th September, 1977 at about Noon between his side and the side of prosecution in

which he sustained some injuries. For the said incident, a report was lodged by the accused Zalim against the informant Lakhan, Gulma, Bal Kishan and deceased Halku, which has been registered on 30th September, 1977 at 16:45 hours, bearing Chik Gairdastanji No. 377, under Sections 323/434/427 I.P.C. at Police Station--Mauranipur, District-Jhansi.

46. In **Suresh Chandra Bahri Vs. State of Bihar** reported in *1995 Supp (1) SCC 80*, the Apex Court has opined that a motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with proof of motive for the commission of the crime it affords added support to the finding of the court that the accused was guilty of the offence charged with. Paragraph nos. 21 and 25 of the said judgment which are relevant are quoted here-under:

"21.At the very outset we may mention that sometimes motive plays an important role and becomes a compelling force to commit a crime and therefore motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with illegal means with a view to achieve that intention. In a case where there is clear proof of motive for the commission of the crime it affords added support to the finding of the court that the accused was guilty of the offence charged with. But it has to be remembered that the absence of proof of motive does not render the evidence bearing on the guilt of the accused nonetheless untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to a certain course of action leading to the commission of the crime. In the present case before us the prosecution has adduced evidence that the appellant Suresh Bahri had strong motive to eliminate his wife and two children from his way which evidence has been accepted by both the courts below. We shall, therefore, have a look at the said evidence to see whether the two courts are justified or not in taking the view that the appellant Suresh Bahri had a strong motive to hatch a conspiracy with the assistance of the other two appellants, namely, Raj Pal Sharma and Gurbachan Singh to commit the murder of his wife and the two children."

25. .....It is difficult to lay down a hard and fast rule as to how and in what manner a person would react and to achieve his motive could go to what extent in the commission of crime under a particular circumstance. It is not possible to measure up the extent of his feelings, sentiments and desire and say as to what compelled him to commit a particular crime. There may be persons who under frustration and on mere trifling domestic matters take decision to commit a serious crime, while others may approach it with cool and calm mind and think more dispassionately before taking any hazardous and serious steps. It all depends as to how a person reacts in a given circumstance and it is he alone who best knows his intention and motive to commit a crime and the extent thereof. ....."

47. From the aforesaid facts, which have been noted herein above, we find substance in the submissions made by the learned A.G.A. that there is a case of direct and clinching evidence like three injured eye witnesses of the incident, namely, P.W.-2,. P.W.-3 and Panna in which Khuman was

murdered, two independent witnesses, namely, P.W.-4 and P.W.5 (P.W.-4 is an independent eye witness of the murder of Khuman and P.W.-5 is of Halku). P.W.-7 Beti Bai, who is married daughter of the deceased Halku is also an eye witness of the murder of Halku. The medical evidence fully supports the prosecution evidence. Both the incidents occurred in broad day light. The first information report lodged by the informant is prompt, which was lodged within 4-5 hours on 30th September, 1977 of both the incidents. The accused persons including the appellants had also motive to commit such offence. The incidents and the places of incidents were not disputed by the defence side.

48. Considering the same set of facts, the Apex Court in its latest judgment in the case of **Mekala Sivaiah vs. State of Andhara Pradesh** reported in *2022 SCC Online SC 887, in paragraph nos.25 and 26* has held as follows:

"25. The facts and evidence in present case has been squarely analyzed by both Trial Court as well the High Court and the same can be summarized as follows:

i. The prosecution has discharged its duties in proving the guilt of the appellant for the offence under Section 302 I.P.C. beyond reasonable doubt.

ii. When there is ample ocular evidence corroborated by medical evidence, mere non-recovery of weapon from the appellant would not materially affect the case of the prosecution.

iii. If the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or natural contradictions have appeared into his testimony.

iv. The deceased has been attacked by the appellant in broad daylight and there is direct evidence available to prove the same and the motive behind the attack is also apparent considering there was previous enmity between the appellant and PW-1.

26. Having considered the aforesaid facts of the present case in juxtaposition with the judgments referred to above and upon appreciation of evidence of the eyewitnesses and other material adduced by the prosecution, the Trial Court as well as the High Court were right in convicting the appellant for the offence under Section 302 I.P.C. Therefore, we do not find any ground wa*rranting interference with the findings of the Trial Court and the High Court."*

(Emphasis added)

49. So far as submission no. (i) made by the learned counsel for the appellants that at the time of incident in which Khuman was murdered, the informant was not present, is concerned, we may record that from the evidence adduced by the prosecution, it is apparent from the version of the injured and independent witness i.e. P.W.-4 Dharam Das that the informant was present at the time of incident, when Khuman was murdered by the accused persons and when he along with P.W.-3 and Panna tried to save Khuman, they were also caused injuries by the accused persons. Therefore, the first submission made on behalf of the appellants has no legs to stand.

50. To the submission no.(ii) made by the learned counsel for the accused-appellants regarding the distance between the place where the Khuman was

murdered i.e. field of Khuman and the place where Halku was murdered i.e. entrance of house of Halku and Bara of Dasrau, this Court may record that as the first incident in which the Khuman was murdered occurred at 01:00 p.m. (noon) and the second incident in which Halku was murdered occurred at 02:00 p.m. (noon), therefore, one hour was sufficient time for the accused-appellants to reach both the places of occurrence and murder both the deceased. In such circumstances, we find no substance in the said submission.

51. So far as the submission no. (iii) made on behalf of the appellants that both the deceased were dacoits, it may be recorded that such evidence that both the deceased, namely, ,Khuman and Halku were dacoits, has not been produced by the defence before the trial court. Therefore, we are not required to make any observation on the said submission. Apart from the above, this Court may record that nobody has a right in this country to take law in his/her own hand by murdering any person, whosoever it may be, like criminal, dacoit etc. Therefore, this plea taken on behalf of the appellants is also liable to be rejected.

52. Qua submission nos. (iv) & (v) made on behalf of the appellants, this Court may record that same are treated to be minor discrepancies in the evidence of prosecution which has fully been supported by the injured eye witnesses, independent eye witnesses, medical evidence, inasmuch as motive is also involved therein. Such discrepancies which do not otherwise affect the case of the prosecution, even if present, that itself would not prompt the court to reject the evidence on minor discrepancies.

53. The Apex Court in the case of **State Represented by Inspector of Police VS. Saravanan @ Another** reported in *(2008) 17 SCC 587,* in paragraph 18 has opined as follows:

"18. The High Court also held that as there were some discrepancies and improvements in the statement of the witnesses, their evidence should not be relied upon. In State of U.P. Vs. M.K. Anthony, [(1985) 1 SCC 505] this Court has laid down the approach which should be followed by the Court in such cases:

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper- technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it

would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross- examination is an unequal duel between a rustic and refined lawyer....."

Even otherwise, it has been said time and again by this Court ***that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon appreciation of evidence forms an opinion about the credibility thereof,*** *in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies."*

54. To the last submission i.e. (vi), this Court may record that for the same, a categorical finding has been recorded by the trial court while passing the impugned judgment and order of conviction. In respect of deceased Halku, who was said to have taken rice and gravy of fish in the break fast, the trial court has recorded that as per the post-mortem report, stomach and small intestine of Halku were empty and there was slight faecal matter at places and faecal matter was also escaping from the anus of Halku. Consequently, it appears that he must have taken food more than six hours before he died, this is also true, as alleged by the prosecution. Since deceased Halku had taken rice and gravy of fish only, which is easily digestible and by the time he died, it must have been converted into faecal matter. So far as the deceased Khuman, who had taken rice and fish in the breakfast before leaving his house for his field, is concerned, the trial court has recorded that as per the post-mortem, there was liquid food material 2½ ounces in his stomach, there was slight faecal matter in small intestines as also in the large intestine, the faecal matter was present. Since the deceased Khuman had also died at the expiry of six hours of taking food and he had taken rice and fish, which is quite easily digestible. Consequently, the contents of stomach of Khuman, which the Doctor found during the course of post-mortem, cannot be said to be contradictory to the fact that he had taken rice and fish in his breakfast. On the basis of the aforesaid fact, the trial court came to the conclusion that the post-mortem reports of both the deceased fully support the prosecution version qua occurrence of both the incidents. We are in resepctful agreement with the finding recorded by trial court on the said issue. Apart from above, this Court may also record that while conducting the post-mortem of dead bodies of both the deceased, the Doctor B.D. Magal (P.W.1), who conducted the same, had found that there were vomiting materials in the mouths of both the deceased.

55. Taking cumulative effect of the evidence, we are of the view that the trial court was fully justified in convicting the appellant. Accordingly, we confirm the order of trial court.

56. The appeal has no substance and the same is **dismissed.** The appellants are reported to be on bail. Their bail bonds

stand cancelled and they be taken into custody for serving the remaining sentence.

57. However, it is provided that it shall be open for the accused appellants to approach the State Government, which may consider the request of permanent release of the accused-appellants after calling for reports from the Jail Superintendent concerned qua total period of their incarceration with remission, seeing the facts that the incident in question took place in September, 1977, judgment of conviction was passed in September, 1978, the accused-appellants had been in jail for more than 13 years (from 1977 to 15th May, 1991 i.e. the date of order of the High Court in the present appeal granting bail to the appellants), their work and conduct during their incarceration, now they are very old and weak.

58. Let a copy of this judgment be sent to the concerned trial Court forthwith for compliance.

(2022) 9 ILRA 96
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 922 of 2013

Anil Kumar ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Bhuvnesh Kumar Singh, Sri Ashfaq Ahmed Ansari, Sri Jai Shanker Malviya

Counsel for the Respondent:
Govt. Advocate

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Section 299,300, 302,304 - Culpable homicide - murder - Culpable homicide not amounting to murder - Distinctions between normal discrepancies and material discrepancies - testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence - merely because the prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated. (Para - 42,43)

Incident not pre-motivated - result sudden quarrel - deprived of power of self control and sudden provocation - accused offender caused death of his wife - deceased gave provocation - ocular evidence - when deceased came to shop of accused - quarrel took place between the two - accuded depriving of the power of the self control by grave and sudden provocation - committed the crime with the intention of causing death of the deceased - evidence of eye-witnesses P.W.1(son - labourer)) and P.W.2 (mother of deceased - illiterate) - reliable and trustworthy witnesses - evidence found credible and acceptable - conviction under section section 302 - hence appeal. **(Para - 53)**

(B) Evidence Law - Law of Evidence does not mean if a witness makes one or two confusing or contradictory statements during his lengthy cross examination, the rest of his evidence may be discarded - evidence adduced of a witness should be taken as a whole - hostile witness - if the prosecution witness has turned hostile, the Court may rely upon so much of his testimony which supports the case of the prosecution and is corroborated by other evidence. (Para - 27,32)

HELD:-Conviction of appellant under Section 302 of Indian Penal Code converted to

conviction under Section 304 (Part I) of Indian Penal Code.**(Para -56)**

Criminal appeal partly allowed. (E-7)

List of Cases cited:-

1. Jaishree Yadav Vs St. of U.P., (2005) 9 SCC 788 (F)

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

3. Sidhartha Vashisht @ Manu Sharma Vs St. (NCT of Delhi), 2010 (69) ACC 833 (Supreme Court)

4. Mukesh Vs St. for NCT of Delhi & Ors., AIR 2017 SC 2161

5. Bhagwan Jagannath Markad Vs St. of Maha. , (2016) 10 SCC 537

6. Surinder Kumar Vs St. of Punj., (2020) 2 SCC 563

7. Tukaram & Ors. Vs St. of Maha., (2011) 4 SCC 250

8. B.N. Kavatakar & Anr. Vs St. of Karn., 1994 SUPP (1) SCC 304

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

1. The additional Sessions Judge, Court No. 9, Bijnor passed judgment and order of conviction dated 12.02.2013 against the accused/ appellant Anil Kumar in Sessions Trial no. 837 of 2010 (State Vs. Anil Kumar) under Section 302 I.P.C (arising out of case crime no.290/2010), P.S.-Mandawar, District-Bijnor and sentenced to him to undergo life imprisonment and further imposed fine of Rs.20,000/- and in default six months additional simple imprisonment, hence this appeal.

2. As per the case of prosecution deceased Archana, daughter of informant Jai Prakash, who had a betel shop, was married with accused-Anil Kumar about 15 years before the occurrence. Accused used to make a demand of Rs.5 lac for his business. On 18.8.2010 at about 5.00 p.m. when Archana went to the shop of accused to take a gas cylinder, a quarrel took place between the accused and the deceased and accused inflicted injury upon the deceased with *Patal* (a sharp edged weapon). Meanwhile Jai Prakash-informant, Jaiwati wife of informant and his son Govind Kumar came on the spot and the accused fled away with the murder weapon. A written report Ex.A-17 regarding the occurrence was given to the police station by the informant Jai Prakash on 18.08.2010 at 18.10 p.m. on the basis of which chick FIR Ex.A-8 was registered and G.D. Ex.A-9 was prepared and investigation of the case started. Smt. Archana died of the injuries during treatment. The I.O. recorded the statements of eye-witnesses, informant and other witnesses. The inquest report Ex.A-2 and the papers required for post mortem Ex. A-3 to A-7 were prepared by S.I. Ram Kishun Manik. During investigation the accused was arrested with the murder weapon, which was blood stained, by the I.O. The victim of the occurrence was examined by doctor Anuj Kumar at District-Ghaziabad on 18.08.2010, who prepared the injury report Ex.A-10 and found following injuries on the body of the deceased:

1. Incised wound starting from outer angle of left eye up to whole lenth of back of neck and root of neck about 50.0 x 10. cm. bone deep whole part of muscle and skin is visible. Bleeding present.

2. I.W. 7.0 x 3.0 cm. on joint of left shoulder. Bleeding present.

3. Left hand is chopped up from wrist joint, hand is not present. Bone and

muscle are exposed at wrist joint. Bleeding Present.

4. I.W. 12.0 x 7.0 cm muscle deep over right breast joint above nipple. fat of breast is exposed.

5. I.W. 10.0 x 3.5 cm. over right abdomen 5.0 cm from umblicus 10 o'clock position. Bleeding present

6. I.W. 6.0 x 1.5 cm. on upper aspect of right upper arm.

7. I.W. 3.0 x 1.5 cm over back of right fore arm. 5.0 cm above wrist joint.

8. I.W. 10.0 x 6.0 x bone deep fist cut right knee joint over bone is also cut.

3. During examination the injured died on 18.10.2010 at 6.50 p.m. The doctor opined that injury no.3 and 4 were grievous in nature and rest of the injuries were simple injuries. The injuries were fresh and caused by sharp edged object.

4. The autopsy of the deceased was conducted by doctor Bhoj Raj Singh on 19.8.2010 at 2.00 p.m. who prepared autopsy report Ex.A-1 and found following anti mortem injuries on the body of the deceased:

1. I.W. Over left temporal area, above ear, extending downward and posteriorly up to occipital area, measuring 29.0 cm x 2.0 cm, bone deep.

2. I.W. over left side of root of neck, going back of neck and upto root of neck on right side, 5.0 cms below ears on both sides, measuring 32.0 x 3.0 cms bone deep.

3. I.W. over top of left shoulder, 5.0 x 2.0 cms, muscle deep.

4. I.W. over back of neck on right side, 4.0 x 2.0 cms ears, bone deep , 2.0 cms above injury N.O. 2.

5. I.W. over top of right shoulder , muscle deep, 4.0 x3.0 cms.

6. I.W. over right breast, 15.0 x 9.0 cms, bone deep with skin and muscles absent.

7. I.W. over outer aspect of right arm, 5.0 x 2.0 cms, muscle deep, 13.0 cms above elbow joint.

8. I.W. over post aspect (back) of lower part of right fore arm, 3.0. x 2.0 cms muscle deep, 6.0 cms above wrist joint.

9. I.W. over right lateral aspect of lower part of chest and anterior abdominal wall, 20.0 x 4.0 cms, muscle deep.

10. I.W. over anterior abdominal wall, 8.0 x 5.0 cms, 10. cms below injury no.9.

11. Left palm is separate from limb at wrist joint. I.W. over stump of upper limb at wrist joint, 8.0 x 5.0 cms. and over the stump of palm 8.0 x 6.0 cms.

12. I.W. over dorsum of left palm, 5.0 x 0.5 cm, skin deep, 1.5 cm above the roots of middle and ring finger.

13. I.W. over front of right knee joint, 17.0 x 4.0 cms. with cut of upper part of tibial bone, bone deep.

5. The doctor found that the rigor mortis was present in all four limbs, gases and fecal material in both intestine were present, liver was pale, gal bladder was empty, uterus empty, both sides of heart empty, both lungs pale, 200 gm food material present in stomach. The doctor opined that the death was caused due to shock and hemorrhage as a result of anti mortem injuries about one day ago.

6. The I.O. inspected the spot on pointing out of the informant and prepared site plan Ex.A-11, plain and blood stained earth were also collected from the spot by the I.O. and a memo Ex.A-12 was prepared. After investigation charge sheet A-14 was submitted into the Court.

7. The accused appeared before the Court and the case being a Sessions triable case, it was committed to the Court of Sessions. Charge under Section 302 I.P.C. was framed against the accused who denied of the charge and claimed to the tried.

8. To bring home the guilt of the accused the prosecution has examined P.W.1 Govind Kumar eye-witness, P.W.2 Smt. Jaiwati eye witness, P.W.3 Dr. Bhoj Raj Singh, P.W.4 Con. Vijay Pal, P.W.5 S.I. Ram Kishan Manik witness of the inquest report, P.W.6 Cons. Omkar Singh Scribe of the Chick FIR and G.D. P.W.7 Dr. Anuj Kumar, P.W.8 S.S.I. Sunil Kumar Sharma, P.W.9 Jai Prakash informant and P.W.10 Amit Kumar Scribe of the written report as oral evidence.

9. The documentary evidence produced consisted of autopsy report Ex.A-1, inquest report Ex.A-2, photo nash Ex.A-3, chalan nash Ex.A-4, letter to C.M.O Ex.A-5, letter to R.I. Ex.A-6, specimen seal Ex.A-7, chick FIR Ex.A-8, G.D. Ex.A-9, injury report Ex.A-10, site plan Ex.A-11, recovery memo, plain and blood stained earth Ex.A-12, memo of recovery of murder weapon Ex.A-13, charge sheet Ex.A-14, F.S.L reports Ex.A-15 and

10. The statement of accused was recorded under Section 313 Cr.P.C. who claimed his false implication on the basis of forged story and has denied his any kind of involvement in the crime, however no evidence in defence has been adduced by the accused.

11. Heard learned advocates for the parties.

12. P.W.1 Govind Kumar is said to be the eyewitness of the occurrence. Corroborating the prosecution versions, he has stated in his deposition that his sister Archana was married to the accused Anil before 14-15 years. The accused used to live with them and had a betel shop. He had made a demand of Rs.5 lacs for his business and as money was not given, for this reason he was not happy with his sister. On 18.08.2010 at about 5.00 p.m. when Archana came to the shop of the accused to take gas cylinder, a quarrel started between the two. The accused inflicted injury to his sister by *patal*. He along with his mother Smt. Jaiwati reached there and saw the occurrence. He has further stated that when they tried to save Archana accused fled away leaving his sister in a bitterly injured condition, thereafter his father lodged the report of the occurrence.

13. P.W.2 Smt. Jaiwati, the mother of the deceased has also corroborated the deposition of P.W.1 and has clearly stated that at the time of the occurrence she was present on spot with his son Govind and they saw the accused inflicting injuries upon Archana by *patal*. The left hand palm of Archana was imputed and she had got injuries on various parts of her body. The occurrence happened in front of the shop of Syed Nai and the people assembled there.

14. P.W.3 doctor Bhojraj has conducted the autopsy of body of the deceased. He in his deposition has proved the proceedings of the post mortem, the injuries found on the body of the deceased and has proved the autopsy report Ex.-1. He opined that the cause of death was hemorrhage due to anti mortem injuries and it was caused about one day prior to the post mortem.

15. P.W.4 Cons. Vijay Pal carried the body of the deceased for post mortem along

with HG Prem Chand, on 19.8.2010 at 11.30 pm. he has proved this fact in his evidence.

16. P.W.5 S.I. Ram Kishun Manik has deposed that he conducted the inquest proceeding on 19.8.2010 at 10 p.m. and also prepared the required documents for post mortem and had sent the dead body for the same. He has proved the inquest report and papers relating to autopsy as Ex.A-2 to A-7 respectively.

17. P.W.-6 Cons. Omkar Singh is the scribe of the FIR in his deposition he has proved this fact that on 18.8.2010 at 18.10 hours the informant Jai Prakash had come to P.S. Mandawar along with a written report written by Anil Kumar, on the basis of which he had lodged the FIR of this case and G.D. no. 36 was also prepared by him at the same time.

18. P.W.7 doctor Anuj Kumar was posted as C.M.O in the District Hospital Ghaziabad and on 18.8.2010 at 6.30 p.m. he had medically examined the deceased Smt. Archana then alive. This witness has proved the injury report Ex.A10 in his evidence and the injuries found on the body of the injured. He has also mentioned this fact that the general condition of the injured was very critical and she was in a gasping position, her pulse and b.p were missing. During examination at 6.50 pm she died.

19. P.W.8 Sunil Sharma has proved the F.S.L. report in his deposition as Ex.A-15 and A-16. He has also proved the murder weapon *patal* as material Ex.A-1 and also blood stained earth and plain earth as material Ex.-2 and Ex.-3 respectively. He has also proved the clothes of the deceased recovered from dead body as material Ex.-4 to Ex.-7. Other articles recovered from her body as material Ex.-8 to Ex.-14.

20. P.W.9 Jai Prakash is the informant of the case who is a deaf person. The question were asked to him in writing and he has replied thereof. He has proved the written report Ex.A-17. He has declared hostile by the prosecution. He has mentioned that at the time of the occurrence he was not present on the spot.

21. P.W.10 Amit Kumar is the scribe of the written report Ex.A-17, who has identified his hand writing over written report. He has also been declared hostile by the prosecution.

22. On the basis of the aforesaid evidence the learned trial Court found that the evidence adduced by the prosecution was cogent, consistent and reliable and the prosecution has succeeded to prove the guilt of the accused beyond reasonable doubt and accordingly he was convicted under Section 302 I.P.C.

23. The learned counsel for the appellant has assailed the impugned judgments on various grounds. It has been argued that the prosecution evidence rests upon the ocular version of P.W.1 and P.W.2, who are not reliable witnesses. They are interested witnesses and their presence at the place of occurrence is doubtful at the time of crime. It has been further argued that according to the FIR several persons reached at the spot but none was examined. It is next submitted that no recovery of murder weapon has been made from the possession of the accused and on this point the prosecution evidence is not reliable and does not find support from the version of any independent witness. The question has been raised upon the truthfulness of the

medical evidence also. Learned counsel for the appellant has also argued that as per the prosecution story and the ocular version of the witnesses, it was not a pre-meditated murder and the offence, if any was caused in a spur of moment and in a heat of passion of the quarrel which suddenly took place between the deceased and the accused at the place of occurrence. It has been submitted that if the guilt of the accused is proved he may be convicted under Section 304 part I or part II I.P.C. instead of Section 302 I.P.C.

24. The submissions of the learned counsel for the appellant have been vehemently objected by learned A.G.A. for the State. It has been submitted that many injuries have been found by the doctor on the body of the deceased which show that it was a brutal murder at a public place. The murder weapon has been recovered from the possession of the accused. The ocular version of P.W.1 and P.W.2 is trustworthy and cogent and there was no necessity to get any corroboration of their evidence. It has been further submitted that the prosecution case is very well supported by the medical evidence and there is no contradiction in between the ocular evidence and the medical evidence. There was no chance of false implication of the accused, as he was the real son-in-law of the informant. It has been further submitted that there are no material contradictions in the statements of the witnesses. FIR is prompt and the place of occurrence is certain.

25. On the basis of the above, the learned A.G.A. has prayed for the dismissal of this appeal.

26. We were taken through the evidence and the judgment delivered by the trial Court and the various aspects discussed therein.

27. A careful scrutiny of the evidence of P.W.1 and P.W.2 clearly shows that a quarrel took place at the place of occurrence on the date and time as claimed by the prosecution between the accused and deceased. The accused/ appellant with a *patal* (sharp edged weapon) hit the deceased, who got fatal injuries and subsequently succumbed to the injuries and died. There are no material contradictions in the evidence of P.W.1 and P.W.2 in material particulars. Their evidence is almost identical on the material points viz. place, date and time of occurrence, manner of assault, weapon used etc. It is true that P.W.1 during the course of very lengthy cross examination has given some contradictory statements probably in a state of confused mind as it some times happens with the witnesses particularly with village back ground and not very literate but it is a settled position of law that the evidence adduced of a witness should be taken as a whole. The law of evidence does not mean that if a witness makes one or two confusing or contradictory statements during his lengthy cross examination, the rest of his evidence may be discarded. P.W.1 is a labourer as he has stated in his deposition likewise P.W.2 is a illiterate lady as she has put her thumb impression over her deposition.

28. As a matter of fact, the evidence of P.W.1 and P.W.2 has been recorded in parts after a long gap from the date of occurrence. P.W.1 has been examined in pieces from 4.4.2011 to 8.1.2013 and P.W.2, an illiterate lady, was examined on 27.5.2011, 4.4.2011 and 22.1.2013.

29. Recourse may be taken of the case of ***Jaishree Yadav vs. State of U.P.,*** **(2005)**

9 SCC 788 (F) wherein the Hon'ble Apex Court has held as follows:

"20.....These shortcomings in the evidence of this witness will have to be considered in the background of the fact that this witness was subjected to nearly 217 questions over a period of 14 months i.e. his cross-examination starting on 14-8-1994 and ending on 28-11-1995. Both the courts below have taken judicial notice of this fact, not only in regard to this witness but in regard to other witnesses also and have come to the concurrent conclusion that when a witness is subjected to such lengthy arduous cross-examination over a lengthy period of time there is always a possibility of the witnesses committing mistakes which can be termed as omissions, improvements and contradictions, therefore, those infirmities will have to be appreciated in the background of ground realities which make the witness confused because of the filibustering tactics of the cross-examining counsel".

30. The oral evidence adduced by the prosecution in the form of P.W.1 and P.W.2 find force from the above mentioned observations of the Hon'ble Supreme Court. Hence, we do not find force in the submissions of learned counsel for the appellant that P.W.1 and P.W.2 both have made statements in hostile terms and as such they are not reliable witnesses.

31. Emphasis has been laid down by the learned A.G.A. for the State on decision titled **Ashok Kumar Chaudhary. Vs. State of Bihar 2008 (61) ACC 972 (SC)** wherein it has been held that if the testimony of an eyewitness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected because certain insignificant, normal or natural contradictions have appeared in the testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are only normal and not material in nature, then the testimony of an eyewitness has to be accepted and acted upon. Distinctions between normal discrepancies and material discrepancies are that while normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

32. So far as the hostile witness is concerned, the law is settled that if the prosecution witness has turned hostile, the Court may rely upon so much of his testimony which supports the case of the prosecution and is corroborated by other evidence as held in **Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi) 2010 (69) ACC 833** (Supreme Court) and many other judgments.

33. It has been argued by the learned A.G.A. that *patal* is a sharp edged weapon, the deceased was attacked by *patal* and she has got incised wound over her body, which is evident from the evidence of P.W.3 who has prepared the autopsy report and P.W.7 who has got the opportunity of medical examination of the deceased when she was injured and brought before him for the first time in this way the prosecution finds support from the medical evidence.

34. We find force in the submission of the learned A.G.A. for the State and in our opinion the prosecution case is proved by the medical evidence also. A perusal of inquest report Ex.A-2 is also desirable wherein the *panchas* has also opined that

death of the deceased was caused by inflicting serious injuries by a sharp edged weapon.

35. So far as the topography of the place of occurrence is concerned, Ex.A-17 site plan has been prepared and proved by the P.W.8 the I.O. In the FIR it has been mentioned that the occurrence took place at the shop of the accused/ appellant. In the site map Ex.A-11 the place of occurrence is shown nearby the shop of the accused Anil. P.W.1 and P.W.2 both have categorically stated that when the deceased went to take a gas cylinder to the shop of the accused they had a quarrel and the offence was committed by the accused. P.W 2 has stated that the occurrence took place in front of shop of Saeed Nai. In the site plan EX. A-17, the same position has seen shown and the shop of the accused has also been shown nearby. P.W. 8 in his testimony has also stated that he has found the injured Archana from that very place of occurrence. The FIR also speaks the same, hence so far as the place of occurrence is concerned, the prosecution case is absolutely proved.

36. P.W.8 has also stated that when he got information about the accused surrounded by the public he immediately rushed to the place and arrested the accused with *patal* in his right hand and in presence of the recovery witnesses Namepal, Mahipal the murder weapon was recovered from the possession of the accused and recovery memo Ex.A13 was prepared, the memo of recovery Ex.A13 is on record which has been proved by P.W.8. Signatures of independent witnesses Mahipal and Nam Pal Singh have been obtained upon it. This recovery has been made on the very day of the occurrence. Although the learned counsel for the appellant has made it a ground to hit the prosecution case that recovery memo Ex.A13 has not been proved by any independent witness but in our view there was no necessity of corroboration of the statement of I.O. from any independent witness. P.W.8 in his deposition has clearly proved the factum of recovery of murder weapon from the accused and his arrest as well. He has named the witness Name Pal and Mahi Pal in his statement, who have endorsed there signatures upon the recovery memo.

37. Reliance has been placed by the learned A.G.A. on **Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161** wherein it has been held that if any of the weapon etc. are recovered at the instance of the accused (under Section 27 Evidence Act) only in the presence of police party and there is no public witness to such recovery or recovery memo, the testimony of police personal proving the recovery and the recovery memo cannot be disbelieved merely because there was no witness to the recovery proceedings or recovery memo from the public particularly when no witness from public could be found by the police party despite efforts at the time of recovery.

38. The above mentioned case was a case of recovery under Section 27 of Indian Evidence Act but the present case is on a little different footing. Here the police arrested the accused on the basis of the information from an informer and recovered the murder weapon which he had taken with him and public witnesses were available to the police and their signatures were also obtained over the recovery memo.

39. Learned counsel for the appellant has assailed the testimonies of P.W.1 and P.W.2 on the ground that they are the witnesses related to the deceased being her brother and mother respectively and as

such they are interested witnesses. It has also been argued that it has been stated in the version of P.W. 1 and P.W.2 that several other persons reached the spot at the time of occurrence but none of them was examined as prosecution witness.

40. Per-contra learned A.G.A. has vehemently argued that relationship is not a factor to discredit a testimony of a witness.

41. P.W. 1 in his cross examination has stated that the place of occurrence is situated at a distance of 15-20 steps from his house. He has also stated that he along with his mother reached the spot immediately. P.W.2 has also stated in her cross-examination that her house is situated at a distance of 20-25 steps from the place of occurrence. Hence the presence of P.W.1 and P.W.2 at the place of occurrence is natural and trustworthy.

42. In this context the Hon'ble Apex Court in **Bhagwan Jagannath Markad Vs. State of Maharastra (2016) 10 SCC 537** has held that the testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such a case Court has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of the testimony of such related witness.

43. In **Surinder Kumar Vs. State of Punjab (2020) 2 SCC 563** this principle has been reiterated by holding that merely because the prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated.

44. It is noteworthy that in the case in hand a careful scrutiny of the evidence of eye-witnesses P.W.1 and P.W.2 clearly shows that they are reliable and trustworthy witnesses and their evidence is found credible and acceptable.

45. Another submission made by the learned counsel for the appellant is regarding the genuineness of the FIR. To meet out this contention we carefully perused the contents of the FIR. The offence is said to have been committed on 18.8.2010 at about 5.00 pm and the FIR has been lodged about after 1 hour of the incident. On inquest report Ex.A-2 the case crime number has been clearly mentioned which again goes to show that at the time of inquest, FIR had been lodged.

46. P.W. 6 the scribe has proved the FIR and case registration G.D. as Ex.A-8 and Ex.A-9 in his evidence.

47. P.W. 10 has stated that when he wrote the written report as dictated by Jai Prakash it was not read over to him because he is a deaf person but when Ex.A-1 written report was shown to P.W.10 he admitted that the same was written on the dictation of P.W.9, Jai Prakash.

48. P.W.9 was declared hostile by the prosecution but his hostality hardly makes any difference because whatsoever has been narrated in the written report Ex.A.17, has been totally corroborated by P.W.10 the scribe of the written report and the contents of the written report have been mentioned in the FIR itself. The contents of the FIR have been proved by the ocular version of P.W.1 and P.W.2. Hence, the written report and FIR of the case are genuine documents. FIR is not after thought and it has been

lodged without any delay after the occurrence.

49. Hence, we find no force in the contention of the learned counsel for the appellant so far as the genuineness of the FIR is concerned.

50. Our attention is drawn towards F.S.L report Ex. A-15 and A-16. The murder weapon *patal*, blood stained & plain earth and the clothes of the deceased recovered by the I.O. were sent to Forensic Science Laboratory for examination. All the aforesaid materials have been produced during course of evidence before P.W.8, I.O., who has proved them as Material Ex.A-1 to material Ex.A-14. The F.S.L. report Ex.A-15 and A-16 are also on record. A perusal of Ex. A-16 shows that human blood was found on the murder weapon as well as clothings and peace of earth in the serological examination. Ex.A-15 is the returning memo of the materials which were sent for examination. The aforesaid expert report Ex.A-16 also favours the prosecution case.

51. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which reads as under:

"299. Culpable homicide: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

52. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such

	injury as is mentioned above.

53. The evidence available on record carries us to the conclusion that the incident was not a pre-motivated one. It was a result of a sudden quarrel. Whilst deprived of power of self control and sudden provocation, the accused offender caused the death of his wife when the deceased gave him provocation. The ocular evidence goes to show that when the deceased came to the shop of the accused a quarrel took place between the two and the accuded depriving of the power of the self control by grave and sudden provocation committed the crime with the intention of causing death of the deceased.

54. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra,** reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka, reported in 1994 SUPP (1) SCC 304,** we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

55. In view of the aforementioned discussion, we are of the view that this appeal has to be partly allowed, hence, is partly allowed.

56. The conviction of the appellant under Section 302 of Indian Penal Code is converted to conviction under Section 304 (Part I) of Indian Penal Code and the appellant is sentenced to undergo 10 years of incarceration with fine, reduced to Rs.10,000/-. Default sentence is reduced to three months.

57. Appellant-accused is in jail. If ten years of incarceration is over, he shall be released forthwith, if not required in any other case. He would be entitled to all kind of remissions. The judgement and order dated 12.02.2013 shall stand modified accordingly.

(2022) 9 ILRA 106
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 2057 of 2018
and
Criminal Appeal No. 1802 of 2018

Brijesh Harijan ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Mrs. Swati Agrawal, Sri Shivam Tripathi

Counsel for the Respondent:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 299,300,302, 376 , 376-D , 326 , 326-A & 354 - The Code of criminal procedure, 1973 - Section 207, 313 - murder - culpable homicide not amounting to murder - Proper Sentence - Sentence should not be either excessively harsh or ridiculously low - quantum of sentence - principle of proportionality - Sentence should be based on facts of a given case - Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. (Para -26)

Accused caused injuries to deceased - set her ablaze - primarily responsible for her death - dying declaration recorded about after 10 days of the incident **-** medical evidence for Section 376 D of IPC is absent - death was caused by the accused in unison - homicidal death - accused had no intention to cause death of deceased - injuries sufficient in the ordinary course of nature to have caused death - no intention to do away with deceased. **(Para - 14,20,23)**

(B) Criminal Law - criminal justice jurisprudence - not retributive but reformative and corrective - undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system - no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.(Para - 27,28)

HELD:- Death occurred after ten days, not premeditated. Death was due to septicemia. Offence not under Section 302 of I.P.C. but culpable homicide. Conviction of appellants under Section 302 of IPC r.w. Section 326 of IPC converted to conviction under Section 304 (Part-I) of IPC r.w. Section 326 of IPC . Accused-appellants entitled to all remissions. Judgment & impugned order modified. **(Para - 33,34,37,38)**

Criminal appeal partly allowed. (E-7)

List of Cases cited:-

1. St. of Assam Vs Ramen Dowarah, LAWS(SC) 2016 19

2. Mahavir Singh Vs St. of Haryana, LAWS(SC) 2014 5 62

3. The St. of U.P. Vs Subhash @ @ Pappu , Criminal Appeal No.436 of 2022

4. Khokan @ Khokhan Vishwas Vs St. of Chhattisgarh, Criminal Appeal No.121 of 2021

5. Veeran & ors. Vs St. of M.P., (2011) 5 SCR 300

6. Tukaram & ors Vs St. of Mah., (2011) 4 SCC 250

7. B.N. Kavatakar & anr. Vs St. of Karn., 1994 SUPP (1) SCC 304

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

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

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

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

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

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

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

15. Raj Bala Vs St. of Haryana, (2016) 1 SCC 463

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

1. Heard Mrs. Swati Agrawal assisted by Sri Shivam Tripathi, learned counsel for the appellants in both the appeals and Sri Vikas Goswami, learned AGA for State.

2. Both these appeals have been preferred by the appellants against the judgment and order dated 17.3.2018, passed by learned Additional Sessions Judge, Court No.1, Gazipur in Sessions Trial No.59 of 2016 (State of Uttar Pradesh v. Vinod Harijan and another) arising out of Case Crime No.147 of 2016, under Sections 302, 376 and 326 of Indian Penal

Code, 1860 (in brevity 'IPC'), Police Station Mohammadabad, District Gazipur.

3. The learned Additional Sessions Judge has sentenced the accused-appellants in the following manner and has directed that all the sentences shall run concurrently:

Conviction under Section	Sentence Awarded	Fine	Default Sentence
302 of I.P.C.	Life imprisonment	Rs.20,000/-	1 year
326 of I.P.C.	10 years	Rs.20,000/-	1 year
376 of I.P.C.	Life imprisonment	Rs.20,000/-	1 year

4. The facts of the present case are that complainant Parvati w/o Jaggu Harijan had given written report in police station Muhammadabad that when she had gone to Bihar with her husband to harvest paddy, her daughter namely Soni (hereinafter called as victim/deceased) aged about 18 years was alone at home. On 07.01.2016, Vinod Harijan S/o Patiram Harijan and Brijesh Harijan S/o Phool Chand Harijon, having found her daughter alone, started molesting her. When her daughter namely Soni opposed, they set her ablaze pouring kerosene oil on her person as a result of which entire person of her daughter got burnt thereafter the villagers admitted her daughter in District Hospital, Ghazipur. On receiving information, when she reached near her daughter she had conveyed the aforesaid facts and that was the basis of the said written-complaint of the case by complainant Parvati Devi registered as case crime no.-147/2016 being registered against the accused persons Vinod Harijan and Brijesh Harijan u/s 354, 326-A I.P.C. in police-station Muhammadabad.

5. On the basis of the written-complaint of the complainant Parvati Devi, entry of chik-report dated 17.01.2016 was made at police-station Muhammadabad at 9:30 o'clock(sic). Very strangely dying declaration recorded on 17.1.2016 i.e. 10 days after the occurrence. The investigation of the case was conducted by the then Investigating-Officer who inspected the scene of the occurrence, prepared the site-map of the scene of occurrence, recorded the statements of the witnesses and after completing all the necessary formalities, the charge-sheet was filed against accused persons Vinod Harijan and Brijesh Harijan under Section 302, 376-D and 326-A of Indian Penal Code for trial in the Sub-ordinate court. Investigation was moved into motion and after recording statements of various persons, the Investigating Officer submitted the charge-sheet against accused.

6. The case being exclusively triable by sessions court, copies of prosecution documents were supplied to the accused persons by the Hon'ble Sub-ordinate Court u/s 207 Cr.P.C., and the case was committed to the sessions court for trial on 10.03.2016.

7. On being summoned, the accused-appellants pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined about 12 witnesses who are as follows:

1	Deposition of Parvati Devi	12.5.2016 31.5.2016	PW1
2	Deposition of Jaggu Ram	4.6.2016	PW2
3	Deposition of Deyu Ram	2.7.2016	PW3
4	Deposition of Sudarshan Prasad	27.7.2016	PW4

5	Deposition of Dr. Surendra Kumar	2.9.2016	PW5
6	Deposition of Dr. Umesh Kumar	2.9.2016	PW6
7	Deposition of Dr.Sanjay Mohan Gupta	29.9.2016	PW7
8	Deposition of Dileep Kumar Singh	14.10.2016	PW8
9	Deposition of R.K. Yadav	4.11.2017	PW9
10	Deposition of Kalawati Devi	8.11.2017	PW10
11	Deposition of Prashant Kumar Srivastava	2.1.2018	PW11
12	Deposition of Ram Samujh Singh	1.2.2018	PW12

8. In support of ocular version following documents were filed and proved:-

1	F.I.R.	17.1.2006	Ex.Ka.8
2	Written Report		Ex.Ka.1
3	Dying Declaration	17.1.2016	Ex.Ka.2
4	Recovery memo of pieces of 'Gudari' Kambal and Burnt Ban, Cloth and Ash	19.1.2016	Ex.Ka.7
5	Injury Report	7.1.2016	Ex.Ka.3
6	Medical Report	17.1.2016	Ex.Ka.4
7	Postmortem report	25.1.2016	Ex.Ka.5
8	Panchayatnama	25.1.2016	Ex.Ka.12
9	Charge sheet	27.2.2016	Ex.Ka.10
10	Site plan	19.1.2016	Ex.Ka.6
11	G.D. Entry		Ex.Ka.9
12	Rojnamacha	10.2.2016	Ex.Ka11

9. After concluding the prosecution evidence, the statements of the accused persons were recorded u/s 313 Cr.P.C., in which the accused persons have stated the prosecution story to be wrong and the case to have been initiated against them out of enmity. The accused persons have, in additional statement, stated that the police of PS Muhammadabad has filed charge-sheet by collecting fake evidence in collusion with the opposite parties of the village and out of their enmity.

10. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellants as mentioned herein above. Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court, the appellants have preferred the present appeal.

11. Learned counsel for the appellants has submitted that no offence as alleged has been committed by the accused. It is further submitted that the accused had no motive to do away with the deceased and that the death of the deceased was due to medical negligence and was after a considerable period of time from the date of commission of offence.

12. Learned counsel for the appellant has relied on the decision of Supreme Court in **(a) State of Assam Versus Ramen Dowarah, LAWS(SC) 2016 19 (b) Mahavir Singh Vs. State of Haryana, LAWS(SC) 2014 5 62 (c) Criminal Appeal No.436 of 2022 (The State of Uttar Pradesh Vs. Subhash @ @ Pappu) decided on 1.4.2022 by the Apex Court and in Criminal Appeal No.121 of 2021 (**

Khokan @ Khokhan Vishwas Vs. State of Chhattisgarh) decided on 11.2.2021 by the Apex Court so as to contend that the decision of imprisonment for life is bad and life could not be till the last breath and the conviction under Section 302 read with Section 326 and 376 of I.P.C. is not made out. In alternative, it is submitted that the the offence would be under Section 304 Part II or Section 304 Part I of I.P.C as per the decisions narrated herein above on which heavy reliance is being placed by the counsel for the appellants. It is further submitted that if the Court comes to the conclusion that the accused has committed the offence, in that case as the accused have been in jail for more than 6 years without remission, he may be granted fixed term punishment of incarceration.

13. It has been vehemently submitted by learned A.G.A. for the State that the offences alleged are gruesome and the offences having been committed by the appellants is conclusively proved by dying declaration. Learned counsel has taken us through the evidence on record and the manner in which the deceased was raped and then out of fear was done to death. Sri Vikas Goswani, learned A.G.A. for the state has submitted that life imprisonment awarded to the accused in the facts and circumstances of the case was the only punishment which could be awarded to the accused-appellants and requested for dismissal of appeal.

14. Before we start considering the evidence which we are not elaborately discussing, the reason being it is proved conclusively that the accused have caused injuries to the deceased and set her ablaze which was primarily responsible for her death. The alternative prayer about lesser punishment is to be considered.

15. After some arguments, learned counsel for the appellant submitted that he is not pressing this appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for the past more than 6 years.

16. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants as far as death of deceased is concerned.

17. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under **Section 302, 376 and 326** of I.P.C. should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

18. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of

approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

19. While considering the evidence as considered by the learned Trial Judge and looking to the medical evidence, the accused were earlier charged with commission of offence under section 354 of IPC read with 326 of IPC. The deceased was aged 28 years of age. The postmortem of the deceased was conducted. The dying declaration dated 17.1.2016 read with the ocular version of witnesses and the evidence narrates that the deceased was raped and after being scared, both the accused tried to set her ablaze. The dying declaration dated 17.1.2016 was recorded, namely ten days after the said incident occurred. The injuries report, the medical report and the finding of facts would go to show that the death occurred due to burn injuries. In evidence of PW-1, he has mentioned that both the accused tried to molest her daughter and when she resisted, they set her ablaze. In cross examination, she has accepted that she and her husband were not in their house. PW-2 came to know about the said accident on telepathically information given by the villagers. PW-1, PW-2 & PW-3 were not eye witnesses. PW-4 who was the Naib Tehsildar stated that his daughter was 70% burned and was admitted in the Hospital.

20. We are pained to mention that the dying declaration is recorded about after 10 days of the incident. The medical evidence for Section 376 D of IPC is absent and therefore it is very difficult to concur with the trial court as far as punishment under Section 376 D of IPC is concerned. Learned Judge nowhere discusses as to how and on what basis he accepts that offence under Section 376 D of IPC was committed when the other witnesses have mentioned that the accused tried to molest the deceased. The evidence of Doctors, PW-5, PW-6 and PW-7 are also silent to

this effect. Very unfortunate that PW-4 and PW-5 do not throw any light whether the deceased was forced to forcible sex or not. PW-6 had also examined the deceased on the very same date. She was in her senses when dying declaration was recorded. Even PW-7 who had performed the postmortem nowhere mentioned that there was forcible sex with the deceased. Except the dying declaration recorded after 11 days, there is no medical evidence to corroborate that the rape was committed on the deceased.

21. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

*[375. **Rape.**- A man is said to commit "rape" if he-*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman o/r makes her to do so with him or any other person; or

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

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

***First.-** Against her will.*

***Secondly.**- Without her consent.*

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

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

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

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

***Seventhly.**- When she is unable to communicate consent.*

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

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

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

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

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

22. In that view of the matter the conviction u/s 376 IPC cannot be concurred with and requires to be set aside as there

are no sign of forcible sex with deceased. The dying declaration for this aspect could not be acted upon.

23. From the upshot of the aforesaid discussions, it appears that the death was caused by the accused in unison and it was a homicidal death whether the same was not premeditated or premeditated will have to be seen. The accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

24. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka, reported in 1994 SUPP (1) SCC 304**, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

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

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

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

27. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak***, [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh***, [(2014) 7 SCC 323], ***State of***

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

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

29. Since the learned counsel for the appellant has not pressed the appeal on merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is required to be partly allowed as guilt of accused is established from dying declaration and the ocular evidence of witnesses plus injuries caused on the deceased primary sufficient to fastening her death at a very young age.

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

31. We are unable to agree with the submission of learned learned A.G.A. as far as it relates to the finding of the court below that the death was a premeditated murder and falls within provisions of Section 300 of IPC and the sentence under Section 302 IPC is just and

proper. The reason for the same is that the deceased did not die and insistence death had it been a premeditated murder, the injuries on the body would have caused her immediate death.

32. One more glaring fact is that from the record of the medical papers that the deceased survived for more than ten days. She was admitted in District Hospital, Ghazipur and thereafter she developed fissure and later on during treatment, she breathed her last due to septicemia. Though we concur with learned Trial Judge that the death was homicidal death we are unable to accept the submission of Sri Vikas Goswami, learned A.G.A.

Punishment:

33. In view of the judgment of the Apex Court in State of Uttar Pradesh Vs. Subhash @ Pappu (supra) and Khokan @ Khokhan Vishwas Vs. State of Chhattisgarh (supra) will enure for the benefit for the accused-appellants as the death occurred after ten days was not a premeditated.

34. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but is culpable homicide.

35. The accused are in jail since 17.1.2016. The Apex Court in such cases has converted the conviction under Section 302 of I.P.C. to Section 304 Part I of I.P.C. which will come to the aid of the accused.

36. In view of the aforementioned discussion, we are of the view that the appeals have to be partly allowed, hence, appeals are partly allowed.

37. The conviction of the appellants under Section 302 of Indian Penal Code read with Section 326 of Indian Penal Code is converted to conviction under Section 304 (Part-I) of Indian Penal Code read with Section 326 of Indian Penal Code and the appellants are sentenced to undergo 10 years of incarceration with fine reduced at Rs.10,000/- for offence u/s 304(Part-I) of IPC and 10 years for offence under Section 326 with fine of Rs.5,000/- for default sentence . The accused shall under go incarceration for six month both serves to run concurently.

38. Appellants-accused are in jail since 17.1.2016. On completion of 10 years of incarceration with remission is over for all the offences and if fine is not deposited, the default sentence would start after the period of ten years. The accused- appellants shall be released on completion of said period, if not required in any other case. The accused-appellants would be entitled to all remissions. The judgment and order impugned in this appeal shall stand modified accordingly.

39. Let a copy of this judgment along with the trial court record be sent to the Court and Jail Authorities concerned for compliance.

(2022) 9 ILRA 115
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.09.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE MRS. JYOTSNA SHARMA, J.

Jail Appeal No. 2994 of 2010

Shamshad ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
Sri Mithilesh Tiwari, Sri Satyaveer Singh (A.C.)

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

(A) Criminal Law - Jail Appeal - Indian Penal Code, 1860 - Section 302 - murder - The Code of criminal procedure, 1973 - Section 313 - statement under Section 313 Cr.P.C. cannot form sole basis for conviction - can be a relevant consideration for courts to examine - particularly when the prosecution has otherwise been able to establish the chain of events - Indian Evidence Act, 1872 - Section 6 - those facts relevant which though not in issue - are so connected with a fact in issue so as to form part of same transaction - whether they occurred at the same time and place or at different times and place. (Para -11,18)

Accused murdered his pregnant step-mother along with her three kids - inflicting injuries on vital parts - with an axe on the night - PW1 and PW2 gave an eye-witness account of the incident – informant (father of accused and husband of deceased and father of rest of deceased persons) - gave an unimpeachable evidence - found relevant under Section 6 of the Indian Evidence Act - An incriminating article i.e., weapon of offence was recovered - FIR lodged with requisite promptness - ruling out any probability of embellishment therein - no probability of false implication. **(Para -3,20)**

(B) Evidence Law - Indian Evidence Act, 1872 - Section 27 - discovery of facts includes not only the object found but more importantly the place from which it was produced and the knowledge of the accused as to its existence – held - evidence led by the prosecution, is not only admissible and relevant under Section 27 of the Indian Evidence Act - but also tantamounts to the evidence of conduct of an accused which too is relevant. **(Para - 16)**

HELD:-While evaluating the evidence, it cannot be held to be unworthy of credit just because the witnesses were closely related. No infirmity in the conclusion drawn by the trial Court as to the culpability of the appellant.**(Para -20,21)**

Jail appeal dismissed. (E-7)

List of Cases cited:-

1. Sukhar Vs St. of U.P. ,(1999) 9 SCC 507

2. Arjun Vs St. of U.P., 2003 (1) A.Cr.R. 329

3. Charan Das Swami Vs St. of Guj., (2017) 7 SCC 177

4. Rafique Ahammad @ Rafi Vs St. of U.P., AIR 2011 Supreme Court 3114

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Satyaveer Singh, learned Amicus Curiae appearing for the appellant and Sri Vikas Goswami, learned A.G.A. for the State.

2. This is an appeal against the judgment and order dated 13.04.2010 passed by learned Additional District and Session Judge/F.T.C.-3, Bijnor in Session Trial No. 638 of 2009 (State vs. Shamshad) in Case Crime No. 920 of 2009 under Section 302 IPC, Police Station-Afzalgarh, District-Bijnor and sentenced to imprisonment for life and imposed fine of Rs. 1,00,000/- and further imprisonment of three years in default thereof.

3. As per the prosecution case, the lone named accused Shamshad, murdered his pregnant step-mother alongwith her three kids i.e., his step siblings by assaulting them and inflicting injuries on vital parts with an axe on the night of 26.08.2009 at around 10 pm. The FIR was lodged by his own father Abdul Rashid, the same day at 22.45 hours.

4. The prosecution examined two eye-witnesses namely, Chhote and Sirajuddin as PW1 and PW2 respectively, the informant Abdul Rashid as PW4. The prosecution also examined PW9-Ishrar in whose presence the weapon of offence "kulhari' was retrieved by the accused himself after giving a disclosure statement. The prosecution in all examined ten witnesses and furnished the documentary evidence Exhibit Ka-1 to Exhibit Ka-41.

5. Before proceeding further, it shall be useful to briefly state the FIR version which said that the informant-Abdul Rashid, on returning to his house, found a crowd of people at his doorstep and was told by them that his own son Shamshad, who was in inebriated state assaulted and inflicted wounds by a "kulhari' on the neck of the informant's wife Chhoti, who had died by then and also inflicted fatal injuries to his children. His daughters Ruksana and Farzana, aged about 12 years and 6 years respectively and 5 years old son Faizan, were found by him lying in an injured condition on the cots. All of them, died before they could avail any medical help in the hospital. It is also mentioned in the FIR that the people of the locality saw the accused Shamshad escaping with "kulhari' held in his hands.

6. As per the prosecution version, the inquest was carried out on 26.08.2009, the same night from 22:45 onwards and continued till 6:00 am on 27.08.2009 in the precincts of the Hospital. The dead bodies had fatal injuries on their neck, faces and areas around it. As per the opinion of Dr. S.R. Soni PW3, the victims died because of shock and hemorrhage following ante-mortem injuries. The postmortem on all four dead bodies was conducted on 27.08.2009 between 1.30 pm to 3.45 pm and all of them found to have incised wounds on face, neck, skull and other body parts.

7. PW1-Chhotte and PW2-Sirajuddin, the residents of same Village deposed that Chhotte's sister namely, Chhoti, the victim was often harassed by his step-son. They went to her house between 09.40 to 10.00 pm and saw with their own eyes that Shamshad was assaulting the deceased persons with an axe inflicting injuries. When they tried to intervene, he ran towards them in attacking mode. The witnesses tried to catch hold of him, but he escaped towards the jungle and could not be apprehended.

8. We have gone through the testimony of PW1 and PW2, in the light of the submission of the defence that the above two witnesses are in fact not the eye-witnesses but have been planted by the prosecution to give credence to its version. In our view, in the brief cross-examination done by the defence, nothing has come to lead us to disbelieve their testimony. We cannot scrutinise the testimony of witnesses with an air distrust unless there are some strong indicators compelling the Court to draw a different conclusion. If no material is coming forth to indicate that witnesses may be lying or may be giving a wrong evidence for certain ulterior motives or extraneous reasons, the Court is not supposed to discard such testimony for non-existent or imaginary reasons. In our view, the conclusion drawn by the trial court is based upon the evidence available before it which may be direct or circumstantial and not on conjunctures.

9. PW4-Abdul Rashid, the husband of deceased Chhoti and father of three innocent kids, has deposed that when he

returned to his house, he found a crowd of people there and they told him that his son Shamshad escaped holding an axe, soaked in blood. In his cross-examination, he fairly admitted that he did not witness the incident. He did not himself see anybody fleeing from the scene of crime and that he lodged the FIR on the basis of things narrated by the people of the locality present at the spot at that time. This has come in a very brief cross-examination done by the defence.

10. This fact cannot escape attention of the Court that though his whole family got killed but he refrained from giving any exaggerated version. His testimony evokes confidence of the Court and is, in our view, one of the most important pieces of evidence in this case. With regard to his testimony, the Illustration (a) to Section 6 of the Indian Evidence Act, 1872 is worth notice, which reads as under:-

"(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

11. Section 6 of the Indian Evidence Act, 1872 makes those facts relevant which though not in issue, are so connected with a fact in issue so as to form part of same transaction, whether they occurred at the same time and place or at different times and place.

12. The Hon'ble Supreme Court in **Sukhar vs. State of U.P. (1999) 9 SCC 507,** discussed several landmark judgments and gave an opinion in-line with settled legal proposition that the statement must be contemporaneous with the act or must have been made immediately thereafter. It is the spontaneity and immediate nature of such statement which makes them admissible and reliable. In **Arjun vs. State of U.P.; 2003 (1) A.Cr.R. 329**, PW2 rushed to the spot on hearing distress cries and gained knowledge through others present there (PW3) that it was the accused appellant who stabbed the victim. His evidence was found admissible under Section 6 of the Indian Evidence Act.

13. The evidence given by PW4 comes within the scope of Section 6 of the Indian Evidence Act. It is such a piece of circumstantial evidence which cannot be ignored. It passes the test of proximity in time and of spontaneity as held in umpteen cases by the Hon'ble Courts. The evidence of PW4 gets intrinsic support from documentary evidence Exhibit Ka-41 which is a Memo prepared by the Police at the time of the arrest of the accused. This paper mentions that at the time of his arrest, there were blood spots on the clothes worn by the appellant. It should be noted that the accused was arrested shortly after the occurrence on 27.08.2009 at 12.30.

14. PW9-Ishrar has given an evidence that alongwith the Police personnels, he went to the place Ghasi Wala Park, Jungle where the vehicle was stopped and the accused retrieved a blood stained axe, hidden inside the bushes at about 1 pm in the afternoon of 27.08.2009, before him.

15. PW10- S.I. Sri Ram has given a similar statement and has also proved Exhibit Ka-40, Memo of recovery and has stated that the blood stained axe was recovered from the spot different from the place of occurrence of crime. The accused himself retrieved the weapon hidden in bushes.

16. Recovery of an article from a place hitherto unknown to anybody else including the investigating officer, is a fact which underlines the confirmation theory which is at the heart of provisions of Section 27 of the Indian Evidence Act. The discovery of facts includes not only the object found but more importantly the place from which it was produced and the knowledge of the accused as to its existence. The importance of disclosure statement and the discovery of fact has been very well examined in **Charan Das Swami vs. State of Gujrat; (2017) 7 SCC 177**. In this case before us, the evidence of PW9 and PW10 further strengthens the prosecution case in the light of the above provisions of law. In our view, the evidence led by the prosecution on this count, is not only admissible and relevant under Section 27 of the Indian Evidence Act but also tantamounts to the evidence of conduct of an accused which too is relevant.

17. The accused was given an opportunity as provided under Section 313 Cr.P.C. to enable him to explain his side and to give explanation, if any, for testimony which came against him implicating him in the crime. However, to all the questions put by the Court, he simply gave a bald reply that the evidence is wrong. He refrained from saying anything else.

18. The Hon'ble Apex Court in **Rafique Ahammad @ Rafi vs. State of U.P.; AIR 2011 Supreme Court 3114,** observed that the statement under Section 313 Cr.P.C. cannot form sole basis for conviction but certainly it can be a relevant consideration for the courts to examine, particularly when the prosecution has otherwise been able to establish the chain of events.

19. In view of the above, the only conclusion which can be drawn is that perhaps he had no plausible explanation to offer before the Court. Though the fact of non-explanation cannot replace the burden of prosecution to prove its case beyond reasonable doubt, however, where such burden stands discharged fully the defence is expected to offer whatever reasonable explanation it might have. Here there is none, which further strengthens the prosecution case.

20. To sum up the PW1 and PW2 have given the eye-witness account of the incident. The informant, who happens to be the father of the accused (and husband of the deceased-Chhoti and father of rest of the deceased persons, Ruksana, Farzana and Faizan) has given an unimpeachable evidence found relevant under Section 6 of the Indian Evidence Act. An incriminating article i.e., weapon of offence was recovered on the basis of the disclosure statement given by the accused during investigation. The FIR has been lodged with requisite promptness ruling out any probability of embellishment therein. There is no material before the Court to indicate even remote probability of false implication. In our view, there is no infirmity in the conclusion drawn by the trial Court as to the culpability of the appellant.

21. There has been a very faint submission on behalf of the appellant that PW1 and PW9 are not reliable because they happen to be closely related to the informant. In our view, a relationship howsoever close it may be, cannot by itself be a ground to discard the testimony unless there is some material which may have tendency to corrode the credibility of a witness. The court has to examine the

evidence in toto to determine whether it has, on the whole a ring of truth. While evaluating the evidence, it cannot be held to be unworthy of credit just because the witnesses were closely related.

22. This appeal lacks merits and is liable to be dismissed and is hereby **dismissed.** The judgment of the trial court is hereby affirmed. The appellant is in jail. He shall serve out the sentence as awarded by the trial court.

23. Office is directed to certify this order to the court concerned forthwith to ensure compliance and also to send back the lower court record.

(2022) 9 ILRA 120
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.08.2022

BEFORE

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

Criminal Appeal No. 6335 of 2011

Raj Kumar ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Arun Kumar Srivastava, Sri K.K. Mishra, Sri Mahesh Kumar Kuntal, Sri Mohd. Samiuzzaman Khan, Sri Shailendra Singh

Counsel for the Respondent:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Section 498 A, 304 B , Section 302 r/w Section 149 - Dowry prohibition Act,1961 - Section 3 & 4 - The Code of criminal procedure, 1973 – Section 313 - opportunity to defend anything adverse to the accused should be given to the accused - dowry death - In case of offence under Section 304B of IPC - there is reverse burden of proof on the accused - which is not in the case of Section 302 of IPC.(Para -17, 21)

Death of deceased occurred in her matrimonial home - before seven years of marriage - occurrence took place after three months of marriage of deceased - before two days of occurrence - deceased told her parents for demand of plot and harassment for that - all ingredients of offence under Section 304B of IPC present - trial court framed alternative charge under Section 302 r/w 149 of IPC. **(Para - 18)**

(B) Evidence Law - Indian Evidence Act, 1872 - Section 113B - Presumption as to dowry death - Section 106 - Burden of proving fact especially within knowledge - "soon before death" - depends upon facts of each case - proximity live link between harassment or cruelty and the death of deceased - when presumption under Section 113B is drawn - matter falls within the purview of offence under Section 304B of IPC because the marriage of the deceased was solemnized just before three months. (Para - 19)

HELD:- Judgement and order upturned to the extent of conviction and sentence of accused-appellant with regard to the offence under Section 302 r/w Section of 149 IPC . Accused-appellant convicted for the offence under Section 304B of IPC. Conviction and sentence under Section 3 and 4 of Dowry Prohibition Act maintained. **(Para -22)**

Criminal appeal partly allowed. (E-7)

List of Cases cited:-

1. Santosh Vs St. of U.P., 2021 0 Supreme (All) 173

2. Nallapareddi Sridhar Reddy Vs St. of A.P., (2020) 12 SCC 467

3. R. Rachaiah Vs Home Secy., 2016 0 Supreme (SC) 383

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

1. This criminal appeal is preferred by appellant-Raj Kumar against the order and judgement dated 17.09.2011 passed by Additional Sessions Judge, Court No.17, Bulandshahr in Session Trial No.1398 of 2007 (State Vs. Raj Kumar) and Session Trial No.86 of 2008 (State Vs. Smt. Geeta and others) arising out of Case Crime No.301 of 2007, under Section 498A, 304B of IPC alternatively under Section 302 r/w Section 149 of IPC and Section 3 and 4 of Dowry Prohibition Act, Police Station- Pahasu, District- Bulandshahr, by which the accused persons Smt. Geeta, Tej Pal and Ram Pratap were acquitted of all the charges. During the course of trial, accused Dharmwati has passed away and trial was abated against her and appellant-Raj Kumar was convicted for the offence under Section 302 r/w Section 149 of IPC and sentenced for life imprisonment with fine of Rs.10,000/- and one year S.I. in case of default of fine. Appellant-Raj Kumar was also convicted under Section 3 of Dowry Prohibition Act, 1961 and sentenced to five years R.I. and fine of Rs.15,000/- and one year S.I. in case of default of fine. Appellant-Raj Kumar was further convicted under Section 4 of Dowry Prohibition Act, 1961 and sentenced to two years R.I. with fine of Rs.5,000/- and six months additional S.I. in case of default of fine. All the sentences were directed to run concurrently.

2. Heard Shri Mohd. Samiuzzaman Khan, learned counsel for the appelllant, Shri N.K. Srivastava, learned AGA for the State and perused the record.

3. The brief facts as culled out from record are that informant Ompal Singh gave a written report in police station-Pahasu, District- Bulandshahr on 13.08.2007 alleging that he is resident of Bank Colony, Bhiwani, Haryana. He had solemnized the marriage of his daughter Pooja on 06.05.2007 with Raj Kumar son of Heera Singh resident of District-Bulandshahr. He had given dowry more than his capacity but in-laws of his daughter were not happy with the dowry given and demanded more amount. He had incurred more than Rs.3 lacs as expenditure in the aforesaid marriage. There was also a plot in the name of his daughter Pooja. It is further stated that in-laws of his daughter Pooja used to pressurize him and his relatives to sell the aforesaid plot and purchase a plot in Khurja for them. It is also stated that before two days of the occurrence, he and his wife went to the matrimonial home of Pooja, where she told them that pressure was being mounted on her for selling the plot, and, she was being threatened for her life. Informant has further stated that he had refused to sell the plot, hence, due to this reason, husband of his daughter Raj Kumar, mother-in-law, sister-in-law Geeta, husband of Geeta, Tej Pal and younger brother of husband Ram Pratap had murdered his daughter Pooja by burning her. On receiving a phone call, he and his wife went to the matrimonial home of Pooja, where they found her burnt body and they came to know that Raj Kumar had also committed similar act with his first wife by burning her.

4. On the basis of the aforesaid written report, a Case Crime No.301 of 2007 was registered at Police Station-Pahasu, under Section 498A, 304B IPC and Section 3/4 Dowry Prohibition Act. Investigation was taken up by the investigating officer, who visited the spot and recovered kerosene oil can, match box

and plastic rope from the spot and half burnt leaves of guava tree of which recovery memos were prepared separately. Inquest report was prepared and the post mortem of deceased Pooja was conducted by the panel of two doctors and post mortem report was prepared. During the course of investigation, I.O. recorded the statements of witnesses and site plan was prepared. After completion of investigation, I.O. submitted charge sheet against Raj Kumar and Dharmwati under Section 498A, 304B, 201 and 120B IPC and under Section 3/4 Dowry Prohibition Act. Second charge sheet was submitted to the court against the accused Smt. Geeta, Tej Pal and Ram Pratap under the aforesaid offences.

5. The case, being triable exclusively by the court of Sessions, was committed to the court of the Sessions for trial by the concerned Magistrate.

6. The trial court framed charges against all the accused persons under Sections 304B, 498A of IPC and under Section 3/4 of Dowry Prohibition Act. The accused persons denied the charges and claimed to be tried. After the examination of all the prosecution witnesses, learned trial court framed alternative charge on 25.08.2011 under Section 302 r/w Section 149 of IPC.

7. Prosecution produced following witnesses before learned trial court in oral testimony:

1.	Asha	PW1
2.	Yogendra	PW
3.	Dr. Rajkumar	PW
4.	R.K. Singh	PW
5.	Vijendra Singh Tomar	PW
6.	Padam Singh	PW
7.	Ompal	PW
8.	Rajpal Singh	PW

Court witness No.1 Bangali Rai Gautam was also examined by the court.

8. In support of its case, the prosecution filed following documentary evidence before the trial court, which was proved by leading the evidence:

1.	FIR	Ex.ka.13
2.	Written report	Ex.ka.1
3.	Recovery memo of kerosene oil can, match box and plastic rope	Ex.ka.4
4.	Recovery memo of half burnt leaves of guava tree	Ex.ka.5
5.	Post mortem report	Ex.ka.2
6.	Panchayatnama	Ex.ka.7
7.	Site plan	Ex.ka.3

9. After conclusion of evidence, statements of accused persons were recorded under Section 313 of Cr.P.C., in which they contended that false evidence was led against them and they were falsely implicated. Accused persons examined no witness in their defence.

10. All the accused except accused-appellant Raj Kumar were acquitted of all the charges and Raj Kumar was convicted and sentenced under Section 302 r/w section 149 of IPC along with Sections 3 and 4 of Dowry Prohibition Act.

11. Learned counsel for the appellant submitted that all the accused persons except the appellant were acquitted by the learned trial court on the same set of the evidence. Hence, the conviction of appellant is bad in the eyes of law. Learned counsel for appellant has raised a legal question namely that initially the charge

was framed under Section 304B of IPC along with other offences but after recording of the entire oral evidence by the prosecution, learned trial court framed alternative charge under Section 302 r/w Section 149 of IPC and no opportunity was given to the appellant to defend himself against the aforesaid alternative charge. Learned counsel for appellant submitted that prosecution had examined 8 witnesses, namely PW1 to PW8 and the last witness was examined on 24.08.2009. After about two years, on 25.08.2011 after change of presiding Judge alternative charge under Section 302 r/w Section 149 of IPC was framed by learned trial court, the accused-appellant was not given opportunity to cross-examine any of the witnesses examined i.e. PW1 to PW8 with regard to the charge under Section 302 of IPC., hence, accused had no get opportunity to defend himself against alternative charge for higher offence framed by learned trial court. By this way, the accused was prejudiced. It is submitted that on this ground alone, the trial was vitiated and appellant could not have been convicted under Section 302 of IPC.

12. Learned counsel heavily relied on the judgement of this Court in the case of **Santosh Vs. State of U.P. reported in 2021 0 Supreme (All) 173,** where one of us (Dr. Kaushal Jayendra Thakar, J.) was signatory to the said judgement. The only defence in the said matter was that in the aforesaid case, the witnesses had turned hostile. In our case, witnesses have not turned hostile, but the fact remains that the accused-appellant was never put to questions even while examining the accused under Section 313 Cr.P.C. with regard to the offence under Section 302 of IPC. Learned counsel for the appellant also submitted that no additional demand of dowry was proved by the prosecution. The appellant had never pressurized his deceased wife for selling the plot in question and purchasing another plot in Khurja. Rather the informant, father of the deceased, himself entered into agreement to sell the aforesaid plot with someone and received Rs.1 lac. For this reason, the deceased was upset and she accidentally died and appellant along with his family members were roped in.

13. Learned counsel has further submitted that learned trial court placed reliance on the evidence of Dr. Rajkumar PW3 who had deposed in connection with the post mortem of the deceased. PW3 had opined that the cause of death of the deceased was asphyxia as a result of smothering. On the basis of this statement alone, the learned trial court convicted the appellant under Section 302 of IPC. It is submitted that it was not proved that the act of smothering was committed by the appellant. Learned trial court convicted the accused on the basis of surmises and conjectures and in preconceived notions on basis of altered charge only.

14. Learned AGA for the State opposed the submissions made on behalf of the appellant and submitted that the deceased died in her matrimonial home after only three months of her marriage and her body was found in burnt condition in matrimonial home. Learned AGA also submitted that all the witnesses of fact have supported the prosecution case and have categorically stated that the deceased was being pressurized for selling the plot of land, which was in her name and she was killed by smothering, which could not be accidental. Hence, the learned trial court has rightly convicted the appellant under Section 302 of IPC. There is no illegality in

impugned judgement which calls for any interference by this Court.

15. The legal question, raised by the learned counsel for the appellant is answered by this Court, with regard to the conviction of accused-appellant under Section 302 of IPC. It is evident from the record that in this case PW1 Smt. Asha was examined on 07.04.2008 and the last prosecution witness PW8 Rajpal Singh C.O., Anoopshahr was examined on 24.08.2009. Alternative charge under Section 302 r/w Section 149 of IPC was framed by learned trial Judge on 25.08.2011. First charge was framed under Section 304B of IPC along with other offences and after framing the alternative charge under Section 302 IPC on 25.08.2011, none of the prosecution witness, namely PW1 to PW8 was re-examined nor recalled nor any opportunity was given to appellant-accused to cross-examine any of the aforesaid witnesses on the fresh charge framed. It is also very relevant to note that no evidence with regard to the offence under Section 302 of IPC was led. The accused-appellant was not put to any question during recording of his statement under Section 313 Cr.P.C. and no additional statement under Section 313 Cr.P.C.

16. It would be pertinent to reproduce Section 216 of Cr.P.C. regarding the alteration of charge which reads as follows:

216. Court may alter charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

17. It has been time and again held by the Apex Court that Section 313 of Cr.P.C. has its own importance and opportunity to defend anything adverse to the accused should have been given to the accused. The opportunity to cross-examine the prosecution witnesses was not given to the accused-appellant even the prosecution witnesses deposed much before the alternative charge. After framing the alternative charge, learned trial court should have recalled the prosecution witnesses and they should have been permitted to be cross-examined by the accused-appellant, in the absence of which, the accused could not have thought that the said alteration of charge would be acted upon and the trial would culminate into the

returning the finding of punishment to him under Section 302 of IPC. The ingredients of Section 302 of IPC were not present in the charge of which the appellant was put to trial. The object and scope of altering the charge and principles therein have been summarized by the Apex Court in **Nallapareddi Sridhar Reddy Vs. State of A.P. (2020) 12 SCC 467,** which are applicable in our case. The Apex Court in **R. Rachaiah Vs. Home Secretary 2016 0 Supreme (SC) 383** has held that alteration of charge in violation of mandate as per Section 216 and 217 Cr.P.C. and conviction recorded under altered charge seriously causes prejudice to the accused. Therefore, this impropriety of the trial court stands vitiated and there could have been no conviction under altered charge namely under Section 302 of IPC. Hence, we hold that the conviction on altered charge was bad because the accused was never given opportunity to defend himself for the offence under Section 302 of IPC and his interest was prejudiced. We are supported in our view by the reasonings in Santosh (supra).

18. We find it very strange that even in alternative charge, the learned trial court has mentioned the ingredients of dowry death, as demand of plot as additional dowry is there. Homicidal death of the deceased Pooja for not meeting out the demand of additional dowry is also there. It is admitted fact that the death of the deceased occurred in her matrimonial home even before seven years of marriage because the occurrence had taken place after three months of the marriage of the deceased. It is also evidence that before two days of the occurrence, the deceased had told her parents for demand of the plot and harassment for that. Hence, in this matter all the ingredients of offence under Section 304B of IPC are present yet, the learned trial court framed alternative charge under Section 302 r/w 149 of IPC. This exercise of learned trial Judge was futile.

19. For dowry death, presumption under Section 113B of Indian Evidence Act, 1872 is drawn, if it is shown soon before her death such woman had been subjected by the person causing death to cruelty or harassment for, or in connection with any demand of dowry, the court shall presume that such person had caused dowry death. The concept of "soon before death" varies from case to case. What is "soon before death" depends upon the facts of each case, keeping in view the proximity live link between the harassment or cruelty and the death of deceased. In our case, it is evident on record that the pressure was being mounted on the deceased for selling the plot, which stood in her name and she was being threatened to life also. In this case facts go to show and it is proved that "soon before her death" the deceased was subjected to harassment in connection with demand of additional dowry because pressurizing the deceased for selling the plot was indirect way of demand of dowry. Hence, when presumption under Section 113B of Indian Evidence Act, 1872 is drawn then the matter falls within the purview of offence under Section 304B of IPC because the marriage of the deceased was solemnized just before three months of the occurrence. Hence, the death of the deceased was within seven years of the marriage and as discussed above it is shown that soon before her death, she was subjected to cruelty/harassment by the appellant in connection with demand of dowry, the death of the deceased would be considered "dowry death".

304B. Dowry death.-

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

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

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

20. While going through the provision of Section 304B of IPC, it is very clear that it can be read with Section 106 of the Indian Evidence Act and coupled with Section 113B of the Indian Evidence Act. We are fortified in a view that the matter is covered by the ingredients of the said sections. The fact that Section 302 IPC conviction cannot stand but the same time acquittal cannot be ordered in favour of the accused. The ground allegedly taken by accused is also not stated by any cogent evidence being led under Section 313 of Cr.P.C. As we considered the totality we are of the confirmed opinion that the accused has to be dealt with Section 304B IPC and acquittal under Section 304B IPC and conviction under Section 302 IPC cannot be sustained.

21. In case of offence under Section 304B of IPC, there is reverse burden of proof on the accused, which is not in the case of Section 302 of IPC. The learned trial court has committed manifest error by convicting the accused-appellant under Section 302 of IPC on the basis of reverse burden of proof on the shoulders of the appellant. The evidence in this case does not show that Section 302 of IPC is applicable to the facts of this case.

22. Hence, we upturn the judgement and order of the learned trial court to the extent of conviction and sentence of accused-appellant with regard to the offence under Section 302 r/w Section of 149 IPC and convict the accused-appellant for the offence under Section 304B of IPC. The period undergone would be just and proper as the accused-appellant is in jail for more than 10 years. The conviction and sentence of appellant under Section 302 of IPC is set aside and appellant is convicted and is sentenced under Section 304B of IPC to the period already undergone. The conviction and sentence under Section 3 and 4 of Dowry Prohibition Act is maintained. All the sentences to run concurrently as directed by learned trial court. Fine and default sentence maintained.

23. With these observations, the appeal is **partly allowed** as modified above.

24. Record and proceedings be sent back to the court below.

(2022) 9 ILRA 126
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 6384 of 2009

Umesh Mahto & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Mahesh Prasad Yadav, Sri P.C. Srivastava, Sri Abhishek Kumar, Sri Ajatshatru Pandey, Sri Ajit Singh, Sri S.N. Srivastava, Sri Swapnil Srivastava, Sri Vimal Chandra Pathak

Counsel for the Respondent:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Section 302/34 & 307/34 - The Code of criminal procedure, 1973 - Section 313 - Indian Evidence Act, 1872 – Section 134 - No particular number of witnesses shall in any case be required for the proof of any fact - It is quality of evidence which is required to be taken note of by Courts - Distinctions between normal discrepancies and material discrepancies - when the direct evidence establishes the crime, motive is of no significance and pales into insignificance - testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. (Para -21,30,39,55)

Accused persons killed his brothers – motive and enmity - P.W.1(brother of deceased) is sole witness of fact - prosecution case fully corroborated with medical evidence - offence of murder committed by both accused appellants - in furtherance of common intention of both - each and every circumstance leading to homicidal death of deceased - proved by cogent & trustworthy evidence - murder committed at public place - no material contradiction about whole occurrence right from the beginning till the death of deceased. **(Para -28,29,34,57,63,66)**

HELD:-Prosecution proved charge under Section 302/34 I.P.C. beyond reasonable doubt against both accused appellants. Offence under Section 307/34 not proved against accused appellants beyond reasonable doubt. **(Para – 65,66)**

Criminal appeal partly allowed. (E-7)

List of Cases cited:-

1. Raj Narain Singh Vs St. of U.P. ,2010 AIR SCW 521

2. Kusti Mallaiah Vs St. of A.P. ,(2013) 12 Supreme Court Cases 680

3. Vadivelu Thevar Vs The St. of Madras ,AIR 1957 SC 614

4. Lallu Manjhi & anr. Vs St. of Jhar., (2003) 2 SCC 401,

5. Prithipal Singh & ors. Vs St. of Punj. & anr., (2012) 1 SCC 10

6. Jhapsa Kabari & ors. Vs St. of Bihar, (2001) 10 SCC 94

7. Amar Singh Vs St. (NCT of Delhi), (2020) 19 Supreme Court Cases 165

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

9. Bikau Pandey Vs St. of Bihar, (2003) 12 SCC 616

10. Anil Rai Vs St. of Bihar, (2001) 7 SCC 318

11. Deepak Verma Vs St. of H.P., (2011) 10 SCC 129

12. Gopal Singh Vs St. of Uttrakhand, (2013) 7 SCC 545

13. Hema Vs St., (2013) 81 ACC 1 (Supreme Court)

14. Bhagwan Jagannath Markad Vs St. of Maha., (2016) 10 SCC 537

15. Surinder Kumar Vs St. of Punj., (2020) 2 SCC 563

16. Indrapal Singh Vs St. of U.P., (2022) 4 SCC 631

17. Saudan Singh Vs St. of U.P., S.L.P. (Cr.) No. 4633 of 2021, Criminal Appeal No. 308/2022

18. Vishnu Vs St. of U.P. , Criminal Appeal No. 204 of 2021

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

1. This criminal appeal is directed against the judgement and order dated 07.10.2009 passed by Special Judge (E.C. Act), Gorakhpur in Session Trial No. 270 of 2000 arising out of Case Crime No. 126 of 2002, P.S.-Sahpur, District- Gorakhpur convicting and sentencing the appellants under Section 302/34 I.P.C. to undergo life imprisonment further imposing fine of Rs. 10,000/- each and in default of payment of fine to undergo one year rigorous imprisonment and under Section 307/34 I.P.C. to undergo seven years rigorous imprisonment and fine of Rs.5,000/- each and in default of payment of fine to undergo six months rigorous imprisonment.

2. The prosecution story unfolds with an FIR lodged at P.S. Shahpur, District-Gorakhpur on the basis of written report given on 22.03.2002 at 19 p.m. by Muneshwar Mahto, S/o Sipahi Mehto, brother of the deceased. It was narrated in the written report by the informant that he as well as his brothers Suraj Mehto and Rameshwar Mehto work as sales men in the bakery. The accused persons Umesh Mehto and Krishna Mehto, who happen to be their relatives have been on inimical terms on account of some land disputes and litigation. On 22.03.2002 at about 5:30 pm when he and his brother Suraj Mehto were coming to the city Gorakhpur from Pipraich after finishing their duty, the accused persons Umesh Mehto and Krishna Mehto chased them by motor cycle and surrounded both of them in front of the farm of Jitendra Jaiswal near Padri Bazar Kasba. Both the accused persons got down from the motor cycle and opened fire with country made pistols upon the informant and his brother Suraj Mehto. When they rushed from the spot to save themselves, the accused persons fired upon his brother Suraj Mehto who fell down in the wheat field and died. The accused persons fled away on motorcycle. The informant Muneshwar Mehto and the people nearby witnessed the occurrence. On the basis of the written report Exhibit A-1 given by the informant Muneshwar Mehto, Chik FIR Exhibit A-4 was prepared by Cons.Moharrir Saroj Kumar on 22.3.2002 at 19 pm and its entry was made in the G.D. rapat number 37, Exhibit A-5 at the same time.

3. The investigation was started and the inquest report Exhibit A-2 was prepared on 23.03.2002, the papers required for post mortem Exhibit A-7 to A-11 were also prepared and the autopsy of the dead body of the deceased was performed by doctor V.K. Dubey on 23.3.2002 who prepared the autopsy report Exhibit A-3 and found the following anti mortem injuries on the body of the deceased.

(i) fire arm wound of entry 1 cm x 1 cm x cavity deep on right side chest 5 cm lateral to right nipple margin inverted, blackening and charring present in an area 14 cm x 7 cm

(ii) fire arm wound of exit 1.5 cm x 1.5 cm on left side chest 5 cm. Below to left nipple margins everted.

(iii) fire arm wound of entry ¾ cm x ½ cm on medial side of right upper arms in. Middle margin inverted.

(iv) fire arm wound of exit 1 cm x 1 cm on lateral side of right upper arm in middle, margins inverted.

Internal Examination

Right and left pleura were found punctured. Both lungs were also punctured. Clotted blood about 1-1/2 litre was found present in thoracic cavity, eyes and mouth closed, rigor mortis present on both limbs.

Cause of death in his opinion was haemorrhage and shock due to anti mortem injuries.

4. The I.O. recorded the statement of the witnesses of fact and formal witnesses, prepared map Exhibit A-13 after spot inspection and after completing the investigation charge sheet Exhibit A-6 was submitted to the Court.

5. The case of the accused persons after their appearance before the Court being exclusively triable by Sessions Court was committed to the Court of Sessions by the Chief Judicial Magistrate, Gorakhpur on 27.6.2002.

6. The charges under Section 302 read with Section 34 I.P.C. and Section 307 read with Section 34 I.P.C. were framed against the accused persons who denied of the charges and claimed to be tried.

7. To bring home the guilt of the accused persons, oral evidence was recorded as PW-1 Muneshwar Mehto- first informant, P.W.-2 Rameshwar witness of inquest report, P.W.-3 Dr. V.K. Dubey, P.W.-4 Constable Saroj Kumar Scribe, P.W.-5 S.I. Parshuram Singh, Second I.O. P.W.-6 S.I. Suresh Singh witness of inquest report and secondary witness of S.I. Rameshwar, first I.O and C.W.-1 Constable Musafir Prasad.

8. Documentary evidence was produced as written report Ex. A-1 , inquest report Ex.A-2, autopsy report Ex.A-3, FIR Ex.A-4, G.D Ex. A-5, charge sheet Ex.A-6, photo nash Ex.A-7, Form No. 33 Ex.A-8, Form No.13 Ex.A-9, R.I. letter Ex.A-10, C.M.O. letter Ex.A-11, Memo of recovery of articles taken from the spot Ex.A-12 and site plan Ex.A-13.

9. The statements of the accused persons were recorded under Section 313 Cr.P.C. The accused persons denied the allegations and incriminating evidence against them and stated that due to family enmity they have falsely been implicated in this case, however, no defence evidence has been adduced by the accused persons.

10. P.W-1 namely Muneshwar Mahto, who is the sole witness of fact in his oral testimony has stated that he, his brothers Suraj Mehto and Rameshwar Mehto are engaged in the business of sale of biscuits and slice bread. Accused persons Umesh Mahto and Krishna Mahto are their relatives and cousins to each other. Both the parties had earlier village disputes and the accused persons were not ready to compromise. On 22.3.2002 when the informant along with his brother Suraj Mahto, was returning from Pipraich to Gorakhpur after routine business work, accused persons Umesh Mahto and Krishna Mahto coming from the side of Pipraich by motorcycle surrounded both of them near farm house of Pappu Jaiswal at 5.30 p.m. When the accused persons pulled desi pistol from their pockets, the informant and his brother ran away and when looked back, the accused persons opened fire upon his brother, who got injured and died. He and the passers-by witnessed the occurrence. A report in respect of the occurrence was written by Ajay Kumar Ojha, which was given in the police station and FIR was lodged. He has further stated that it was broad light at the time of occurrence and the accused persons killed

his brothers due to enmity of the village. He has proved the written report Ex. A-1 and has also stated that the inquest report was prepared before him. Inquest Ex.A-2 has also been proved by this witness.

11. P.W.-2 Rameshwar, the real brother of the informant is also a witness of the inquest report who had identified his thumb impression made over the inquest report Ex.A-2 in his deposition. He has stated that his brother Muneshwar Mahto had informed him regarding the murder of his brother Suraj. He has further stated that at the time of occurrence he was at his room and preparing dinner.

12. P.W.-3 Dr. V.K. Dubey has prepared autopsy report of the deceased which he has proved as Ex.A-3 in his evidence. He has opined that the cause of death of the deceased was haemorrhage and shock due to anti mortem fire arm injuries.

13. P.W.-4 Head Moharrir, Saroj Kumar, the Scribe in his evidence has proved the FIR of the case as Ex.A-4 and has stated that on the basis of the written report of the informant Muneshwar Mahto he had prepared the Chick FIR which is on record before him. He has also proved the G.D. of the case as Ex.A-5 as secondary witness for Head Cons. Musafir Prasad. However, the aforesaid Head Cons. Musafir Prasad has subsequently been examined as C.W.-1 who has proved his hand writing and signature over the G.D. Ex. A-5, rapat no. 37 prepared on 22.03.2002 at 19 p.m.

14. P.W.-6 S.I. Suresh Singh, who is the witness of the inquest report has proved his hand writing and signature over the inquest report Ex.A-2 and has also narrated that the related documents i.e. photo nash Ex. A-7, form number 33 Ex.A-8, form number 13 Ex.A-9, R.I. letter Ex.A-10, C.M.O. letter Ex.A-11 were also prepared by him in his own hand writing and signature. This witness has also proved the fard recovery Ex. A-12 relating to the articles found on the body of the deceased and also the articles found on the spot. This witness is a secondary witness to S.I. Ram Singh, the first I.O. of the case and has proved the site plan Ex.A-13.

15. P.W.-5 S.I. Parshuram Singh is the second I.O. of the case, who has deposed before the Court that he started the investigation on 7.5.2002 and after recording the evidence of the eye-witnesses and witnesses of fard recovery and scribe and submitted charge sheet Ex.A-6 to the Court.

16. On the basis of the aforesaid evidence, the learned trial Court came to the conclusion that the prosecution has succeeded in establishing the guilt against the accused persons, on the basis of cogent, consistent and reliable evidence and the charges against the accused persons were proved beyond reasonable doubt and, accordingly, conviction order was passed.

17. Learned counsel for the appellants has assailed the impugned judgement on various grounds. It has been argued that the prosecution version rests upon the sole testimony of P.W.-1 Muneshwar Mahto, who is not a reliable witness. It is submitted that it is mentioned in the FIR that several independent persons came over the spot but none was examined by prosecution during trial. It has also been argued that the place of occurrence is not fixed which creates doubt in respect of truthfulness of the prosecution story. It has further been submitted that it is an admitted fact that the parties were on inimical terms since prior

to the occurrence and the accused persons/ appellants have falsely been implicated due to enmity but the learned trial Court did not pay attention to this fact at all. It has also been argued that the prosecution story does not find corroboration from the medical evidence and the investigation of the case has been very faulty. The trial Court in an arbitrary manner without considering the evidence on record in proper way passed the conviction order, which is liable to be set aside by allowing the appeal.

18. Per-contra, learned A.G.A. has contended that the prosecution has succeeded to prove its case on the basis of cogent and reliable evidence, there is no force in any of the contentions raised by the appellants and the appeal as such is liable to be dismissed.

19. Heard Shri M.P. Yadav, for the original accused-appellant herein, Shri N.K. Srivastava, learned A.G.A. for the State and perused the record.

20. From perusal of the record it is evident that P.W.1 Muneshwar Mahto, brother of the deceased is the sole witness of fact examined by the prosecution. In charge sheet Ex. A-6 the names of some other witnesses as eye witness of the case have been mentioned. P.W.1 in his examination in chief has also stated that the other passers-by and the neighbours

21. Whether non-examination of other eye-witnesses by the prosecution vitiates the prosecution story, needs to be examined in light of the legal position. It is an established principle of law that to prove a given fact particular number of witness need not be examined. In Section 134 of the Indian Evidence Act it has been provided that "No particular number of witnesses shall in any case be required for the proof of any fact. Reference can be placed on the Hon'ble Apex Court decision in **Raj Narain Singh Vs. State of U.P. 2010 AIR SCW 521** wherein it has been held that it is not necessary that all those persons who were present at spot must be examined. It is quality of evidence which is required to be taken note of by Courts.

22. A close scrutiny of the entire evidence of P.W.1 goes to show that his evidence is quite natural, innocent and trustworthy and he is wholly reliable witness. His deposition in its continuity is quite natural and bears no material contradiction in material particulars such as to the manner of assault, place of occurrence, participants of the crime and the weapon used in the occurrence and all relating factors are concerned he was real brother of the deceased and used to work in bakery shop along with the deceased bother. They lived in the city of Gorakhpur and on the fateful day they were returning from Pipraich to Gorakhpur. In the evening both the brothers were going together when the occurrence happened near Jaiswal farm house. In this way the presence of P.W.1 on the spot at the time of occurrence was quite natural. He is not a chance witness but he was accompanying the deceased at the time of occurrence. He has clearly stated in his evidence that both the accused persons chased them and opened fire and his brother died due to the fire arm injury. Prior to this they were surrounded by the accused persons who came on spot by motor cycle and got their country made pistols out from their pockets. When P.W.1 and his brother ran away they were chased by the accused persons. This shows the intention of the accused persons to kill the deceased. They had come on spot with full preparation to finish the deceased, Suraj Mahto. There is

nothing in the cross-examination of P.W.1 which goes to show any infirmity or material contradiction. In the autopsy report Ex.A-3 the doctor has found that the cause of death was haemorrhage and shock due to anti mortem injuries and two fire arm entry wounds coupled with the exit wounds were found on the body of the deceased. In the inquest report Ex.A2, the *panchas* have also opined that due to the gun shot injury the death of the deceased has been caused. During investigation, this theory was found reliable and cogent and decision of trial Court is based on these facts. P.W.1 has also deposed regarding the prior enmity between the parties.

23. Learned counsel for the appellants has vehemently argued that P.W.1 in his cross-examination has stated that they were coming by cycles and the accused came from behind by motor cycle from the right direction but while driving the motor cycle they did not open fire upon them. He has also stated that the accused persons had opened only two fires and the injuries thereof were inflicted only upon his brother. Learned counsel has further submitted that the statement of P.W.1 creates a doubt regarding the truthfulness of the prosecution story. Had the accused persons any intention to kill the deceased, it was very easy for them to fire upon him when he was on bicycle and the accused persons were coming from behind.

24. We do not find any force in this contention of the learned counsel for the appellants.

25. The perusal of the statement of P.W.1 shows that the accused persons firstly surrounded the informant and his brother and when they tried to escape they opened fire and committed the murder of the deceased. It makes no difference if they did not open fire on them when they were on their bicycles. It was the choice of the accused persons as to what mode of attack they opted.

26. The Hon'ble Supreme Court in **Kusti Mallaiah Vs. State of Andhra Pradesh (2013) 12 Supreme Court Cases 680** has laid down as follows:

*"23. It has been held in catena of decisions of this Court that there is no legal hurdle in convicting a person on the sole testimony of a single witness if his version is clear and reliable, for the principle is that the evidence has to be weighed and not counted. I**n Vadivelu Thevar v. The State of Madras AIR 1957 SC 614**, it has been held that if the testimony of a singular witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. In the said pronouncement it has been further ruled that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. Similar view has been expressed in **Lallu Manjhi and another v. State of Jharkhand (2003) 2 SCC 401, Prithipal Singh and others v. State of Punjab and***

another (2012) 1 SCC 10 and Jhapsa Kabari and others v. State of Bihar (2001) 10 SCC 94.

27. The same view has been reiterated in **Amar Singh Vs. State (NCT of Delhi) (2020) 19 Supreme Court Cases 165** wherein it has been held as follows:

....As a general rule the Court can and may act on the testimony of single eye witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony Courts will insist on corroboration. It is not the number, the quantity but quality that is material. The time honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise (see Sunil Kumar V/s State (NCT of Delhi) (2003) 11 SCC 367).

28. On the analysis of evidence of P.W.1 we find that his evidence is cogent and trustworthy and further gets corroboration from the medical evidence.

29. The minor discrepancies found in his evidence are ignorable and he is a wholly reliable witness.

30. In **Ashok Kumar Chaudhary. Vs. State of Bihar 2008 (61) ACC 972 (SC)** it has been categorically held that if the testimony of an eyewitness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected because certain insignificant, normal or natural contradictions have been appeared into his testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are only normal and not material in nature, then the testimony of an eyewitness has to be accepted and acted upon. Distinctions between normal discrepancies and material discrepancies are that while normal discrepancies do not corrode the credibility of a party's that the case, material discrepancies do so. The evidence of P.W.1 has also been assailed on the ground that he is the real brother of the deceased and as such he is an entrusted witness and his evidence cannot be accepted as a gospel truth.

31. Learned counsel for the appellants has contended that the prosecution case does not find support from the medical evidence and has submitted that there are material contradictions between the occular evidence and medical evidence. He has referred the deposition of P.W.1, who in his examination-in-chief has stated that when the informant and his brother were running away they were chased by both the accused persons who opened fire upon the deceased. It has been argued that in the autopsy report a fire arm entry wound has been found on right side chest which was 5 cm lateral to the right nipple. The second fire arm entry wound was found on medial side of right upper arm in middle. Both the entry wounds had corresponding exit wounds. It has been argued by the learned counsel for the appellants that if the informant and the deceased were running and they were being chased by the accused persons then how the one gun shot injury could be inflicted into the chest of the deceased instead of, on the back of the chest. In this respect my attention is drawn towards the statements of P.W.1 who in his examination-in-chief has stated that when

he and his brother were being chased by the accused persons they looked back them and at the same time the fire was opened. In his cross-examination also he has clarified that when he and his brother were being chased by the accused persons they turned and looked back and at the same moment the fire was opened. That is why the fire was not inflicted upon the back of the deceased but since he was in a little bit turning position the fire inflicted upon his chest and also upon the right upper arm. The doctor P.W.3 in his deposition has proved the autopsy report. He has also stated that in the first entry wound blackening and charring was present, which means that it was a close fire. P.W.1 in his cross-examination has stated that fire was made from a distance 2-1/2 -3 feet, which inflicted upon his brother.

32. Keeping in view the principles of medical jurisprudence, it can be safely opined that broadly speaking rifles, pistol and revolvers, if fired within 3 feet may show blackening, tattooing, charring and wad of cartridge may be present in or around the wound.

33. P.W.3 in his cross-examination has stated that:

"मृतक के शरीर पर दो अलग-अलग फायर से चोटे आयी थी। पहली चोट सामने से शरीर के दाहिने तरफ से मारने से आयी होंगी। मृतका के शरीर पर आयी चोट नं० 3 कुछ दूर से गोली चलाने से आयी होंगी। चोट नं० 1 कम दूरी नजदीक से गोली चलाने से आयी होगी।"

34. Hence, from the above, it is clear that the prosecution case is fully corroborated with the medical evidence and evidence of P.W.1 is also consistent with the medical evidence.

35. It has been further contended by learned counsel for the appellants that the place of occurrence is doubtful which creates a genuine suspicion about truthfulness of the prosecution story.

36. The site plan Ex.A-13 is on record, which has been proved by P.W.6 S.I. Suresh Sharma as secondary witness for the first I.O. S.I. Raghuveer Singh. In the site plan Ex.A-13 the places where the accused persons were present and where they stopped their motor cycle, the direction towards which the deceased and the informant ran away, the place from where the fire was open, the field where the dead body was recovered, and the other existing fields, roads and village situated nearby have been clearly shown by the Investigating Officer. All the positions shown in the site plan get support from the evidence of P.W.-1.

37. P.W.6, who is the witness of inquest report has stated that he had found the dead body in the standing crops of wheat field and the same has been shown in the site plan Ex.A-13. The wheat field of Jitendra Jaiswal which is situated on spot has also been shown in Ex.A-13. It has been clearly stated in the statement of P.W.1 and also find place in the written report Ex.A-1 as to whom the occurrence happened and the I.O. has inspected the spot with the informant as P.W.1. In the FIR Ex.A-4 the place of occurrence has been mentioned as in the village Padri Bazar infront of farm of Jitendra Jaiswal and the I.O has also found the same. Thus the entire oral and documentary evidence in respect of the place of occurrence are in consonance with each other and the place of occurrence is fixed and proved without any doubt.

38. Learned counsel for the appellants has vehemently argued that the motive

assigned behind the crime has not been properly proved. It has also been argued that if there was an enmity between the parties the accused undoubtedly have been falsely implicated due to enmity. To meet out this plea, it is to be remembered that in the factual scenario of this case it is very much clear that the prosecution case rests upon direct evidence. P.W.1 is the witness of the occurrence who has clearly proved the occurrence and all the incriminating circumstances relating thereto.

39. The trial Court has discussed the various aspects of motive and enmity existing between the parties in the present case. Reliance has been placed upon **Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616** wherein it has been held that when the direct evidence establishes the crime, motive is of no significance and pales into insignificance.

40. In **Anil Rai Vs. State of Bihar (2001) 7 SCC 318** it has been held that enmity is a double edged weapon which can be a motive for the crime as also the ground for false implication of the accused persons.

41. There are catena of decisions on the point that in a case based upon the eye witness account, the motive loses its significance. In **Deepak Verma Vs. State of Himachal Pradesh (2011) 10 SCC 129** It has been held as under:

"...Proof of motive is not a sine qua non before a person can be held guilty of commission of crime. Motive being a matter of mind, is more often than not difficult to establish through evidence."

42. However, in this case a motive has been assigned in the FIR to the effect that the parties have been on enmical terms as they have some land and litigation disputes. Enmity between the parties is no doubt a double edged weapon. If on account of enmity the accused can be falsely implicated by the complainant party, at the same time due to that very enmity the accused may commit crime also against the complainant party.

43. P.W.1 in his examination-in-chief has admitted the factum of previous enmity between the parties. He has been cross examined at length, on this point wherein he has clarified that the parties belonged to one *Khandan* and they have some land disputes in respect of the ancestral property. Civil litigation had also been pending in respect of the aforesaid land and the parties had quarrel also in respect thereof much before the present incident.

44. In the discussion mentioned herein above, it has been found that the evidence of P.W.1 is cogent, trustworthy and innocent, hence, if there was any enmity between the parties prior to the present occurrence, it does not affect adversely the prosecution case which is otherwise proved by the reliable ocular evidence of P.W.1 and the theory of false implication fails as such.

45. On the basis of the above, I do not find any substance in the contention of the learned counsel for the appellants so far as the motive is concerned.

46. The genuineness of the FIR has also been hit by the learned counsel for the appellants. It has been argued that FIR has been lodged after 1-1/2 hours of the occurrence whereas the police station is only 5 km. away from the place of occurrence.

47. Per-contra, learned A.G.A. has contended that the FIR was prompt one and has been lodged only after 1-1/2 hours of the occurrence.

48. To examine this issue we have to consider certain other aspects also. Chick FIR Ex.A-4 and G.D. Ex.A5 have been proved by the scribe of the FIR. Perusal of Ex.A-4 shows that the FIR was lodged on 22.03.2002 at 19 p.m, the police station is situated at a distance of 5 km from the place of occurrence. P.W.1 in his cross-examination has stated that after the occurrence he remained at the place of occurrence for 45 minutes and then he dictated the report to Ajay Kumar Ojha who came over there. It can be easily understood that after the blind murder of his brother the informant-P.W.1- would have been in a state of shock and grief. He has further stated in his cross-examination that after dictating the *tehrir* he along with Ajay Ojha went to the police station by cycle and then FIR was lodged. No doubt it explains the whole story of time from the occurrence up to the lodging of the FIR. This fact cannot be ignored that the inquest report has been prepared on 23.03.2002 which bears the crime number of the case as 126 of 2002 under Section 302, 307 I.P.C. Hence it cannot be said from any corner that the FIR was lodged delayed or anti time or it was a result of deliberations and after thought. The trial Court has discussed this issue at length in the impugned order and has arrived at the right conclusion that the FIR was not delayed and it was a genuine document.

49. Learned counsel for the appellants has also pointed out some contradictions in the statement of P.W.1. so far as the contents of FIR and written report are concerned but from perusal of the whole testimony of P.W.1 it is evident that the so called contradictions are minor contradictions and are ignorable. It is also pertinent to mention here that the FIR is not an encyclopedia and there is no requirement of law that every minute detail should find place in the FIR. One should always remember the mental state of P.W.1 before whom the real brother was shot dead.

50. Another submission made by the learned counsel for the appellants is that investigation of this case is faulty and no murder weapon has been recovered from either of the accused persons.

51. So far as the recovery of the murder weapon is concerned, emphasis may be laid down upon **Gopal Singh Vs. State of Uttrakhand (2013) 7 SCC 545 (para 12 & 13)** wherein the Hon'ble Apex Court found that the *"katta" and "knife"* used in causing the injuries to the victim were not recovered by the Investigating Officer but the doctor's evidence was available to prove that the victim had sustained gun shot and knife injuries, it was held that non-recovery of the said weapon was not fatal to the prosecution case as the injuries sustained by the victim proved the nature of the weapon used.

52. No other material negligence on the part of the I.O. as been pointed out by the learned counsel for the appellants. From perusal of the evidence on record, particularly on the deposition of the I.O. of the case, no material negligence or omission on the part of the I.O. is found. Moreover, since the prosecution case is well established and proved by the ocular evidence of the sole eye-witness supported with the medical evidence, negligence or omission, if any, on the part of the I.O. does

not adversely effect the prosecution version at all.

53. In **Hema Vs. State (2013) 81 ACC 1 (Supreme Court)** it has been held by the Hon'ble Apex Court that any irregularity or deficiency in investigation by I.O. need not necessarily lead to rejection of the case on prosecution when it is otherwise proved. The only requirement is to use of extra caution. The defective investigation cannot be fatal to prosecution when ocular testimony is found credible and cogent. It may be reiterated at the cause of repetition that investigation in the present case does not suffer with any material irregularity in the investigation.

54. Learned counsel for the appellants has vehemently argued that the P.W.1 Muneshwar Mahto, who is said to be the sole eye-witness of the occurrence is the real brother of the deceased and as such he is an interested witness. The prosecution was under obligation to produce any other independent witness of fact but it has not been done deliberately. It has been submitted that the evidence of an interested and relative witness cannot be relied upon particularly when the ocular version of only that witness is available on record.

55. In this context the Hon'ble Apex Court in **BhagwanJagannathMarkad Vs. State of Maharastra (2016) 10 SCC 537** has held that the testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such a case Court has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of the testimony of such related witness.

56. Reliance has been placed on **Surinder Kumar Vs. State of Punjab (2020) 2 SCC 563 by the learned A.G.A**. wherein it has been reiterated that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated.

57. In the present case, no doubt the witness Muneshwar Mahto is the real brother of the deceased but on this ground his evidence cannot be discarded because from the discussion made above even after a careful scrutiny his evidence is found credible and trustworthy and his presence at the place of occurrence is quite natural .

58. From the aforesaid discussion, it is very much clear that cumulative effect of the statement of witnesses examined by the prosecution, overwhelmingly establishes commission of offence by the appellants and in the facts and circumstances of the case their guilt has been proved beyond reasonable doubt.

59. One more aspect to be taken into consideration is that both the accused appellants have been convicted through the aid of Section 34 I.P.C. Section 34 I.P.C. reads like this:

Section 34. "Acts done by several persons in furtherance of common intention.--When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone".

60. Now, what a "common intention' is, has been explained by the Hon'ble Supreme Court in the case of Deepak

Verma (supra) wherein the Hon'ble Supreme Court explained it like this:

"12 "Common intention" implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Under this Section a preconcert in the sense of distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of offence showing a pre-arranged plan and prior concert (See Krishna Govind Patil Vs. State of Maharastra AIR 1963 SC 1413)

61. In **Indrapal Singh v. State of U.P., (2022) 4 SCC 631** the Hon'ble Apex Court held as under:

".....16.Suresh [Suresh v. State of U.P., (2001) 3 SCC 673, is also a case under Section 302 read with Section 34 IPC. This Court relied upon the judgments of the Privy Council in *Barendra Kumar Ghosh [Barendra Kumar Ghosh v. King Emperor,* 1924 SCC OnLine PC 49 : (1924-25) 52 IA 40 : AIR 1925 PC 1] *and Mahbub Shah v. King Emperor [Mahbub Shah v. King Emperor,* 1945 SCC OnLine PC 5 : (1944-45) 72 IA 148 : AIR 1945 PC 118] *and also a three-Judge Bench decision of this Court in Pandurang v. State of Hyderabad* [Pandurang v. State of Hyderabad, AIR 1955 SC 216 : 1955 Cri LJ 572] in the said case. This Court opined that to attract the applicability of Section 34 IPC the prosecution is under an obligation to establish that there existed a common intention which requires a prearranged plan. That before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of all. In the absence of a prearranged plan and thus a common intention, even if several persons simultaneously attack the man, each one of them would be individually liable for whatever injury he caused and none could be vicariously convicted for the act of any or the other. Thus, it is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference and incriminating facts must be incompatible with the innocence of the accused and incapable of explanation or any other reasonable hypothesis".

62. Since the learned counsel for the appellants has argued on this point that the act alleged was never done in furtherance of common intention of both the accused, we have given our anxious consideration to the arguments of the respective counsels and perused the material on record to satisfy ourselves whether the present case is one where the offence has been committed in furtherance of common intention of both the accused

63. It has been proved by the evidence on record that the accused appellants were waiting for the deceased and informant to reach the spot and when they reached there they chased them with country made pistols *(tamancha)* in their hands, both of them opened fire upon the deceased and he succumbed to injuries. On this aspect, the ocular version of P.W.1 has been held absolutely credible and reliable, hence there is left no room of doubt that the offence of murder was committed by both the accused appellants in furtherance of common intention of both. They have premeditated plan to kill the deceased and that is why they along with fire arms were

present nearby the place of occurrence and when the deceased tried to escape they chased him and killed him by fire. Hence we find no force in contention of the learned counsel for the appellants that the crime alleged was not committed in furtherance of common intention of both the accused appellants.

64. The accused appellants have also been convicted under Section 307/34 I.P.C. It has been alleged that during commission of the same occurrence the accused appellants in furtherance of common intention of them opened fire upon the informant Muneshwar Mahto with their *desi pistols* with intention to kill him.

65. It this context it is noteworthy that the P.W.1 was not caused any injury at all. There is no injury report of P.W.1 Muneshwar Mahto, the informant on record. A perusal of the cross examination of P.W.1 shows that offence under Section 307/34 I.P.C. has not been proved against the accused appellants beyond doubt. P.W.1 in his cross examination has stated that when the accused persons stopped their motor cycle they did not open any fire. He and his brother fled away together side by side and his brother was running at a distance of 2-1/2--3 feet from him. He has further stated that the accused persons had fired only twice and both the fires inflicted upon his brother. After the second fire, the accused persons did not open any fire upon him. The aforesaid statements of P.W.1 make the conviction of the accused persons under 307/34 doubtful and not convincing. The learned counsel for the appellants has drawn our attention towards the aforesaid statements of P.W.1 and we find force in his argument and, accordingly, conclude that offence under Section 307/34 has not been proved against the accused appellants beyond reasonable doubt.

66. From the discussion made above and in the totality of the facts and circumstances of the case, it is evident that the prosecution has proved each and every circumstance leading to the homicidal death of the deceased by cogent and trustworthy evidence. Both ocular and medical evidence corroborate each other. The murder was committed at a public place. The version of P.W.1 has been wholly reliable and his ocular version finds support from the medical evidence. He has deposed without any material contradiction about the whole occurrence right from the beginning till the death of the deceased who had succumbed to the injuries. The learned trial Court has examined each and every aspect of the matter and well appreciated the evidence on record, no infirmity, therefore, could be found in the judgment of the trial Court. We are of considered opinion that the prosecution has proved charge under Section 302/34 I.P.C. beyond reasonable doubt against both the accused appellants Umesh Mahto and Krishna Mahto but charge under Section 307/34 I.P.C. has not been proved beyond reasonable doubt against them.

67. Resultantly, appeal is **partly allowed** in the aforesaid terms. The conviction and sentence under Section 302/34 is hereby confirmed and the conviction and sentence under Section 307/34 I.P.C. is hereby set aside.

68. The appellants Umesh Mahto and Krishna Mahto are on bail, their bail bonds are cancelled and sureties are discharged.

69. The concerned Court is directed to take the appellants Umesh Mahto and Krishna Mahto into custody and send them to jail to serve out the remaining sentence.

70. The case of the convicts/ appellants be considered for remission by the State after completing therein incarceration period of 14 years as per the judgement of Hon'ble Supreme Court passed in Criminal Appeal No. 308/2022 ***(Saudan Singh Vs. State of U.P.) arising out of S.L.P. (Cr.) No. 4633 of 2021*** and the judgement of this High Court passed in **Vishnu Vs. State of U.P. being Criminal Appeal No. 204 of 2021.**

71. Let the lower Court record be transmitted back along with the certified copy of this judgement for information and necessary compliance.

72. Certify this judgement to the Court below immediately for necessary action.

(2022) 9 ILRA 140
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2022

BEFORE

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

First Appeal From Order No. 1481 of 2016

Smt. Sunita Khare & Ors. ...Appellants
Versus
Jabbar & Anr. ...Respondents

Counsel for the Appellants:
Sri Avinash Pandey

Counsel for the Respondents:
Sri Aditya Singh Parihar

A. Civil Law - Motor Vehicle Act, 1988 - Section 173-Enhancement of compensation-deceased was above 40 years and was Head-Cashier in bank earning a sum of Rs. 3,09,356/-per annum after tax deduction-Tribunal awarded a sum of Rs. 12,01,985/- together with interest @ 6% per annum as compensation but not granted future loss of income-the-By applying the multiplier of 14, the total loss of dependency comes to Rs. 37,53,512/-apart from that, Rs. 1,00,000/- awarded under non-pecuniary heads-After deducting 50% towards contributory negligence, claimant held entitled for increase of compensation a sum of Rs. 19,27,000/- with 7.5% interest from Rs. 12,01,985/- @ 6% per annum. (Paras 1 to 16)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Sarla Verma & ors. Vs DTC & anr.. (2009) ACJ 1298

2. Bajaj Allianz Gen. Ins. Co. Ltd. Vs Smt. Renu Singh & ors. FAFO No. 1818 of 2012

3. Rylands Vs Fletcher (1868) 3 HL (LR) 330

4. Jacob Mathew Vs St. of Punj. (2005) 0 ACJ SC 1849

5. Vimal Kanwar & ors. Vs Kishore Dan & ors. (2013) 3 TAC 6 SC

6. NICL Vs Pranay Sethi & ors. (2017) LawSuit (SC) 1093

7. NICL Vs Mannat Johal & ors. (2019) 2 TAC 705 SC

8. A.V. Padma & ors. Vs R. Venugopal (2012) 3 SCC 378

9. A.V. Padma & ors. Vs R. Venugopal (2012) 3 SCC 378

10. Gen. Mgr. KSRTC Trivandrum Vs Susamma Thomas & ors. (1994) AIR SC 1631

11. O.I.C. Ltd. Vs Chief Commr of Income Tax(TDS) R/Spl. Civil Appl. No. 4800 of 2021

12. Bajaj Allianz Gen. Ins. Co. Pvt. Ltd. Vs U.O.I. & ors.

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

1. This appeal has been preferred against the judgment and award dated 26.05.2012 passed by Motor Accident Claims Tribunal, Court No.9, Saharanpur (hereinafter referred to as "Tribunal') in M.A.C.P. No. 210 of 2010 (Smt. Sunita Khera and Others Vs. Jabbar and another), by which the learned Tribunal has awarded a sum of Rs.12,01,985/- with 6% per annum simple rate of interest. Learned Tribunal also held contributory negligence to the tune of 50% of each of the drivers, involved in the accident.

2. Brief facts as culled out from the record are that a claim petition was filed by appellants-claimants on account of death of Ram Kumar Khera with the averments that on 10.05.2010, the deceased was going on motorcycle No. UP 11B 9754, driving himself, at a moderate speed from Saharanpur to his house Yamunanagar. At about 7:00 pm when he reached near Bajaj Agency from Sarsawa, a truck Tata 407 bearing No.11 T 1174 came from opposite direction. This truck was being driven rashly and negligently and at a high speed by its driver. The truck driver hit the motorcycle of the deceased after coming from the wrong side in order to overtake a three wheeler. In this accident, Ram Kumar Khera sustained serious injuries. He was admitted to District Hospital, Saharanpur, where he was declared dead by the doctor. The age of the deceased was 39-40 years and he was working in Punjab National Bank as Head Cashier.

3. Heard Shri Avinash Pandey, learned counsel for the appellants-claimants and Shri Aditya Singh Parihar, learned counsel for the Insurance Company-respondent. Perused the record.

4. Learned counsel for the appellants-claimants has submitted that learned Tribunal has held that drivers of truck and motorcycle were guilty of 50% contributory negligence. Learned counsel submitted that this finding of learned Tribunal cannot be sustained because there is no evidence on record with regard to the fact that the deceased was also co-author of the accident. Plea of the contributory negligence, taken by the insurance company, is not proved. It is further submitted that at the time of accident, the truck driver was driving at a high speed and in order to overtake a three wheeler, the truck came from wrong side and hit the motorcycle of the deceased. In this way, the truck driver was solely negligent but learned Tribunal erroneously held the deceased also negligent to the tune of 50% while there is no basis on which the learned Tribunal has fixed the percentage of the negligence.

5. Learned counsel for the appellants-claimants next submitted that learned Tribunal has not calculated the amount of compensation in a right way because the deceased was serving in Punjab National Bank as a Head Cashier and at the time of his death in an accident his income was nearly Rs.35,000/- per annum but learned Tribunal has assessed the income on lower side. Learned counsel for the appellants also submitted that the income of the deceased is proved by witness PW6 but his testimony was wrongly disbelieved by the Tribunal. It is also submitted that learned Tribunal has not awarded any sum towards future loss of income and no reason for it is assigned in the impugned judgement. It is next submitted that non-pecuniary damages, awarded by the Tribunal, are on lower side and not in consonance with the settled law.

6. Per contra, learned counsel for the insurance company submitted that learned Tribunal has rightly held the deceased guilty of contributory negligence to the tune of 50% because it is proved on record that both the vehicles i.e. truck and motorcycle met with accident in the middle of road from opposite direction. In fact, it was head-on collision. Learned counsel vehemently argued that the truck driver is examined by insurance company as DW1 and the driver has deposed that at the time of accident, the deceased was coming from opposite direction and there were other bikers riding other bikes with him and all of them were involved in racing and the deceased lost balance of his motorcycle and dashed into the rear wheel of the truck. Learned counsel further submitted that in fact the accident had taken place due to sole negligence of the deceased. Learned counsel drew our attention towards site-plan also and submitted that site plan also goes to show that the accident had taken place in the middle of the road and not at the rear portion of the truck. It is submitted that learned Tribunal has not committed any error in holding the deceased also negligent.

7. With regard to the quantum of compensation, learned counsel for the insurance company submitted that PW6 was not rightly believed by learned Tribunal because he appeared before the Tribunal to prove the salary of the deceased but without original record and moreover the learned Tribunal has committed no mistake in relying upon the copy of the acknowledgment of the income tax return. Learned counsel for the insurance company very fairly admitted that no reason has been assigned by the learned Tribunal for not granting the future prospects but submitted that the Tribunal has applied multiplier of 15 which should have been of 14 as per the settled law in the case of ***Sarla Verma and Others Vs. Delhi Transport Corporation and Another, 2009 ACJ 1298.***

8. This appeal has been preferred mainly on two grounds, one for challenging contributory negligence attributed to the deceased and second on the issue of quantum of compensation awarded.

9. The controversy as to whose negligence was there in commission of accident has to be decided. The term negligence has to be viewed from the perspective of the law laid down till date.

10. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

11. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

12. The Division Bench of this Court in ***First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)*** decided on 19.7.2016 has held as under :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330.*** *From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

20. These provisions (section 110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file

an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (per three-Judge Bench in ***Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."

(Emphasis added)

13. It is not disputed that the accident had taken place when, the vehicles involved were coming from opposite directions and colluded in middle of the road. Although the site-plan is relied on by the insurance company and Tribunal cannot be disputed so as to show the place of accident, which is middle of the road. The driver of the truck Adesh Tyagi has deposed as DW1. He has appeared before the learned Tribunal and deposed in his testimony he has opined that at the time of accident, the deceased was coming on motorcycle from opposite direction and some other boys were also riding vehicles along with the deceased and all these bikers were involved in racing activity. It is deposed by DW1 that in the process of the racing, the deceased lost his control and dashed his motorcycle in the rear wheel of the truck. Keeping in view the evidence on record, we are in agreement with the finding of learned Tribunal with regard to the negligence of the deceased and we do not disturb the finding that the driver of truck and deceased both were co-authors of the accident and were negligent to the tune of 50% each.

Compensation:-

14. The issue so as to grant of quantum of compensation, has to be re-evaluated. It is not disputed that at the time of death, the deceased was serving in bank as a Head Cashier meaning thereby he was a salaried person. Learned Tribunal has held that PW6 has not produced original record before the Tribunal to prove the salary of the deceased. Although the standard of proof in motor accident claim case is not as strict as in civil suit or criminal trials but to prove the income/salary of the deceased, official record must be brought before the learned Tribunal. In this case, learned Tribunal has mentioned in impugned judgement that PW6 did not produce the original record and admitted that he has not brought the original record. But learned Tribunal took the holistic view and relied on the copy of the acknowledgment of the income tax return of the deceased for the assessment year 2009-10. The income tax return is authentic documentary proof of the income. Learned Tribunal deducted the amount of

income tax from the gross income and considered the annual income of the deceased at Rs.2,36,357/-, but learned Tribunal has relied on the acknowledgement of the income tax return which is not even signed and not disclosing the period. We find on record the best document to be relied on in connection with income of a salaried person, which is known as Form-16, which is issued by Punjab National Bank, Islam Nagar, where the deceased was an employee, which is paper No.79-C on record. The perusal of the aforesaid Form-16 shows that it pertains to the period from 01.04.2009 to 31.03.2010. This is the relevant period for assessment of income of the deceased because the death of the deceased had taken place on 10.05.2010. The aforesaid document shows gross income of salary at Rs.3,14,236/- and Rs.4880/- was deducted towards income tax. No other amount except income tax could be deducted in the light of the judgement of Apex Court in ***Vimal Kanwar and Others Vs. Kishore Dan and Others, 2013 (3) T.A.C. 6 (SC).*** Hence, the learned Tribunal has lost the sight and did not consider the Form-16 of the deceased, which is the mirror of his actual annual income, reflecting the tax component also. Hence, the annual income of the deceased at Rs.3,14,236 - Rs.4,880 = Rs.3,09,356/-.

15. Learned Tribunal has not awarded any sum for future prospects and no reason is assigned for non-granting the same. Learned counsel for the insurance company has vehemently submitted that at the time of accident the age of the deceased was above 40 years. The original educational certificate of the deceased is available on record in which his date of birth is mentioned as 21.01.1970. The accident had taken place on 10.05.2010 and, hence, at the time of accident, the age of the deceased was above 40 years and undoubtedly he was Head Cashier in Punjab National Bank. In the light of judgement of ***National Insurance Co. Ltd. Vs. Pranay Sethi and Others, 2017 LawSuit (SC) 1093,*** 30% would be added towards future loss of income. Learned Tribunal has rightly deducted 1/3 for personal expenses of the deceased with which we concur because he was survived by three dependents. Learned Tribunal has applied multiplier of 15 but as per judgement of Sarla Verma and others (supra) as the age of the deceased was within the bracket of 40-45 years, the multiplier of 14 will be applied. Apart from it, in the light of judgement of Pranay Sethi (supra) appellants would be entitled to get Rs.15,000/- for loss of estate and Rs.15,000/- for funeral expenses. The wife of the deceased would also be entitled to get Rs.40,000/- for loss of consortium. Hence appellants-claimants will be entitled to Rs.15000+15000+40000= Rs.70,000/- towards non-pecuniary heads with 10% increase for every three years. We fix lump-sum amount of Rs.1,00,000/- under non-pecuniary heads.

16. Hence, the total amount of compensation, payable to the appellant-claimants is computed herein below:-

(i) Annual income : Rs.3,09,356/-

(ii) Percentage towards future prospects : 30% namely Rs.92,806/-

(iii) Total income : Rs.4,02,162/-

(iv) Income after deduction of 1/3rd: Rs.4,02,162 - Rs.1,34,054= Rs.2,68,108/-

(v) Multiplier applicable : 14

(vi) Loss of dependency: Rs.2,68,108/- X 14 = Rs.37,53,512/-

(vii) Amount under non pecuniary head : Rs.1,00,000/-

(viii) Total compensation: Rs.37,53,512/- + 1,00,000/- = Rs. Rs.38,53,512/-

(ix)Amount after 50% deduction towards contributory negligence : Rs. 38,53,5012/- - 19,26,756 = **Rs.19,27,000 /-** (round off)

17. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in ***National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)*** wherein the Apex Court has held as under:

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

18. Learned Tribunal has awarded rate of interest as 6% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

19. We deem it fit to rely on the judgment of the Apex Court in the case of **A.V. Padma and others Vs. R. Venugopal**, 2012 (3) SCC 378 wherein the Apex Court has considered the judgment rendered in General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas and others, AIR 1994 SC 1631 for disbursement.

20. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma (supra), the order of investment is not passed because claimants are neither illiterate nor rustic villagers.

21. Recently the Gujarat High Court in case titled the **Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS), R/Special Civil Application No.4800 of 2021** decided on 05.04.2022, it is held that interest awarded by the tribunal or appellate court under Section 171 of Motor Vehicles Act is not taxable under the Income Tax Act, 1961.

22. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As 12 years have elapsed since occurrence of accident, the amount be deposited in the Saving Account of claimants in Nationalized Bank. The amount shall be credited in the said account with without investment as the case may be.

23. In view of the above, the appeal is partly **allowed**. Judgment and award passed by the learned Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

24. Record be transmitted to Tribunal.

(2022) 9 ILRA 147
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE CHANDRA KUMAR RAI, J.

Writ Tax No. 554 of 2022
with
other connected cases

Vikas Gupta ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ankur Agarwal, Sri Ankur Agarwal, Sri Ashish Bansal

Counsel for the Respondents:
A.S.G.I., Sri Gaurav Mahajan, Sri Krishna Agarawal, Sri Praveen Kumar

A. Tax Law – Reassessment - Income Tax Act, 1961 - Sections 147, 148, 151 & 282A - Information Technology Act, 2000 - Sections 2(d), 2(p) & 2(t) - General Clauses Act, 1897 - Section 3(56).

Assumption of jurisdiction – Unsigned Approval - Sub-section (1) of S.282A contains the following necessary conditions:

(i) such notice or other document **shall be signed** by that Authority **and**
(ii) issued in paper form or communicated in electronic form by that authority
(iii) in accordance with such procedure as may be prescribed. (Para 16)

Words and Phrases – (a) *'and'* - The word "and" should normally be given its ordinary meaning and should be understood in conjunctive sense. The first and foremost condition u/s 282A(1) is that notice or other document to be issued by any income-tax authority shall be signed by that authority. **The word "and" has been used in sub-section (1), in conjunctive sense meaning thereby that such notice or other document has first to be signed by the authority and thereafter it may be issued either in paper form or may be communicated in electronic form by that authority.** In the present set of facts, it is the admitted case of the respondents that the PCIT has not recorded satisfaction under his signature prior to the issuance of notice by the Assessing Officer u/s 148 of the Act, 1961. (Para 18, 19, 27)

(b) *'Signed'* - General Clauses Act, 1897: Section 3(56) - 'sign', with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include 'mark', with its grammatical variations and cognate expressions. As per Webster's New World Dictionary, the word "sign" means "to write one's name on, as in acknowledging authorship, authorising action etc." (Para 20, 21)

(c) *'shall be signed'* - The expression "shall be signed" used in S.282A(1) of the Act, 1961 makes the signing of the notice or other document by that authority a mandatory requirement. It is not a ministerial act or an empty formality which can be dispensed with. (Para 23)

"Signed" means to sign one's name; to signify assent or adhesion to by signing one's name; to attest by signing or when a person is unable to write his name then affixation of "mark" by such person: The document must be signed or mark must be affixed in such a way as to make it appear that the person signing it or affixing his mark is the author of it. Therefore, a notice or other document as referred in S.282A(1) of the Act, 1961 will take legal effect only after it is signed by that income-tax authority, whether physically or digitally. The usage of the word "shall" make it a mandatory requirement. (Para 22, 23, 25, 28)

B. Validity of recording satisfaction u/s 151 by the Commissioner for the purposes

of issuance of notice u/s 148 of the Act, 1961 – An Assessing Officer may issue jurisdictional notice u/s 148 only after the prescribed authority u/s 151 of the Act records his satisfaction that it is fit case for issue of notice u/s 148 - S.151 of the Act, 1961 specifically provides recording of satisfaction by the prescribed authority, on the reasons recorded by the Assessing Officer that it is a fit case for the issue of notice u/s 148 of the Act, 1961. **Unless the prescribed authority u/s 151 of the Act, 1961 records his satisfaction on application of mind and under his signature, there cannot be a valid satisfaction empowering the Assessing Officer to assume jurisdiction to issue notice u/s 148 of the Act, 1961.** (Para 28)

In the present case, there was no valid satisfaction recorded by the by the prescribed authority u/s 151 of the Act, 1961 when the Assessing Officer issued notice to the assessees u/s 148 of the Act, 1961. Subsequent to issuance of the notice u/s 148 of the Act 1961 by the Assessing Officer, the satisfaction u/s 151 was digitally signed by the prescribed authority. Therefore, the point of time when the Assessing Officer issued notices u/s 148, he had no jurisdiction to issue the impugned notices u/s 148 of the Act, 1961. (Para 29)

There was no valid satisfaction u/s 151, therefore, the question whether Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner of Income-tax for the purposes of recording of satisfaction u/s 151 is a designated income-tax authority u/s 282A of the Act, 1961, is left open. **Writ Tax No. 554 of 2022, Writ Tax No. 370 of 2022, Writ Tax No. 427 of 2022, Writ Tax No. 475 of 2022, Writ Tax No. 487 of 2022, Writ Tax No. 555 of 2022, Writ Tax No. 642 of 2022 and Writ Tax No. 710 of 2022 are hereby <u>allowed</u>. The impugned notices u/s 148 of the Act, 1961 and the reassessment orders, if any, passed by the Assessing Officer and all consequential proceedings are hereby quashed.** The concerned income-tax authority shall be at liberty to initiate proceedings, if still permissible, strictly in accordance with law and on due observance of the relevant provisions of the Act, 1961 and the Rules framed thereunder. **Writ Tax No. 694 of 2022 is <u>dismissed</u>** inasmuch as recording of satisfaction by the PCIT and issuance of notice u/s 148 by the Assessing Officer are simultaneous. Liberty is granted to the petitioner to file appeal to challenge the reassessment order. (Para 30 to 32) (E-4)

<u>Precedent followed</u>:

1. Maharaja Sir Pateshwari Prasad Singh Vs St. of U.P., (1963) 50 ITR 731 (Para 19)

2. Rattan Anmol Singh Vs Ch. Atma Ram, 1955 (1) SCR 481; AIR 1954 SC 510 (Para 21)

3. Hindustan Construction Co. Ltd. Vs U.O.I., 1967 (1) SCR 543; AIR 1967 SC 526 (Para 22)

4. Dakshin Haryana Bijli Vitran Nigam Ltd. Vs Navigant Technologies (P.) Ltd., (2021) 7 SCC 657 (Para 23)

5. Commissioner of Agricultural Income Tax Vs Keshab Chandra Mandal, 1950 SCR 435; AIR 1950 SC 265; (1950) 18 ITR 569 (Para 24)

6. Chhugamal Rajpal Vs S.P. Chaliha & ors., (1971) 1 SCC 453; AIR 1971 SC 730; (1971) ITR 603 (Para 26)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard learned counsel for the petitioners, Sri S.P. Singh, learned Additional Solicitor General of India assisted by Sri Krishna Agrawal and Sri Praveeen Kumar, learned counsel for the respondents in all the above-noted writ petitions.

2. These writ petitions have been filed praying to quash the notice under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act, 1961')

and the reassessment orders passed under Section 147/148 of the Act, 1961.

3. Since common questions of law on similar set of facts are involved in this batch of writ petitions, therefore, with the consent of learned counsels for the parties, the Writ Tax No.554 of 2022 have been heard as a leading writ petition and facts of this case are being noted.

4. In the above noted writ petitions, the following reliefs have been sought by the petitioners:

"WRIT TAX No. 554/22

(I) Issue a writ, or direction in the nature of Certiorari ***quashing the impugned notice u/s 148 of the Act, dated 31.03.2021,*** *issued by respondent no.3, for* ***A.Y. 2013-14.*** *(Annexure No. 4).*

(ii) Issue a writ, order or direction in the nature of Prohibition thereby restraining Respondent No. 3 from undertaking further reassessment proceedings pending before him against the Petitioner, for A.Y. 2013-14 in pursuance of notice u/s 148 of the Act, dated 31.03.2021.

(iii) Issue any other writ order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(iv) Award the costs of the petition to the petitioner.

(v) Issue a Writ, Order or Direction in the nature of Certiorari ***to quash the Assessment Order dated 23.03.2022*** *passed by Respondent No.4 (Annexure - 13) being in consequence of the proceedings which is without jurisdiction and without giving an effective opportunity of being heard.*

(vi) Issue writ order or direction in nature of mandamus directing Respondent Nos.3 & 4 not to proceed further towards the recovery of demand created in consequence of the assessment order dated 23.03.2022 (Annexure - 13)/ not treat the Petitioner as assessee in default, during the pendency of the present writ petition.

WRIT TAX No. - 370 of 2022

(a) Issue a writ, order or direction in the nature of Certiorari quashing the notice dated 08.02.2022 (Annexure-1 to the writ petition) issued by the Respondent No. 1 disposing of the objections raised by the petitioner against the issuance of notice dated 31.03.2021 under Section 148 of the Income Tax Act for the Assessment Year 2015-16;

(b) Issue a writ, order or direction in the nature of Certiorari quashing the notice dated 08.02.2022 (Annexure-3 to the writ petition) issued by the Income Tax Department under Section 143(2) read with Section 147 of the Income Tax Act, 1961;

(c) Issue a writ, order or direction in the nature of Certiorari quashing ***the notice dated 31.03.2021 issued by the Assistant Commissioner of Income Tax*** *Officer, Circle 5(1)(1), Gautam Budh Nagar* ***under Section 148 of the Income Tax Act, 1961 for the Assessment Year 2015-16*** *(Annexure-2 to the writ petition);*

(c-i) Issue a writ, order or direction in the nature of Certiorari ***quashing the assessment order dated 31.03.2022*** *u/s 147 of the Income Tax Act, 1961 passed by the respondent no. 3, the demand notice and computation sheet issued to the petitioner (Annexure-19 to the writ petition);*

(d) Issue a writ, order or direction in the nature of Mandamus

restraining the respondents from proceeding with the consequential reassessment initiated vide notice dated 31.03.2021 issued under Section 148 of the Income Tax Act, particularly, the notices dated 23.11.2021 (Annexure-9 to the writ petition) and 08.02.2022 (Annexure-3 to the writ petition) issued under Section 142(1) and Section 143(2) read with Section 147 of the Income Tax Act respectively;

(d-i) Issue a writ, order or direction in the nature of Mandamus restraining the respondents from taking any coercive steps pursuant to the show cause notice dated 31.03.2022 issued by the respondent no. 3 u/s 274 read with Section 271(1)(c) of the Income Tax Act, 1961 to the petitioner (Annexure-22 to the writ petition).

WRIT TAX No. - 427 of 2022

(a) Issue a writ, order or direction in the nature of Certiorari quashing the notice dated 16.02.2022 (Annexure-1 to the writ petition) issued by the Respondent No. 1 disposing of the objections raised by the petitioner against the issuance of notice dated 31.03.2021 under Section 148 of the Income Tax Act for the Assessment Year 2014-15;

(b) Issue a writ, order or direction in the nature of Certiorari quashing the notice dated 25.11.2021 (Annexure-3 to the writ petition) issued by the Income Tax Department under Section 143(2) read with Section 147 of the Income Tax Act, 1961;

(c) Issue a writ, order or direction in the nature of Certiorari ***quashing the notice dated 31.03.2021 (served on 01.04.2021)*** *(Annexure-2 to the writ petition) issued by the Income Tax Officer, Ward-2(3) (1), Kanpur Nagar* ***under Section 148 of the Income Tax Act, 1961 for the Assessment Year 2014-15;***

(d) Issue a writ, order or direction in the nature of Mandamus restraining the respondents from proceeding with the consequential reassessment proceedings initiated vide notice dated 31.03.2021 issued under section 148 of the Income Tax Act, particularly, the notice dated 25.11.2021 issued under Section 143(2) read with Section 147 of the Income Tax Act respectively;

WRIT TAX No. - 475 of 2022

(i) issue writ, order or direction in the nature of certiorari so as to ***quash the notice dated 31.03.2021*** *(Annexure - 10) issued* ***under section 148*** *by the Respondent No3, as the same being illegal having been issued without prior approval under section 151 of the Act, hit by first proviso to section 147 and is also based on 'change of opinion';*

(ii) issue writ, order or direction in the nature of certiorari so as to quash the notices dated 20.12.2022, 22.02.2022 & 28.02.2022 (Annexures 15, 18 & 19 respectively) issued by Respondent No.2 under section 142(1) of the Income Tax Act, for the purposes of making reassessment and that too in pursuance of an invalid notice;

WRIT TAX No. - 487 of 2022

(i) Issue writ, or direction in the nature of Certiorari so as ***to quash the notice dated 31.03.2021*** *(Annexure - 6)* ***issued under section 148*** *by the Respondent No3, as the same being illegal having been issued without prior approval under section 151 of the Act, hit by first*

proviso to section 147 and is also based on 'change of opinion';

(ii) issue writ, order or direction in the nature of certiorari so as to quash the notices dated 08.02.2022 & 28.02.2022 (Annexures 14 & 16 respectively) issued by Respondent No.2 under section 142(1) of the Income Tax Act, for the purposes of making reassessment and that too in pursuance of an invalid notice;

WRIT TAX No. - 555 of 2022

(i) Issue a writ, or direction in the nature of Certiorari ***quashing the impugned notice u/s 148 of the Act, dated 31.03.2021,*** *issued by respondent no.3, for A.Y. 2013-14. (Annexure No. 4).*

(ii) Issue a writ, order or direction in the nature of Prohibition thereby restraining Respondent No. 3 from undertaking further reassessment proceedings pending before him against the Petitioner, for A.Y. 2013-14 in pursuance of notice u/s 148 of the Act, dated 31.03.2021.

(III) Issue any other writ order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(iv) Award the costs of the petition to the petitioner.

(v) Issue a Writ, Order or Direction in the nature of Certiorari ***to quash the Assessment Order dated 31.03.2022*** *passed by Respondent No.4 (Annexure 11) being in consequence of the proceedings which is without jurisdiction and without giving an effective opportunity of being heard.*

(vi) Issue writ order or direction in nature of mandamus directing Respondent Nos.3 & 4 not to proceed further towards the recovery of demand created in consequence of the assessment order dated 31.03.2022 (Annexure -11)/ not treat the Petitioner as assessee in default, during the the present writ petition.

WRIT TAX No. - 642 of 2022

A. issue a writ, order or direction in the nature of certiorari **quashing the impugned notice issued under section 148** of income tax act dt. 31.03.2021 and order disposing off objections dt. 26.03.2022, as also the sanction authorising the issuance of such notice for a.y. 2013-14.

B Issue a writ, order or direction in the nature of certiorari quashing the impugned order of reassessment dt. 30.03.2022 which is made contrary to settled principles of law and in violation to the settled principles of natural justice.

WRIT TAX No. - 694 of 2022

1. issue a writ, order or direction in the nature of certiorari ***quashing the impugned notice issued under section 148*** of income tax act dt. 31.03.2021 and order disposing off objections dt. 10.02.2022, since the notice u/s 148 has been issued without obtaining the sanction of respondent 2, which was received post-facto i.e. after the issuance of impugned notice.

2. issue a writ, order or direction in the nature of certiorari ***quashing the impugned order of reassessment dt. 26.03.2022***

3. Issue any other writ, order or direction as this hon'ble court may deem fit and proper in the circumstances of the case.

4. award costs in favour of the petitioner

WRIT TAX No. - 710 of 2022

1. Issue a writ, order or direction in the nature of certiorari ***quashing the***

impugned notice issued under section 148 *of income tax act dt. 31.03.2021 and order disposing off objections dt. 02.03.2022, as also the sanction authorising the issuance of such notice for a.y. 2013-14.*

2. issue a writ, order or direction in the nature of certiorari ***quashing the impugned order of reassessment dt. 28.03.2022*** *and consequential proceeding which is made contrary to settled principles of law and in violation to the settled principles of natural justice.*

3. issue any other writ, order or direction as this hon'ble court may deem fit and proper in the circumstances of the case.

4. award costs in favour of the petitioner"

Facts:-

5. In this batch of writ petitions, the admitted facts are that on the basis of unsigned alleged digital approval under Section 151, Assessing officer issued notices to the assessees under Section 148 of the Act, 1961. The point of time when the aforesaid approval under Section 151 of the Act, 1961 was signed, is subsequent to the issuance of notices by the Assessing Officer under Section 148 of the Act, 1961.

6. Facts of Writ Tax No.554 of 2022 are that as per approval under Section 151 of the Act, 1961 for the Assessment Year 2013-14 filed as Annexure-4 to the writ petition, the Principal Commissioner of Income Tax (for short "PCIT') **granted approval on 31.03.2021 at 07:05 P.M., i.e. 19:05 hours by digitally signing the approval.** Jurisdictional **notice under Section 148 of the Act, 1961** was digitally signed by the respondent No.3/ Assessing officer **on 31.03.2021 at 05:43 P.M.**, i.e. 17:43 hours, **which is prior to the grant of digitally signed approval by the PCIT under Section 151 of the Act, 1961.** As per Section 151 of the Act, 1961, as stood at the relevant time no notice shall be issued by the Assessing Officer after expiry of four years from the end of the Assessment Year unless the Principal Chief Commissioner/ PCIT is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for issuing such notice.

7. In **Writ Tax No. 370 of 2022** the impugned notice under section 148 of the Act, 1961 relating to the assessment year 2015-16 was issued on 31.3.2021 at 6.33 p.m. whereas the satisfaction under section 151 was recorded by the PCIT subsequently at 7.15 p.m. on the same day. In **Writ Tax No. 427 of 2022** the impugned notice under section 148 of the Act, 1961 relating to the assessment year 2014-15 was issued on 31.3.2021 at 3.32 p.m. whereas the satisfaction under section 151 was recorded by the PCIT subsequently at 4.02 p.m. on the same day. In **Writ Tax No. 475 of 2022** the impugned notice under section 148 of the Act, 1961 relating to the assessment year 2014-15 was issued on 31.3.2021 at 3.34 p.m. whereas the satisfaction under section 151 was recorded by the PCIT subsequently at 4.02 p.m. on the same day. In **Writ Tax No. 487 of 2022** the impugned notice under section 148 of the Act, 1961 relating to the assessment year 2015-16 was issued on 31.3.2021 at 3.38 p.m. whereas the satisfaction under section 151 was recorded by the PCIT subsequently at 4.02 p.m. on the same day. In **Writ Tax No. 555 of 2022** the impugned notice under section 148 of the Act, 1961 relating to the assessment year 2013-14 was issued on 31.3.2021 at 6.32 p.m. whereas the satisfaction under section 151 was recorded by the PCIT subsequently at 7.00 p.m. on the same day. In **Writ Tax No.**

642 of 2022 the impugned notice under section 148 of the Act, 1961 relating to the assessment year 2013-14 was issued on 31.3.2021 at 6.25 p.m. whereas the satisfaction under section 151 was recorded by the PCIT subsequently at 7.07 p.m. on the same day. In **Writ Tax No. 710 of 2022** the impugned notice under section 148 of the Act, 1961 relating to the assessment year 2013-14 was issued on 31.3.2021 at 2.40 p.m. whereas the satisfaction under section 151 was recorded by the PCIT subsequently at 3.52 p.m. on the same day.

8. In **Writ Tax No. 694 of 2022** the impugned notice under section 148 of the Act, 1961 relating to the assessment year 2013-14 was issued on 31.3.2021 at 4.01 P.M. by Assessing Officer and satisfaction was recorded by the PCIT at 4.01 p.m. Thus the recording of satisfaction under section 151 and issuance of notice under section 148 are simultaneous.

Submissions on behalf of the Petitioners:-

9. Learned counsel for the petitioners submitted that the impugned notices under Section 148 of the Act, 1961 are wholly without jurisdiction, inasmuch as, it was issued without prior satisfaction/approval of the competent authority under Section 151 of the Act, 1961. Since at the point of time when notices under Section 148 of the Act, 1961 were issued, there was no valid satisfaction/ approval of the competent authority, therefore, the Assessing Officer could not assume jurisdiction to issue notice under Section 148 of the Act, 1961. Hence, the notices under Section 148 of the Act, 1961 are without jurisdiction and thus invalid. Consequently, the subsequent proceedings including reassessment orders are also without jurisdiction. Section 282A of the Act, 1961 has no relevance with respect to the recording of satisfaction or prior permission by the PCIT under Section 151 of the Act, 1961.

Submissions on behalf of the respondents:-

10. Learned Additional Solicitor General of India has submitted that the unsigned satisfaction of the PCIT stands validated in view of Section 282A of the Act, 1961 inasmuch as the digital or physical unsigned satisfaction recorded by the PCIT shall be deemed to be authenticated under Section 282A of the Act, 1961 read with Rule 127A of the Income Tax Rules, 1962 and Sections 2(d), 2(p) and 2(t) of the Information Technology Act, 2000 inasmuch as satisfaction bears the name and office of a designated income tax authority, i.e. PCIT. He submits that the moment the PCIT has pushed in "Generate Tap in ITBA System" his satisfaction under Section 151 of the Act, 1961, would be deemed to be an authenticated document in terms of Section 282A and thus is a valid satisfaction under Section 151 of the Act, 1961. The digital signature affixed by the PCIT on his aforesaid satisfaction under Section 151 of the Act, 1961, subsequent to issuance of the notice by the Assessing Officer under Section 148, would not invalidate the notices under Section 148 of the Act, 1961. He referred to paragraphs 17, 18 and 19 of the supplementary counter affidavit dated 02.05.2022 sworn by Nisha Gupta, Income Tax officer, Ward-5(2)(5), NOIDA, which read as under:

"17. That a perusal of the aforesaid provisions demonstrates that if a notice or other document is issued served or given for the purpose of the Act by any income tax authority, the same shall be

deemed to be authenticated, if the name and office of a designated income tax authority is printed, stamp or otherwise written thereon.

18. That the aforesaid provisions of law clearly demonstrates that the approval issued by the PCIT in electronic form, without affixing digital signature is also deemed to be authenticated and therefore affixation of digital signature is not a precondition for validation of the document.

19. That it is respectfully submitted that in view of the above, the approval granted by PCIT is valid approval even if the digital signature was affixed later in point of time."

Discussion and Findings:-

11. We have carefully considered the submissions of the learned counsels for the parties and perused the records of the writ petitions. Before we proceed to examine the rival contentions of learned counsels for the parties, it would be appropriate to reproduce below the relevant provisions of the Act, 1961, the Income Tax Rules, 1962 and Information and Technology Act, 2000:-

"A. Income Tax Act, 1961

"Issue of notice where income has escaped assessment.

Section 148. *(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 :*

Provided *that in a case--*

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2) of section 143after the expiry of twelve months specified in the proviso to sub-section (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, re-assessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice:

Provided further *that in a case--*

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of section 153, every such notice

referred to in this clause shall be deemed to be a valid notice.

Explanation.--For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.

Sanction for issue of notice.

Section 151. *(1) No notice shall be issued under section 148 by an Assessing Officer, after the expiry of a period of four years from the end of the relevant assessment year, unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer, that it is a fit case for the issue of such notice.*

(2) In a case other than a case falling under sub-section (1), no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.

(3) For the purposes of sub-section (1) and sub-section (2), the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner or the Joint Commissioner, as the case may be, being satisfied on the reasons recorded by the Assessing Officer about fitness of a case for the issue of notice under section 148, need not issue such notice himself.

Authentication of notices and other documents.

282A. *(1) Where this Act* ***requires a notice or other document to be issued*** *by any income-tax authority,* ***such notice or other document shall be signed and issued in paper form or communicated in electronic form by that authority in accordance with such procedure as may be prescribed.***

(2) ***Every notice or other document to be issued, served or given*** *for the purposes of this Act by any income-tax authority,* ***shall be deemed to be authenticated*** *if the name and office of a* ***designated income-tax authority*** *is printed, stamped or otherwise written thereon.*

(3) For the purposes of this section, a ***designated income-tax authority shall mean any income-tax authority authorised by the Board to issue, serve or give such notice or other document*** *after authentication in the manner as provided in sub-section (2).*

B. Income Tax Rules, 1962:-

Authentication of notices and other documents.

Rule 127A*. (1) Every notice or other document communicated in electronic form by an income-tax authority under the Act shall be deemed to be authenticated,-*

(a) in case of electronic mail or electronic mail message (hereinafter referred to as the e-mail), if the name and office of such income-tax authority-

(i) is printed on the e-mail body, if the notice or other document is in the e-mail body itself; or

(ii) is printed on the attachment to the e-mail, if the notice or other document is in the attachment,

and the e-mail is issued from the designated e-mail address of such income-tax authority;

(b) in case of an electronic record, if the name and office of the income-tax authority-

(i) is displayed as a part of the electronic record, if the notice or other document is contained as text or remark in the electronic record itself; or

(ii) is printed on the attachment in the electronic record, if the notice or other document is in the attachment,

and such electronic record is displayed on the designated website.

(2) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) shall specify the designated e-mail address of the income-tax authority, the designated website and the procedure, formats and standards for ensuring authenticity of the communication.

Explanation. - For the purposes of this rule, the expressions-

(i) "electronic mail" and "electronic mail message" shall have the same meanings respectively assigned to them in Explanation to section 66A of the Information Technology Act, 2000 (21 of 2000);

(ii) "electronic record" shall have the same meaning as assigned to it in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000).

C. Information Technology Act, 2000:-

***Section 2(d) —affixing electronic signature** with its grammatical variations and cognate expressions means adoption of any methodology or procedure by a person for the purpose of authenticating an electronic record by means of digital signature;*

Section 2(p) —digital signature means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3;

***Section 2(t) —**electronic record means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;*

***Explanation to Section 66-A--** For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message."*

12. Annexure-4 to the writ petition is the alleged approval, under section 151 of the Act, 1961 for the Assessment Year 2013-14 which was granted by the PCIT on 31.03.2021 at 7:05 P.M. i.e. 19:05 hours by digitally signing the approval. Notice under Section 148 of the Income Tax Act, 1961 was digitally signed by the respondent no.3 on 31.03.2021 at 5:43 P.M. i.e. 17:43 hours, which is prior to the satisfaction recorded by the PCIT. **Section 151** of the Act, 1961 as stood at the relevant time provides that **no notice shall be issued under section 148** of the Act by Assessing Officer after expiry of period of 4 years from the end of assessment year **unless Principal Chief Commissioner** or Chief Commissioner or Principal Commissioner or Commissioner **is satisfied,** on the reason recorded by the assessing officer that **it is a fit case for issuing such notice.**

13. Thus, as per provision of Section 151 of the Income Tax Act, 1961, an assessing officer gets jurisdiction to issue notice to an assessee under Section 148 of the Act, 1961 after Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner of Income Tax is satisfied on the reason recorded by the assessing officer that it is a fit case for issuing such notice. The date and time of the approval granted digitally under Section 151 of the Act and the date and time of the notice under section 148 of the Act, shows that the satisfaction was recorded by the PCIT digitally after the notice under section 148 was digitally signed and issued by the Assessing Officer.

14. Thus, the following questions arise for consideration:-

(a) Whether an unsigned content in an electronic record said to be pushed through electronic mode at a particular point of time, can be said to be a valid satisfaction of the PCIT under Section 151 for assumption of jurisdiction by the Assessing Officer to issue jurisdictional notice to an assessee under Section 148 of the Act, 1961?

(b) Whether impugned notices under Section 148 of the Act, 1961 issued by the Assessing Officer without satisfaction signed by the PCIT under Section 151 of the Act, 1961, is a valid notice?

15. The whole case set up by the respondents is that "unsigned approval" issued in electronic form to the Assessing Officer is a valid approval as it is an authenticated document within the meaning of Section 282A of the Act, 1961. Therefore, we proceed to examine correctness of the stand taken by the respondents in their oral submissions as also made in paragraphs 17, 18 and 19 of supplementary counter affidavit dated 02.05.2022.

Whether unsigned alleged approval is an authenticated document under Section 282A of the Act, 1961:-

16. Sub-section (1) of Section 282A contains the following necessary conditions:

(i) **such notice or other document shall be signed by that Authority and**

(ii) issued in paper form or communicated in electronic form by that authority

(iii) in accordance with such procedure as may be prescribed.

17. The procedure for communication in electronic form has been prescribed under Rule 127A of the Rules 1962.

18. The first and foremost condition under Section (1) of Section 282A is that notice or other document to be issued by any Income Tax Authority shall be signed by that authority. The word "and" has been used in sub-Section (1), in conjunctive sense meaning thereby that **such notice or other document has first to be signed by the authority and thereafter it may be issued either in paper form or may be communicated in electronic form by that authority. In the present set of facts, it is the admitted case of the respondents that the PCIT has not recorded satisfaction under his signature prior to the**

issuance of notice by the Assessing Officer under Section 148 of the Act, 1961.

19. In the case of **Maharaja Sir Pateshwari Prasad Singh vs. State of U.P. (1963) 50 ITR 731,** three judges bench of Hon'ble Supreme Court held that the word "and" should normally be given its ordinary meaning and should be understood in conjunctive sense. Thus, as per provisions of sub-Section (1) of Section 282A, the notice or other document shall be signed and thereafter it shall be issued in paper form or may be communicated in electronic form then the document or notice so issued or communicated, shall be deemed to be an authenticated notice or document in terms of Rule 127A of the Rules, 1962.

Signed - Meaning:-

20. The word "**signed**" has not been defined under the Act, 1961, which is a central Act. However, it has been defined in Section 3(56) of the General Clauses Act, 1897, as under:

"3(56) "sign", with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include "mark", with its grammatical variations and cognate expressions;"

21. As per Webster's New World Dictionary, the word "sign' means "to write one's name on, as in acknowledging authorship, authorising action etc.' In **Rattan Anmol Singh vs. Ch. Atma Ram, 1955 (1) SCR 481 : AIR 1954 SC 510 (para-6),** Hon'ble Supreme Court explained the meaning of the word "sign' and held as under:

"6. The Oxford English Dictionary sets out thirteen shades of meaning to the word "subscribe", most of them either obsolete or now rarely used. The only two which can have any real relation to the present matter are the following:

1. "To write (one's name or mark) on, originally at the bottom of a document, especially as a witness or contesting party; to sign one's name to."

This meaning is described as "rare."

*2. "**To sign one's name to; to signify assent or adhesion to by signing one's name; to attest by signing."***

This appears to be its modern meaning, and is also one of the meanings given to the word "sign", namely "to attest or confirm by adding one's signature; to affix one's name to (a document) etc."

22. In **Hindustan Construction Co. Ltd. vs. Union of India, 1967 (1) SCR 543 : AIR 1967 SC 526 (Para-7),** Hon'ble Supreme Court held as under:

"7. This brings us to the meaning of the word "sign" as used in the expression "signed copy". In Webster's New World Dictionary, the word "sign" means "to write one's name on, as in acknowledging authorship, authorising action etc." To write one's name is signature. Section 3(56) of the General Clauses Act, No. 10 of 1897, has not defined the word "sign" but has extended its meaning with reference to a person who is unable to write his name to include "mark" with its grammatical variations and cognate expressions. ***This provision indicates that signing means writing one's name on some document or paper.*** *In Mohesh Lal v. Busunt Kumaree, (1881) ILR 6 Cal 340, a question arose as*

to what "signature" meant in connection with S.20 of the Limitation Act, No. IX of 1871. It was observed that "where a party to a contract signs his name in any part of it in such a way as to acknowledge that he is the party contracting, that is a sufficient signature". It was further observed that ***the document must be signed in such a way as to make it appear that the person signing it is the author of it, and if that appears it does not matter what the form of the instrument is, or in what part of it the signature occurs. "***

23. In **Dakshin Haryana Bijli Vitran Nigam Ltd. vs. Navigant Technologies (P.) Ltd. (2021) 7 SCC 657 (paras 25 and 26)**, Hon'ble Supreme Court observed that **the words ''shall be signed', makes signing mandatory for authentication** and held as under:

"Legal requirement of signing the award

25. The legal requirement of signing the arbitral award by a sole arbitrator, or the members of a tribunal is found in Section 31 of the 1996 Act, which provides the form and content of an arbitral award. Section 31 provides that :

"31. Form and contents of arbitral award.- *(1) An arbitral award shall be made in writing and* ***shall be signed*** *by the members of the arbitral tribunal. (2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.*

....

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party."

26. Section 31 (1) is couched in mandatory terms, and provides that an arbitral award shall be made in writing and signed by all the members of the arbitral tribunal. If the arbitral tribunal comprises of more than one arbitrator, the award is made when the arbitrators acting together finally express their decision in writing, and is authenticated by their signatures. ***An award takes legal effect only after it is signed by the arbitrators, which gives it authentication. There can be no finality of the award, except after it is signed, since signing of the award gives legal effect and validity to it.*** *The making and delivery of the award are different stages of an arbitration proceeding. An award is made when it is authenticated by the person who makes it. The statute makes it obligatory for each of the members of the tribunal to sign the award, to make it a valid award.* ***The usage of the term "shall" makes it a mandatory requirement. It is not merely a ministerial act, or an empty formality which can be dispensed with."***

(Emphasis supplied by us)

24. In the case of **Commissioner of Agricultural Income Tax vs. Keshab Chandra Mandal, 1950 SCR 435 : AIR 1950 SC 265 : (1950) 18 ITR 569 (para-17, 19 and 26),** Hon'ble Supreme Court held as under:

"17. Then after stating that the Courts ought not to restrict the common law rule qui facit per alium facit per se,

unless the statute makes a personal signature indispensable, and referring to certain decided cases, enunciated the proposition that when the word "sign" or "signature" is used by itself and unless there be a clear indication requiring the personal signature by the hand of the person concerned, the provision would be satisfied by a person signing by the hand of an agent. Applying this test the High Court came to the conclusion that there was not only not anything in the Act or the rules requiring the personal signature of the individual assessee but that insistence on such a requirement would create an anomaly, in that while an assessee who is an individual will have to sign personally, the persons authorised to sign for the other categories of assessees, namely, a Hindu undivided family, a company, the Ruler of an Indian State, a firm or any other association will not be compellable to sign personally. The High Court took the view that to avoid such a patent anomaly which would inevitably result if the interpretation proposed by the department were to be accepted, the Court should follow the common law rule mentioned above. In the result, the High Court answered the point of law referred to them in the affirmative.

19. There is no doubt that the true rule as laid down in judicial decisions and indeed, as recognised by the High Court in the case before us, is that unless a particular statute expressly or by necessary implication or intendment excludes the common law rule, the latter must prevail. It is, therefore, necessary in this case to examine the Act and the rules to ascertain whether there is any indication therein that the intention of the legislature is to exclude the common law rule.

26. Turning now to the judicial decisions cited before us it will be found that Courts have insisted on personal signature even when there were not so many clear indications in the statutes under consideration in those cases as there are in the statute and the rules before us. Thus in Monks v. Jackson (1876) 1 C.P.C. 683 : (46 L.J.C.P. 162), which was a case under s.1(3), Municipal Elections Act (38 and 39 Vic. c. 40) which required delivery of the nomination paper" by the candidate himself or his proposer or seconder to the Town Clerk" it was held that this requirement was not satisfied by the delivery it by an agent. In The Queen v. Mansel Jones, (1889) 23 Q B.D. 29 : (60 L.T. 860) it was held that a person charged with any corrupt or illegal practice at a municipal election who was entitled, under s.38, Corrupt and Illegal Practices Prevention Act, 1883, to be "heard by himself" was not entitled to be heard by his counsel or solicitor. In re-Prince Blucher, (1931) 2 Ch. 70 : (100 L.J.Ch. 292) the English Court of Appeal held that a proposal of composition signed by the solicitors of a debtor, who was, by reason of his serious illness, unable to sign it, did not comply with the requirements of s.16(1) of the Bankruptcy Act, 1914, which required "a proposal in writing signed by him." The Court of Appeal applied the principles of the decision in Hyde v. Johnson, (1836) 2 Bing. (N.C.) 776 : (5 L.J.C P.291) and in In re Whitley Partners Ltd., (1886) 32 Ch.B. 337 : (55 L.J.Ch. 540). In Luchman Bukshi Roy v. Runjeet Ram Panday, 20 W.R-375 : (13) Beng. L. R. 197), a Full Bench of the Calcutta High Court held that an acknowledgment by a Mooktear was not sufficient for the purposes of s.1 (5), Limitation Act (XIV [14] of 1859) which required an acknowledgment signed by the mortgagee. Rankin C.J. held in Japan Cotton Trading Co. Ltd. v. Jajodia Cotton Mills, Ltd., 54 Cal. 345 : (A.I.R. (14) 1927 Cal. 625) that a demand letter signed by the solicitors of

the petitioning creditor was not a notice under section 163, of the Indian Companies Act which as it then stood required a demand "under his hand." A similar view was taken by the Rangoon High Court in Manjeebhai Khataw & Co. v. Jamal Brothers & Co. Ltd., 5 Rang. 483 : (A.I.R. (14) 1927 Rang. 306) and M.A. Kureshi v. Argus Footwear, Ltd., 9 Rang. 323 : (A.I.R. (18) 1931 Rang. 306. See also Wilson v. Wallani , (1880) 5 Ex D.155 : (49 L.J.Ex. 437). In Nachiappa Chettyar v. Secy. of State, 11 Rang. 380 : (A.I.R. (20) 1933 Rang. 229), it was held that the registration of a firm on an application signed by the agent of the partners was ultra vires inasmuch as the rules framed under s.59, Income-tax Act, required an application signed by at least one of the partners. In Commr. of Income-tax, Madras v. Subba Rao, I.L.R. (1947) Mad. 167 : (A.I.R. (33) 1946 Mad. 411) it was held that by reason of the word "personally" occurring in R.6, Income-tax Rules framed under s.59, Income-tax Act, 1922, a duly authorised agent of a partner was precluded from signing on behalf of the partner an application under s.26-A of the Act for registration of the firm. ***In all these cases the common law rule was not applied, evidently because the particular statutes were held to indicate that the intention was to exclude that rule. This intention was gathered from the use of the word "himself" or "by him" or "under his hand" or "personally." It is needless to say that such an intention may also be gathered from the nature of the particular statute or inferred from the different provisions of the statute and the rules framed thereunder.*** *As already stated, there are many indications in the Bengal Agricultural Income-tax Act, 1944, and the rules made thereunder evidencing an intention to exclude the common law rule in the matter of the signature of the assessee, appellant or applicant on the return, appeal or application."*

25. Thus the expression **"shall be signed"** used in Section 282A(1) of the Act 1961 makes the signing of the notice or other document by that authority a mandatory requirement. It is not a ministerial act or an empty formality which can be dispensed with. "Signed" means to sign one's name; to signify assent or adhesion to by signing one's name; to attest by signing or when a person is unable to write his name then affixation of "mark" by such person. The document must be signed or mark must be affixed in such a way as to make it appear that the person signing it or affixing his mark is the author of it. Therefore, a notice or other document as referred in Section 282A (1) of the Act, 1961 will take legal effect only after it is signed by that Income Tax Authority, whether physically or digitally. The usage of the word "shall" make it a mandatory requirement.

26. In the case of **Chhugamal Rajpal vs. S.P. Chaliha and others, (1971) 1 SCC 453 (para-5) : AIR 1971 SC 730 : (1971) ITR 603,** Hon'ble Supreme Court considered the **validity of recording satisfaction under Section 151** by the Commissioner for the purposes of issuance of notice under Section 148 of the Act, 1961 and held as under:

"5. In his report the Income-tax Officer does not set out any reason for coming to the conclusion that this is a fit case to issue notice under Section 148. The material that he had before him for issuing notice under Section 148 is not mentioned in the report. In his report he vaguely refers to certain communications received by him from

the C.I.T., Bihar and Orissa. He does not mention the facts contained in those communications. ***All that he says is that from those communications "it appears that these persons (alleged creditors) are name lenders and the transactions are bogus".*** *He has not even come to a prima facie conclusion that the transactions to which he referred are not genuine transactions. He appears to have had only a vague feeling that they may be bogus transactions.* ***Such a conclusion 'does not fulfil the requirements of Section 151(2). What that provision requires is that he must give reasons for issuing a notice under Section 148.*** *In other words he must have some prima facie grounds before him for taking action under Section 148. Further his report mentions : "Hence proper investigation regarding these loans is necessary. In other words his conclusion is that there is a case for investigating as to the truth of the alleged transactions. That is not the same thing as saying that there are reasons to issue notice under Section 148. Before issuing a notice under Section 148, the Income-tax Officer must have either reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under Section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of clause (a) or (b) of Section 147 are satisfied, the Income-tax Officer has no jurisdiction to issue a notice under Section 148. From the report submitted by the Income-tax Officer to the Commissioner, it is clear that he could not have had reasons to believe that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his assessment for the accounting year in question, income chargeable to tax has escaped assessment for that year; nor could it be said that he as a consequence of information in his possession, had reasons to believe that the income chargeable to tax has escaped assessment for that year. We are not satisfied that the Income-tax Officer had any material before him which could satisfy the requirements of either clause (a) or (b) of Section 147. Therefore he could not have issued a notice under Section 148. Further the report submitted by him under Section 151(2) does not mention any reason for coming to the conclusion that it is a fit case for the issue of a notice under Section 148.* ***We are also of the opinion that the Commissioner has mechanically accorded permission. He did not himself record that he was satisfied that this was a fit case for the issue of a notice under Section 148.*** *To Question No. 8 in the report which reads "Whether the Commissioner is satisfied that it is a fit case for the issue of notice under section 148",* ***he just noted the word "yes" and affixed his signatures thereunder.*** *We are of the opinion that if only he had read the report carefully, he could never have come to the conclusion on the material before him that this is a fit case to issue notice under Section 148.* ***The important safeguards provided in sections 147 and 151 were lightly treated by the Income-tax Officer as well as by the Commissioner.*** *Both of them, appear to have taken the duty imposed on them under those provisions as of little importance. They have substituted the form for the substance."*

(Emphasis supplied by me)

Question No. (a) and (b)

27. The first and foremost condition under sub-Section (1) of Section 282A is that notice or other document to be issued by any Income Tax Authority shall be signed by that authority. The word "and" has been used in sub-Section (1), in conjunctive sense, meaning thereby that such **notice or other document has first to be signed by the authority and thereafter it may be issued either in paper form or may be communicated in electronic form by that authority. In the present set of facts, it is the admitted case of the respondents that the PCIT has not recorded satisfaction under his signature prior to the issuance of notice by the Assessing Officer under Section 148 of the Act, 1961.**

28. Section 282A (1) of the Act, 1961 specifically provides that a notice or other documents issued by any Income Tax Authority shall be signed by that authority in accordance with such procedure as may be prescribed. Section 151 of the Act, 1961 specifically provides recording of satisfaction by the Prescribed Authority, on the reasons recorded by the Assessing Officer that it is a fit case for the issue of notice under section 148 of the Act, 1961. Unless such satisfaction is recorded, the Assessing Officer could not get jurisdiction to issue notice under section 148. A satisfaction, to be a valid satisfaction under section 151 of the Act, 1961, has to be recorded by the Prescribed Authority under his signature on application mind and not mechanically, as also held by the Hon'ble Supreme Court in the case of Chhugamal Rajpal (supra). Unless the Prescribed Authority under section 151 of the Act, 1961 records his satisfaction on application of mind and under his signature, there cannot be a valid satisfaction empowering the Assessing Officer to assume jurisdiction to issue notice under section 148 of the Act, 1961. In other words, an Assessing Officer may issue jurisdictional notice under Section 148 only after the Prescribed Authority under section 151 of the Act records his satisfaction that it is fit case for issue of notice under section 148.

29. In the present set of facts there was no valid satisfaction recorded by the by the Prescribed Authority under section 151 of the Act, 1961 when the Assessing Officer issued notice to the assessees under section 148 of the Act, 1961. At the time when the notice under section 148 of the Act, 1961was issued by the Assessing Officer to the petitioner there was no valid satisfaction recorded by the Prescribed Authority i.e. the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner. Subsequent to issuance of the notice under section 148 of the Act, 1961 by the Assessing Officer, the satisfaction under section 151 was digitally signed by the Prescribed Authority. Therefore, the point of time when the Assessing Officer issued notices under section 148, he was having no jurisdiction to issue the impugned notices under section 148 of the Act, 1961. Consequently the impugned notices issued by the Assessing Officer under section 148 of the Act, 1961 were without jurisdiction. The questions no. (a) and (b) are answered accordingly.

30. Since we have come to the conclusion that there was no valid satisfaction under section 151, therefore, the question whether Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner of Income Tax for the purposes of

recording of satisfaction under section 151 is a designated Income Tax Authority under section 282 A of the Act 1961, is left open.

31. For all the reasons aforestated, the above noted writ petitions, namely, Writ Tax No. 554 of 2022, Writ Tax No. 370 of 2022, Writ Tax No. 427 of 2022, Writ Tax No. 475 of 2022, Writ Tax No. 487 of 2022, Writ Tax No. 555 of 2022, Writ Tax No. 642 of 2022 and Writ Tax No. 710 of 2022 are hereby **allowed.** The impugned notices under section 148 of the Act, 1961 and the reassessment orders, if any, passed by the Assessing Officer and all consequential proceedings are hereby quashed. Concerned Income Tax Authority shall be at liberty to initiate proceedings, if still permissible, strictly in accordance with law and on due observance of the relevant provisions of the Act, 1961 and the Rules framed thereunder.

32. Writ Tax No. 694 of 2022 is **dismissed** inasmuch as recording of satisfaction by the PCIT and issuance of notice under section 148 by the Assessing Officer are simultaneous. Liberty is granted to the petitioner to file appeal to challenge the reassessment order.

(2022) 9 ILRA 164
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 858 of 2022

Sri Alok Saxena ...Petitioner
Versus
U.O.I. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Alok Saxena

Counsel for the Respondents:
A.S.G.I., Sri Sudarshan Singh, Sri Dhananjay Awasthi

A. Tax Law – Attachment of bank accounts - The Central Goods & Services Tax Act, 2017- Sections 74 & 83 - A more stringent requirement than a mere expediency, has been provided in S.83. The exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power. **There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue. This necessarily requires existence of tangible material before the Commissioner so as to enable him to form his opinion for provisional attachment of the property of an assessee/person including bank account, which may indicates a live link to the necessity to order a provisional attachment to protect the interest of the Government Revenue.** (Para 7, 11)

When the exercise of the power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory pre-conditions by the Commissioner. While conditioning the exercise of the power on the formation of an opinion by the Commissioner that "for the purpose of protecting the interest of the government revenue, it is necessary so to do", **it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner.** The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue. (Para 7)

An anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute and the rules. (Para 7)

Plane reading of **Section 83 of the CGST** Act leaves no manner of doubt that

1) **firstly, there is necessity of the formation of opinion by the Commissioner;**
2) **secondly, the opinion must be formed before ordering a provisional attachment;**
3) **thirdly, the opinion must indicate that it is necessary so to do for the purpose of protecting the interest of the government revenue;**
4) **fourthly, the order must be in writing for the attachment of any property of the taxable person; and**
5) **fifthly, observance of the Rules by the Commissioner in regard to the manner of attachment. Each of these components of S.83 are integral to a valid exercise of power.**
6) **The expression "it is necessary so to do"** clearly evidences an intent of the legislature that an attachment is authorized not merely because it is expedient to do so but because it is necessary to do so in order to protect interest of the government revenue.
7) **The word "necessary"** postulates that the interest of the revenue can be protected only by a provisional attachment without which the interest of the revenue would stand defeated. (Para 11)

Each of the aforenoted ingredients of S.83 must be strictly applied and complied before a provisional attachment on the property of an assessee can be made. (Para 7, 11)

Facts of the present case clearly reveal that no proceedings u/s 74 of the C.G.S.T. Act has yet been initiated. Respondent No. 2 while passing the impugned order, **has neither recorded his opinion nor referred to any tangible material which necessitated him to pass the impugned provisional attachment order so as to protect the interest of the Government revenue**. The basic ingredients required for passing the impugned order u/s 83 of the CGST Act as also authoritatively pronounced by Hon'ble SC and binding upon the respondents u/Art. 141 of the Constitution of India, have been deliberately and completely ignored by the respondent No. 2. Despite the earlier order having been quashed by this Court, the respondent No. 2 has chosen to pass the impugned order on the very next day of withdrawing the earlier order. The impugned order has been passed in a most arbitrary and illegal manner and in complete disregard of provisions of S.83 of the C.G.S.T. Act r/w Rule 159 of the C.G.S.T. Rules 2017 and the law laid down by Hon'ble SC in the case of *Radha Krishan Industries* (*infra*). Consequently, the impugned order cannot be sustained and deserves to be quashed with exemplary cost. (Para 14)

B. Imposition of Cost - Cost should be in real and compensatory terms and not merely symbolic. There can be exemplary costs as well when the appeal is completely devoid of any merit. Imposition of cost on the State/PSU's alone is not going to make much difference as the officers taking such irresponsible decisions to file appeals are not personally affected because of the reason that cost, if imposed, comes from the government's coffers. **Time has, therefore, come to take next step viz. recovery of cost from such officers who take such frivolous decisions of filing appeals, even after knowing well that these are totally vexatious and uncalled for appeals.** We clarify that such an order of recovery of cost from the officer concerned be passed only in those cases where appeal is found to be ex-facie frivolous and the decision to file the appeal is also found to be palpably irrational and uncalled for. (Para 15)

Writ Petition allowed. (E-4)

Precedent followed:

1. Radha Krishan Industries Vs St. of H. P. & ors., (2021) 6 SCC 771 (Para 6, 12)

2. Punjab State Power Corp. Ltd. Vs Atma Singh Grewal, (2014) 13 SCC 666 (Para 15)

Present writ petition assails order dated 19.05.2022, passed by Commissioner of Central Goods and Service Tax Act, Ghaziabad.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Alok Saxena, learned counsel for the petitioner; Sri S.P. Singh, learned Additional Solicitor General of India assisted by Sri Sudarshan Singh, learned counsel for the respondent no.1 and Sri Dhananjay Awasthi, learned Senior Standing Counsel for the respondent no.2.

2. This writ petition has been filed praying for the following relief :

"1. Issue a writ of certiorari quashing order dated 19.05.2022 passed by the respondent no.02 i.e. the Commissioner of Central Goods and Service Tax Act, Ghaziabad directing provisional attachment of the bank accounts of the petitioner and of his firm, detailed in Para 5 of this Writ (Tax) Petition."

3. The petitioner is a proprietor of M/s. S G Plastic Industries, B-19 Roop Nagar Industrial Area, Loni, Ghaziabad, engaged in manufacturing of plastic granules and its compounding.

4. Earlier, Bank account of the petitioner was attached under Section 83 of The Central Goods & Services Tax Act, 2017 (hereinafter referred to as "the CGST Act, 2017') by order dated 22.10.2021, passed by the respondent no.2, against which the petitioner filed Writ Tax No. 448 of 2022 (Varun Gupta Versus Union of India and another) and the writ petition was allowed by order dated 11.05.2022 on the ground that no proceeding under Section 74 of CGST was pending as on the date of attachment. It was further observed that amended provisions of Section 83 of the CGST Act were not available when the attachment order was passed.

5. Consequently, the respondent no.2 has passed the order dated 18.05.2022 intimating the Bank that the attachment has been quashed but on the very next day, the respondent no.2 has passed the **impugned order dated 19.05.2022,** which **is reproduced below:-**

"To
The Branch Manager
AXIS Bank, D-46,
RDC, Raj Nagar, Ghaziabad

Provisional attachment of property under section 83 of CGST Act, 2017

It is to inform that M/s S.G. Industries (proprietor Sh. Varun Gupta) having principal place of business at B-19, Roop Nagar Industrial Area, Loni, Ghaziabad bearing registration number as 09ANFPG 1119E1ZH and PAN ANFPG1119E is a registered taxable person under the Act.

Proceedings have been launched against the aforesaid person under section 67 and Section 74 of the said Act to determine the tax or any other amount due from the said person. As per information available with the department, it has come to my notice that the said person has a bank account in your bank having account no.916010071529025.

In order to protect the interests of revenue and in exercise of the powers conferred under section 83 of the Act, I Alok Jha, Commissioner, CGST, Ghaziabad, hereby provisionally attach the aforesaid account.

No debit shall be allowed to be made from the said ***account or any other*** *account operated by the aforesaid* ***person on the same PAN without the prior*** *permission* ***of this department.***

(ALOK JHA)
Commissioner "

6. As per impugned order proceedings under Sections 67 and 74 has been

launched against the petitioner. However, **learned counsels for the respondents have admitted before this Court on 14.07.2022 that "no proceedings under Sections 74 of the CGST Act, 2017 has yet been initiated".** This fact has been recorded by this Court in paragraph 3 of the order dated 14.07.2022. After noticing the facts of the case in the aforesaid order date 14.07.2022, this Court referred to various paragraphs of the judgment of Hon'ble Supreme Court in the case of Radha **Krishan Industries Vs. State of Himachal Pradesh and others (2021) 6 SCC 771** and observed in paragraph 4 as under :

*"Despite being being repeatedly asked by us, **learned ASGI and learned counsel for respondent no. 2 could not produce any opinion of the respondent no. 2 before this Court under Section 83 of the CGST Act, 2017 indicating that the Commissioner has recorded his opinion on some materials that it is necessary to attach the bank account of the petitioner to protect the interest of revenue."***

7. In the case of **Radha Krishan Industries (supra)** Hon'ble Supreme Court has dealt with almost similar order under Section 83 of the C.G.S.T. Act and held as under :

*"49 Now in this backdrop, it becomes necessary to emphasize that **before the Commissioner can levy a provisional attachment, there must be a formation of "the opinion" and that it is necessary "so to do" for the purpose of protecting the interest of the government revenue. The power to levy a provisional attachment is draconian in nature.** By the exercise of the power, a property belonging to the taxable person may be attached, including a bank account. The attachment is provisional and the statute has contemplated an attachment during the pendency of the proceedings under the stipulated statutory provisions noticed earlier. An attachment which is contemplated in Section 83 is, in other words, at a stage which is anterior to the finalization of an assessment or the raising of a demand. **Conscious as the legislature was of the draconian nature of the power and the serious consequences which emanate from the attachment of any property including a bank account of the taxable person, it conditioned the exercise of the power by employing specific statutory language which conditions the exercise of the power. The language of the statute indicates first,** the necessity of the formation of opinion by the Commissioner; **second,** the formation of opinion before ordering a provisional attachment; **third** the existence of opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue; **fourth,** the issuance of an order in writing for the attachment of any property of the taxable person; and **fifth**, the observance by the Commissioner of the provisions contained in the rules in regard to the manner of attachment. **Each of these components of the statute are integral to a valid exercise of power.** In other words, **when the exercise of the power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory pre-conditions by the Commissioner.** While conditioning the exercise of the power on the formation of an opinion by the Commissioner that "for the purpose of protecting the interest of the government revenue, it is necessary so to do", it is evident that the **statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner. The formation of the**

opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue.

50 By utilizing the ***expression "it is necessary so to do" the legislature has evinced an intent that an attachment is authorized not merely because it is expedient to do so*** *(or profitable or practicable for the revenue to do so)* ***but because it is necessary to do so in order to protect interest of the government revenue. Necessity postulates that the interest of the revenue can be protected only by a provisional attachment without which the interest of the revenue would stand defeated. Necessity in other words postulates a more stringent requirement than a mere expediency.*** *A provisional attachment under Section 83 is contemplated during the pendency of certain proceedings, meaning thereby that a final demand or liability is yet to be crystallized.* ***An anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute and the rules. The exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power.*** *Each of these ingredients must be strictly applied before a provisional attachment on the property of an assesses can be levied. The Commissioner must be alive to the fact that such provisions are not intended to authorize Commissioners to make preemptive strikes on the property of the assessee, merely because property is available for being attached. There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue.*

52 ***We adopt the test of the existence of "tangible material".*** *In this context, reference may be made to the decision of this Court in the Commissioner of Income Tax v Kelvinator of India Limited38. Mr Justice SH Kapadia (as the learned Chief Justice then was) while considering the expression "reason to believe" in Section 147 of the Income Tax Act 1961 that income chargeable to tax has escaped assessment inter alia by the omission or failure of the assessee to disclose fully and truly all material facts necessary for the assessment of that year, held that the power to reopen an assessment must be conditioned on the existence of "tangible material" and that "reasons must have a live link with the formation of the belief". This principle was followed subsequently in a two judge Bench decision in Income Tax Officer, Ward No. 162 (2) v Techspan India Private Limited39. While adverting to these decisions we have noticed that* ***Section 83 of the HPGST Act uses the expression "opinion" as distinguished from "reasons to believe".*** *However for the reasons that we have indicated earlier we are clearly of the view* ***that the formation of the opinion must be based on tangible material which indicates a live link to the necessity to order a provisional attachment to protect the interest of the government revenue.***

70 Ex facie, the above order passed by the Joint Commissioner does not indicate any basis for the formation of the opinion that the levy of a provisional attachment was necessary to protect the interest of the government revenue. The order in the file noting refers to the fact that the case of GM Powertech had been decided under Section 74 resulting in an additional demand of Rs. 39 crores on account of a fraudulent claim of ITC for FY 2017-18 and 2018-19. GM Powertech is alleged to have passed on the ITC to various Registered Tax Persons40 situated

in Himachal Pradesh by issuing invoices inter alia to the appellant during 2018-19 for which a case under Section 74 had been initiated. The order records that the appellant had claimed ITC of Rs 3.25 crores on the strength of the invoices issued by GM Powertech. The order merely records that the submissions which were urged by the appellant on 5 August 2020 "are not sustainable". "In view of the facts involved in the case", ***the Joint Commissioner concluded that it is necessary at this stage to safeguard the government revenue and since the appellant had sold goods to Fujikawa the payment due to it was being attached provisionally. The order of the Joint Commissioner contains absolutely no basis for the formation of the opinion that a provisional attachment was necessary to safeguard the interest of the revenue.*** *No tangible material has been disclosed.* ***The record clearly reveals a breach of the mandatory pre-conditions for the valid exercise of powers under Section 83 of the HPGST Act.***

77 ***For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court dated 1 January 2021.***

78 The writ petition filed by the appellant under Article 226 of the Constitution shall stand allowed ***by setting aside the orders of provisional attachment dated 28 October 2020."***

8. Amended Section 83 of the CGST Act reads as follows :

"83. Provisional attachment to protect revenue in certain cases.

(1) Where, after the initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing, attach provisionally, any property, including bank account, belonging to the taxable person or any person specified in sub-section (1A) of section 122, in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1)."

9. In Section 83 of the CGST Act, following expressions have been used :

(i) Commissioner **is of the opinion**

(ii) that for the purpose of protecting the **interest of the Government revenue**

(iii) it is **necessary so to do**

(iv) by **order in writing,** attach provisionally

(v) in such **manner as may be prescribed.**

10. Chapter XII of the CGST Act contains Sections 59 to 64 providing for assessment. Chapter XIV contains Sections 67 to 72 providing for inspection, search, seizure and arrest. Chapter XV contains Sections 73 to 84 providing for demands and recovery.

11. Plane reading of Section 83 of the CGST Act leaves no manner of doubt that **firstly,** there is necessity of the formation of opinion by the Commissioner; **secondly**, the opinion must be formed before ordering a provisional attachment; **thirdly**, the opinion must indicate that it is necessary so to do for the purpose of protecting the interest of the government revenue;

fourthly, the order must be in writing for the attachment of any property of the taxable person; and **fifthly**, observance of the Rules by the Commissioner in regard to the manner of attachment. Each of these components of Section 83 are integral to a valid exercise of power. The statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner. The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue. The expression "it is necessary so to do" clearly evidences an intent of the legislature that an attachment is authorized not merely because it is expedient to do so but because it is necessary to do so in order to protect interest of the government revenue. The word "necessary" postulates that the interest of the revenue can be protected only by a provisional attachment without which the interest of the revenue would stand defeated. Thus, a more stringent requirement than a mere expediency, has been provided in Section 83. The exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power. There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue. This necessarily requires **existence of tangible material** before the Commissioner so as to enable him to form his opinion for provisional attachment of the property of an assessee/person including bank account, which may indicates a live link to the necessity to order a provisional attachment to protect the interest of the Government Revenue. Each of the aforenoted ingredients of Section 83 must be strictly applied and complied before a provisional attachment on the property of an assesses can be made. In the impugned provisional attachment order there is absence of the aforesaid ingredients of Section 83. Therefore, the impugned order having been passed by the respondent No.2 by arbitrarily exercising his power, can not be sustained. Therefore, it deserves to be quashed.

12. In paragraph 11 of the aforesaid judgment in the case of **Radha Krishan Industries (supra)**, Hon'ble Supreme Court reproduced the order under Section 83 of the Act dated 28.10.2020, as under :

*"**In order to protect the interests of revenue and in exercise of the powers conferred/delegated by Commissioner of the State Taxes & Excise, HP** vide office order No.12-4/78-EXN-Tax-Part-278/22(a)- 26780-82 dated 21.10.2020 under section 83 of the Act, I, U.S. Rana, Joint Commissioner of State Taxes & Excise, South Enforcement Zone, Parwanoo, **hereby provisionally attach the payment to the extent of Rs.5,03,82,554/- of M/s Radha Krishan Industries, Kala-Amb.** Henceforth, no payment shall be allowed to be made from your company to M/s RadhaKrishan Industries without the prior permission of this department / office."*

13. **The order impugned in the present writ petition is almost similar to the order which was impugned before the Hon'ble Supreme Court in the case of Radha Krishan Industries (supra)** which has been quashed by Hon'ble Supreme Court with observations aforequoted.

14. Facts of the present case clearly reveals that no proceedings under Section 74 of the C.G.S.T. Act has yet been

initiated. That apart **the respondent No.2 while passing the impugned order, has neither recorded his opinion nor referred to any tangible material which necessitated him to pass the impugned provisional attachment order so as to protect the interest of the Government revenue. The basic ingredients required for passing the impugned order under Section 83** of the CGST Act as also authoritatively pronounced by Hon'ble Supreme Court and binding upon the respondents under Article 141 of the Constitution of India, **have been deliberately and completely ignored by the respondent No.2.** Despite the earlier order having been quashed by this Court, the respondent no.2 has chosen to pass the impugned order on the very next day of withdrawing the earlier order. The impugned order has been passed in a most arbitrary and illegal manner and in complete disregard of provisions of Section 83 of the C.G.S.T. Act read with Rule 159 of the C.G.S.T. Rules 2017 and the law laid down by Hon'ble Supreme Court in the case of **Radha Krishan Industries (supra)**. Consequently, the impugned order can not be sustained and deserves to be quashed with exemplary cost.

Imposition of Cost:-

15. In the case of **Punjab State Power Corporation Ltd. vs. Atma Singh Grewal, (2014) 13 SCC 666 (para 14),** Hon'ble Supreme Court stressed that **cost should be in real and compensatory terms** and not mrely symbolic. **It further expressed the need to recover the cost from erring officers**. Paragraph-14 of the Punjab State Power Corporation Ltd. (supra) is reproducecd below:

"14. No doubt, when a case is decided in favour of a party, the Court can award cost as well in his favour. ***It is stressed by this Court that such cost should be in real and compensatory terms and not merely symbolic.*** *There can be exemplary costs as well when the appeal is completely devoid of any merit. [See Rameshwari Devi v. Nirmala Devi (2011) 8 SCC 249]. However, the moot question is as to whether imposition of costs alone will prove deterrent? We do not think so.* ***We are of the firm opinion that imposition of cost on the State/PSU's alone is not going to make much difference as the officers taking such irresponsible decisions to file appeals are not personally affected because of the reason that cost, if imposed, comes from the government's coffers. Time has, therefore, come to take next step viz. recovery of cost from such officers who take such frivolous decisions of filing appeals,*** *even after knowing well that these are totally vexatious and uncalled for appeals. We clarify that such an order of recovery of cost from the officer concerned be passed only in those cases where appeal is found to be ex-facie frivolous and the decision to file the appeal is also found to be palpably irrational and uncalled for."*

(Emphasis supplied by us)

16. For all the reasons aforestated, the impugned order dated 19.05.2022 under Section 83 of the C.G.S.T. Act 2017 passed by the respondent no.2, can not be sustained and is hereby quashed. Writ petition is **allowed** with cost of Rs. 50,000/- which shall be paid by the respondents to the petitioner within two weeks.

(2022) 9 ILRA 172
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 1047 of 2021

Shivaaditya Jems & Jewellery Pvt. Ltd. ...Petitioner
Versus
Income Tax & Ors. ...Respondents

Counsel for the Petitioner:
Sri Suyash Agarwal, Sri Divyanshu Agrawal

Counsel for the Respondents:
A.S.G.I., Sri Gaurav Mahajan, Sri Manu Ghildyal, Sri Sudarshan Singh

A. Tax Law – Reassessment – Jurisdiction - Income Tax Act, 1961 - Sections 143(3), 148, 132A, 120(1), 120(2), 148A(d), 2(7A), 124(1) & 124(5) - Concurrent jurisdictions are not an anathema but an accepted position under the Act. The term "jurisdiction" in Section 120 of the Act has been used loosely and not in strict sense to confer jurisdiction exclusively to a specified and single assessing officer, to the exclusion of others with concurrent jurisdiction. The Act does not authoritatively confer exclusive jurisdiction to specific Income Tax Authority. It is left to the Board to issue directions for exercise of power and functions taking into consideration territorial area, class/types of persons, income and case, and Board have been given wide power and latitude. Section 120 by necessary implication postulates and acknowledges that multiple or more than one Assessing officer could exercise jurisdiction over particular assessee. (Para 21)

It has been admitted that respondent No. 1 i.e the ITO-2(1), Moradabad has the territorial jurisdiction over the petitioner, but **only objection to the jurisdiction has been raised merely on the ground that on account of pecuniary limit**, the proceedings ought to have been initiated by ACIT-2, Moradabad. (Para 18)

Merely because some pecuniary limit has been fixed for purpose of distribution of work between officers, it would not mean that there shall be inherent lack of jurisdiction of respondent No. 1. Once the territorial jurisdiction of respondent No. 1 is admitted by the petitioner, there existed no occasion for the Assessing Officer to refer the matter for determination u/s 124(2) before the assessment was made. Therefore, it cannot be said that respondent No. 1 lacked inherent jurisdiction while issuing the impugned notice u/s 148 of the Act, 1961. (Para 19, 20)

Writ petition dismissed. (E-4)

Precedent followed:

1. Abhishek Jain Vs Income Tax Officer, Ward-55 (1), New Delhi; 2018 (94) Taxmann.Com 355 (Delhi) (Para 21)

Present petition assails notice dated 31.03.2021, issued u/s 148 and order dated 13.09.2021, passed by Income Tax Officer ITO-2(1), Moradabad.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Benerji, J.)

1. Heard Sri Suyash Agarwal, learned counsel for the petitioner, Sri Gaurav Mahajan, learned Senior Standing Counsel for the respondent no.2 and Sri Sudarshan Singh, learned counsel for respondent no.3.

2. This writ petition has been filed praying for the following relief:-

"(i) Issue writ, order or direction in the nature of certiorari quashing the

notice dated 31.3.2021 issued under Section 148 of the Act, for A.Y. 2017-18 issued by the Income Tax Officer ITO-2(1), Moradabad, respondent no.1(Annexure no.7).

(ii) Issue writ, order or direction in the nature of certiorari quashing the order dated 13.9.2021 passed by Income Tax Officer ITO-2(1), Moradabad respondent no.1, rejecting the objection of the petitioner (Annexure no.13).

(iii) Issue writ, order or direction in the nature of Prohibition restraining the respondent no. 1 from completing the reassessment proceeding u/s 148 of the Act, for A.Y. 2017-18."

3. Briefly stated facts of the present case are that for the assessment year in question i.e. 2017-18, the petitioner, which is a corporate entity, filed its return of income on 11.10.2017 with the Income Tax Officer (ITO-2(1), Moradabad disclosing total income of Rs. 32,57,900/. It has been admitted by the learned counsel for the petitioner before us that ITO Ward-2(1) is the Assessing Officer who has territorial jurisdiction over the petitioner.

Facts.

4. The case of the petitioner is that since monetary limit fixed for assessment by the ITO for return is upto Rs. 15 lacs and if it is above Rs. 15 lacs, the assessment was to be made by Assistant/Deputy Commissioner, therefore, for that reason the assessment for the Assessment Year 2017-18 was completed by the Assistant Commissioner of Income Tax, Moradabad (ACIT) vide assessment order dated 26.11.2019 under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act, 1961). Therefore, the notice under Section 148 of the Act would have been issued only by the ACIT-2, Moradabad and not by the ITO Ward-2(1), Moradabad.

5. From the record, it appears that thereafter, the ITO, Ward-2(1) received certain information from DDIT (Investigation), Unit 7(4), New Delhi. It came to light in the search conducted under Section 132A of the Act at the premises of Mr. Mohit Garg and others on 11.03.2018 and in subsequent investigations, which, according to the respondent- department revealed that an accommodation purchase entry of Rs.20,32,46,098/- which was not shown by the petitioner. Based on this information, the ITO Ward-2 issued a notice under Section 148 of the Act, 1961 to the petitioner and supplied the reasons recorded for issuance of the notice. The petitioner submitted objection to it which was rejected by order dated 13.09.2021 passed by the ITO-2(1), Moradabad. Being aggrieved, the petitioner has filed the present writ petition, challenging the notice dated 31.03.2021 under Section 148 as well as the order dated 13.09.2021 rejecting the objection.

Submission:

6. The only submission of learned counsel for the petitioner is that the impugned notice under Section 148 of the Act, 1961 issued by the respondent No.1 [ITO-2(1)] is without jurisdiction inasmuch as the ITO Ward 2(1) is not the jurisdictional assessing officer for the Assessment Year 2017-18. He further submits that jurisdictional assessing officer for the Assessment Year 2017-18 is the ACIT, Range-2, Moradabad. Therefore, the impugned notice is without jurisdiction and consequently it cannot be proceeded with by the respondent No.1. For the same

reason, the impugned order rejecting the objection, also deserves to be quashed along with the impugned notice under Section 148.

7. Learned Central Government Standing Counsel and the learned standing counsel for the Income Tax Department - respondent No.1 and 2 jointly supported the impugned notice and the order rejecting the objection.

Discussion and findings:

8. We have carefully considered the submission of the learned counsel for the parties and perused the record of the writ petition.

9. Before we proceed to consider the rival submission, it would be appropriate to reproduce the relevant provisions of the Act, 1961 as under:-

(i) Section 2(7A) defines the word **Assessing Officer**, as under:-

"2(7A) " Assessing Officer" means the Assistant Commissioner or Deputy Commissioner or Assistant Director or Deputy Director or the Income- tax Officer who is vested with the relevant jurisdiction by virtue of directions or orders issued under sub- section (1) or sub-section (2) of section 120 or any other provision of this Act, and the Additional Commissioner or Additional Director or Joint Commissioner or Joint Director who is directed under clause (b) of sub- section (4) of that section to exercise or perform all or any of the powers and functions conferred on, or assigned to, an **Assessing Officer** under this Act;"

(ii) Section 120 of the Act, 1961 provides for jurisdiction of income tax authorities as under:-

"Jurisdiction of income-tax authorities:-

120. (1) Income-tax authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, as the case may be, assign to such authorities by or under this Act in accordance with such directions as the Board may issue for the exercise of the powers and performance of the functions by all or any of those authorities.

Explanation:- For the removal of doubts, it is hereby declared that any income-tax authority, being an authority higher in rank, may, if so directed by the Board, exercise the powers and perform the functions of the income-tax authority lower in rank and any such direction issued by the Board shall be deemed to be a direction issued under sub-section-(1).

(2) The directions of the Board under sub section (1) may authorize any other income-tax authority to issue orders in writing for the exercise of the powers and performance of the functions by all or any of the other income-tax authorities who are subordinate to it.

(3) In issuing the directions or orders referred to in sub-sections (1) and (2), the Board or other income-tax authority authorized by it may have regard to any one or more of the following criteria, namely:-

(a) territorial area;

(b) persons or classes of persons;

(c) income or classes of income; and

(d) cases or classes of cases.

(4)Without prejudice to the provisions of sub- sections (1) and (2), the Board may, by general or special order, and subject to such conditions, restrictions or limitations as may be specified therein,-

(a)authorise any Principal Director General or Director General or

Principal Director or Director to perform such functions of any other income- tax authority as may be assigned to him by the Board;

(b)empower the Principal Director General or Director General or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner to issue orders in writing that the powers and functions conferred on, or as the case may be, assigned to, the Assessing Officer by or under this Act in respect of any specified area or persons or classes of persons or incomes or classes of income or cases or classes of cases, shall be exercised or performed by an Additional Commissioner or an Additional Director or a Joint Commissioner or a Joint Director, and, where any order is made under this clause, references in any other provision of this Act, or in any Rule made thereunder to the Assessing Officer shall be deemed to be references to such Additional Commissioner or Additional Director or Joint Commissioner or Joint Director by whom the powers and functions are to be exercised or performed under such order, and any provision of this Act requiring approval or sanction of the Joint Commissioner shall not apply.

(5)The directions and orders referred to in sub- sections (1) and (2) may, wherever considered necessary or appropriate for the proper management of the work, require two or more Assessing Officers (whether or not of the same class) to exercise and perform, concurrently, the powers and functions in respect of any area or persons or classes of persons or incomes or classes of income or cases or classes of cases; and, where such powers and functions are exercised and performed concurrently by the Assessing Officers of different classes, any authority lower in rank amongst them shall exercise the powers and perform the functions as any higher authority amongst them may direct, and, further, references in any other provision of this Act or in any rule made thereunder to the Assessing Officer shall be deemed to be references to such higher authority and any provision of this Act requiring approval or sanction of any such authority shall not apply.

(6) Notwithstanding anything contained in any direction or order issued under this section, or in section 124, the Board may, by notification in the Official Gazette, direct that for the purpose of furnishing of the return of income or the doing of any other act or thing under this Act or any rule made thereunder by any person or class of persons, the income- tax authority exercising and performing the powers and functions in relation to the said person or class of persons shall be such authority as may be specified in the notification."

(iii) **Section 124** of the Act, 1961 provides for **jurisdiction of Assessing Officers,** as under:-

"Jurisdiction of Assessing Officers

124. (1) Where by virtue of any direction or order issued under sub- section (1) or sub-section (2) of section 120, the **Assessing Officer has been vested with jurisdiction over any area, within the limits of such area, he shall have jurisdiction -**

(a) in respect of any person carrying on a business or profession, if the place at which he carries on his business or profession is situate within the area, or where his business or profession is carried on in more places than one, if the principal place of his business or profession is situate within the area, and

(b) in respect of any other person residing within the area.

(2) Where a question arises under this section as to whether an Assessing Officer has jurisdiction to assess any person, the question shall be determined by the Principal Director General or Director General or the Principal Chief Commissioner or Chief Commissioner or the Principal Commissioner or Commissioner; or where the question is one relating to areas within the jurisdiction of different Principal Directors General or Directors General or Principal Chief Commissioners or Chief Commissioners or Principal Commissioners or Commissioners, by the Principal Directors General or Directors General or Principal Chief Commissioners or Chief Commissioners or Principal Commissioners or Commissioners concerned or, if they are not in agreement, by the Board or by such Principal Director General or Director General or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner as the Board may, by notification in the Official Gazette, specify.

(3) **No person shall be entitled to call in question the jurisdiction** of an Assessing Officer -

(a) where he has made a return under sub- section (1) of section 115WD or **under sub- section (1) of section 139,** after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 142 or sub-section (2) of section 115WE or sub-section (2) of section 143 or after the completion of the assessment, whichever is earlier;

(b) where he has made no such return, after the expiry of the time allowed by the notice under sub-section (2) of section 115WD or sub- section (1) of section 142 or under sub-section (1) of section 115WH or under section 148 for the making of the return or by the notice under the first proviso to section 115WF or under the first proviso to section 144 to show cause why the assessment should not be completed to the best of the judgment of the Assessing Officer, whichever is earlier.

(c) Where an action has been taken under section 132 or section 132A, after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 153A or sub-section (2) of section 153C or after the completion of the assessment, whichever is earlier.

(4) Subject to the provisions of sub-section (3), where an assessee calls in question the jurisdiction of an Assessing Officer, then the Assessing Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under sub-section (2) before the assessment is made.

(5) Notwithstanding anything contained in this section or in any direction or order issued under section 120, **every Assessing Officer shall have all the powers conferred by or under this Act on an Assessing Officer in respect of the income accruing or arising or received within the area, if any, over which he has been vested with jurisdiction by virtue of the directions or orders issued under sub-section (1) or sub-section (2) of section 120."**

10. Thus, sub-section (1) of Section 120 of the Act, 1961 confers powers on the Board to issue directions to the Income Tax authorities for exercise of powers and performance of the functions by all or any of those authorities. Sub-section (2) of Section 120 permits directions of the Board made under sub-section (1) for authorising any other income-tax authority to issue orders in writing for the exercise of the powers and performance of the functions

by all or any of the other income tax authorities who are subordinate to it.

Sub-section (3) of Section 120 provides for the Board or other income tax authority authorised by it to have regard to one or more of the mentioned four criteria in issuing directions or orders referred to in sub-sections (1) and (2) of Section 120. The criteria are:

(a) territorial area;

(b) persons or classes of persons;

(c) incomes or classes of income; and

(d) cases or classes of cases.

Sub-section (5) of Section 120 enables issuance of directions and orders referred to in sub-section (1) and (2) requiring two or more Assessing Officers (whether or not of the same class) to exercise and perform concurrently the powers and functions referred to in the four criteria mentioned in sub-section (3).

Section 124 of the Act deals with jurisdiction vested in any Assessing Officer under sub-section (1) or sub-section (2) of Section 120 of the Act with regard to territorial area. Where any question arises as to whether an Assessing Officer has jurisdiction to assess any person, (qua the territorial area), the question is required to be determined administratively by the authority in the manner mentioned in sub-section (2) of Section 124.

Sub-section (3) of Section 124 limits and negativates the right of any person to call in question the jurisdiction of an Assessing Officer where any of the three conditions mentioned in clause (a),(b) and (c) of sub-section (3) respectively exist. Clause (a) of sub-section (3) of Section 124 refers to situations, inter alia, where a person has made a return under sub-section (1) of Section 139, who has been served with a notice under sub-section (1) of Section 142 or sub-section (2) of Section 143. Given the provision of clause (a) of sub-section (3) of Section 124, no person is entitled to call in question the jurisdiction of an Assessing Officer after expiry of one month from the date on which he is served with such notice, whichever date is earlier.

Sub-section (4) of Section 124 mandates the Assessing Officer to refer the matter for determination under sub-section (2) before the assessment is made, if he is not satisfied with the correctness of the claim of the assessee calling in question the jurisdiction of an Assessing Officer, subject to the provisions of sub-section (3).

Sub-section (5) of Section 124 which begins with a non-obstante clause, is as under:-

"(5) Notwithstanding anything contained in this section or in any direction or order issued under section 120, every Assessing Officer shall have all the powers conferred by or under this Act on an Assessing Officer in respect of the income accruing or arising or received within the area, if any, over which he has been vested with jurisdiction by virtue of the directions or orders issued under sub-section (1) or sub-section (2) of section 120."

11. It is undisputed that ITO Ward-2(1), Moradabad who issued the impugned notice dated 31.3.2021 under Section 148 of the Act, 1961 for the Assessment Year 2017-18 and passed the impugned order dated 10.9.2021/13.9.2021 under Section 148A(d) rejecting the objections, is the Assessing Officer within the meaning of Section 2 (7A) of the Act, 1961.

12. The contention of the learned counsel for the petitioner is that since on account of the mandated monetary limit, the impugned order was passed by the ACIT-2, Moradabad, therefore, only

ACIT-2, Moradabad could have issued notice under Section 148 of the Act and not the ITO Ward-2(1). We do not find any substance in the submission.

13. Section 120(1) of the Act, 1961 confers powers upon the Income Tax Authorities to exercise all or any of the powers and perform all or any of the functions conferred on, or, as the case may be, assign to such authorities by or under this Act in accordance with such directions as the Board may issue for the exercise of the powers and performance of the functions by all or any of those authorities.

Sub-section (3) provides the criteria to be considered by the Board in issuing directions for purposes of sub-section (1) and (2).

14. Admittedly, the Board has issued a direction by Instruction No. 01 of 2011 dated 31.01.2011 and 6 of 2011 dated 8.4.2011 for equitable distribution of works amongst the Assessing Officers and pursuant thereto, the Chief Commissioner of Income Tax, Bareilly issued an order dated 19.2.2018 as under:-

"Order
Dated 19.02.2018.

In exercise of powers conferred on me by CBDT Instructions No. 01/2011 dated 31.01.2011 and 06/2011 dated 08.4.2011 and all other powers enabling me in this behalf, I hereby order that the monetary limit for assigning Non-Corporate cases among Income Tax Officers and Deputy/Assistant Commissioners of Income Tax under the charges of Pr. Commissioner of Income Tax, Bareilly & Moradabad, falling in Chief Commissioner of Income Tax, Bareilly, Region will henceforth be as under:

	Income/Loss Declared.	
	ITOs	Dy./Asst. CsIT.
In case of Non-Corporate Returns	Upto Rs. 15 lac	Above Rs. 15 lac.

The notification will come into effect from 1.4.2018 onwards till further order.

(Praveen Kumar)
Chief Commissioner of Income Tax
Bareilly.
19.2.2018."

15. The learned counsel for the petitioner has also referred to the jurisdictional chart enclosed with the objection against issuance of notice under Section 148, showing Assessing Officer-wise jurisdiction in respect of Corporate cases.

16. It is reiterated that Sub-section (1) of Section 124 of the Act, 1961 provides that where by virtue of any direction or order issued under sub-section (1) or sub-section (2) of section 120, the Assessing Officer has been vested with jurisdiction over any area, within the limits of such area, he shall have jurisdiction- (a) in respect of any person carrying on a business or profession, if the place at which he carries on his business or profession is situate within the area, or where his business or profession is carried on in more places than one, if the principal place of his business or profession is situate within the area, and (b) in respect of any other person residing within the area.

17. Thus, under sub-section (1) of Section 124 of the Act, 1961 the Assessing Officer who has been vested with

jurisdiction over any area, shall have jurisdiction within the limits of such area. Sub-section (5) of Section 124 of the Act, 1961 starts with a non-obstante clause and provides that every Assessing Officer shall have all the powers conferred by or under the Act,1961 on an Assessing Officer in respect of the income accruing or arising or received within the area, if any, over which he has been vested with jurisdiction by virtue of the directions or orders issued under sub-section (1) or sub-section (2) of section 120. Thus, the Assessing Officer vested with jurisdiction by virtue of direction of sub-section (1) and (2) of Section 120 shall have all powers conferred by or under the Act, 1961 on an Assessing Officer in respect of the income accruing or arising or received within the area, if any, over which he has been vested with jurisdiction.

18. It has been admitted before us that respondent no.1 i.e the ITO-2(1), Moradabad has the territorial jurisdiction over the petitioner, but only objection to the jurisdiction has been raised merely on the ground that on account of pecuniary limit, the proceedings ought to have been initiated by ACIT-2, Moradabad.

19. Once the territorial jurisdiction of respondent no.1 is admitted by the petitioner, there existed no occasion for the Assessing Officer to refer the matter for determination under sub-section (2) of Section 124 before the assessment was made.

20. The facts and legal position as discussed above leave no manner of doubt that the respondent no.1 is the Assessing Officer having territorial jurisdiction over the petitioner. Merely because some pecuniary limit has been fixed for purpose of distribution of work between officers, it would not mean that there shall be inherent lack of jurisdiction of respondent no.1. Therefore, it cannot be said that respondent no.1 lacked inherent jurisdiction while issuing the impugned notice under Section 148 of the Act, 1961.

21. A similar controversy came up before the Delhi High Court in the case of **Abhishek Jain Vs. Income Tax Officer, Ward-55 (1), New Delhi; 2018 (94) taxmann. Com 355 (Delhi)** in which it has been held as under:-

"16. Section 120 of the Act which relates to jurisdiction of the Income-tax Authorities stipulates that Income-tax Authorities shall exercise any of the powers and perform all or any of the functions conferred or assigned to such authority by or under this Act as per the directions of the Board i.e., Central Board of Direct Taxes. As per Explanation to sub-section(1), the power can also be exercised, if directed by the Board, by authorities higher in rank. Under sub-section (2), the Board can issue orders in writing for exercise of power and performance of functions by the Income-tax Authorities and while doing so in terms of sub-section (3), the Board can take into consideration and have regard to the four-fold criteria namely, territorial area; persons or classes of persons; incomes or classes of income; and cases or classes of cases. Thus, the Act does not authoritatively confer exclusive jurisdiction to specific Income Tax Authority. It is left to the Board to issue directions for exercise of power and functions taking into consideration territorial area, class/types of persons, income and case, and Board have been given wide power and latitude. The said Section by necessary implication postulates and acknowledges that multiple or more

than one Assessing officer could exercise jurisdiction over particular assessee. Concurrent jurisdictions are therefore not an anathema but an accepted position under the Act. The term "jurisdiction" in Section 120 of the Act has been used loosely and not in strict sense to confer jurisdiction exclusively to a specified and single assessing officer, to the exclusion of others with concurrent jurisdiction. It would refer to "place of assessment", a term used in the Income Tax Act, 1922. Sub-section (5) to Section 120 of the Act again affirms and accepts that there can be concurrent jurisdiction of two or more assessing officers who would exercise jurisdiction over a particular assessee in terms of the four-fold criteria stated in sub-section (3) to Section 120. Second part of sub-section (5) states that where powers and functions are exercised concurrently by Assessing Officers of different classes, then the higher authority can direct the lower authority in rank amongst them to exercise the powers and functions.

.....
.....

19. We would reiterate that sub-section (1) to Section 124 states that the Assessing Officer would have jurisdiction over the area in terms of any direction or order issued under sub-section (1) or sub-section (2) to Section 120 of the Act. Jurisdiction would depend upon the place where the person carries on business or profession or the area in which he is residing. Sub- section (3) clearly states that no person can call in question jurisdiction of an Assessing Officer in case of non-compliance and/or after the period stipulated in clauses (a) and (b), which as observed in S.S. Ahluwalia (supra) would negate and reject arguments predicated on lack of subject matter jurisdiction. Where an assessee questions jurisdiction of the Assessing Officer within the time limit and in terms of sub-section (3), and the Assessing Officer is not satisfied with the correctness of the claim, he is required to refer the matter for determination under sub-section (2) before the assessment is made. Reference of matter under sub-section (2) would not be required when Assessing Officer accepts the claim of the assessee and transfers the case to another Assessing Officer in view the objection by the assessee. (In terms of sub-section (3) to Section 124 of the Act, the petitioner had lost his right to question jurisdiction of the Income Tax Officer, Ward No. 1(1), Noida.

20. Sub-section (5) to Section 124, though limited in scope, would also be applicable in the facts and circumstances of the present case as the Income-Tax Officer, Ward-1 (1), Noida had the power to assess income accruing or arising within the area as it is not the case of the petitioner-assessee that the said officer did not have jurisdiction in view of location of the bank account and/or petitioner's place of work. Section 124(5) of the Act saves assessment made by an assessing officer provided that the assessment does not bring to tax anything other than income accruing, arising or received in that area over which the assessing officer exercises jurisdiction. However, notwithstanding Section 124(5), the Act does not postulate multiple assessments by different assessing officers, or assessment of part or portion of an income [see Kanjimal & Sons Vs. Commissioner of Income Tax, New Delhi, (1982) 138 ITR 391 (Delhi)]. Thus, it is necessary that the Assessing Officers having concurrent jurisdiction ensure that

only one of them proceeds and adjudicate. This is the purport and objective behind sub-section (2) to Section 124 of the Act."

22. The aforesaid judgement of Delhi High Court only supports the view taken by us herein above.

23. No other point has been argued before us by the learned counsel for the petitioner.

24. For all the reasons aforestated, we do not find any merit in this writ petition. Consequently, the writ petition fails and is hereby **dismissed.**

(2022) 9 ILRA 181
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2022

BEFORE

THE HON'BLE OM PRAKASH TRIPATHI, J.

Application U/S 482 No. 1663 of 2016

Ghanshyam Das & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ashutosh Pandey, Sri Ansar Ahmad

Counsel for the Opposite Parties:
G.A., Sri Bhavisya Sharma, Sri Raj Kumar Mishra

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 147, 148, 149, 452, 504, 506, 379-Quashing of summoning order-matrimonial dispute-applicants as well as opposite party no. 2 filed several suit against each other only with intend to create undue pressure-Informant being educated person filed FIR against the applicants-Courts are used as a tool of harassment-Legal awareness does not mean frivolous/vexatious litigations and such litigations are consuming the precious time of Courts-matter was pending since 2015, and the entire dispute has been compromised in 2022-no useful purpose shall be served by prolonging the proceeding of the instant case-Thus, the entire proceedings are quashed on the basis of compromise.(Para 1 to 22)

The application is allowed. (E-6)

List of Cases cited:

1. B.S. Joshi & ors. Vs St. of Har. & anr.. (2003) 4 SCC 675

2. NiKhil Merchant Vs C.B.I. (2008) 9 SCC 677

3. Manoj Sharma Vs St. & ors. (2008) 16 SCC 1

4. Gian Singh Vs St. of Punj. (2012) 10 SCC 303

5. Narindra Singh & ors. St. of Punj. (2014) 6 SCC 466

6. St. of M.P. Vs Laxmi Narayan & ors. (2019) AIR SC 1296

7. Shaifullah & ors. Vs St. of U.P. & anr. (2013) 83 ACC 278

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

1. Heard learned counsel for the applicants, learned counsel for opposite party no.2, learned A.G.A for the State and also perused the record.

2. This application under Section 482 Cr.P.C. has been filed by the applicants with a prayer to quash the summoning order dated 17.12.2015 as well as entire proceedings of Misc. Case No. 137 of 2015 (Tej Singh Verma vs. Ghanshyam Das and others) (Case No.3648 of 2015), under

Sections 147, 148, 149, 452, 504, 506, 379 IPC, Police Station Kotwali, District Etawah, pending in the court of Chief Judicial Magistrate, Etawah.

3. The facts of the present case is that marriage of applicant no.5 solemnized with son of opposite party no.2 according to Hindu Rites and Rituals on 30.11.2013. Thereafter, applicant no.5 namely, Shalu Patel lodged the first information report against opposite party no.2 on 05.07.2014 in Case Crime No.316 of 2014, under Sections 498A, 323, 506 IPC. Investigating Officer submitted charge sheet against opposite party no.2 on 31.07.2014. Subsequently, complaint was filed by opposite party no.2 against the applicants on 10.03.2015, under Section 156(3) Cr.P.C in Case Crime No.116 of 2015, under Sections 147, 148, 149, 452, 323, 504, 506, 307, 379 IPC, with the allegation that on 05.07.2014, applicants entered in the house of opposite party no.2 having lathi and danda in their hands and committed mar-peet with opposite party no.2 and his family members. Investigating Officer submitted a final report on 20.04.2015. Thereafter, learned court below issued notice to opposite party no.2 as such opposite party no.2 filed protest petition under Section 190(1)B Cr.P.C. against the aforesaid final report. Thereafter, learned court below only on the basis of statement recorded under Section 161 Cr.P.C. and without recording statement of opposite party no.2 and other witnesses, applicants were summoned. Investigating Officer submitted final report on the basis of statements recorded under Section 161 Cr.P.C.

4. Perused the impugned order dated 17.12.2015 by which final report no.88 of 2015 dated 20.04.2015 relating to Crime No.116 of 2015 has been rejected and protest petition of the applicants has been accepted and applicants Ghansyam Das, Ashok, Ram Chandra @ Rammo, Vinay Patel, Shalu Patel and Shibhu has been summoned under Sections 147, 148, 149, 452, 504, 506, 379 IPC and cognizance has been taken under Section 190(1)(b). This shows that after investigation, final report has been filed and applicants have been summoned on the basis of protest petition filed by the complainant Tej Singh Verma, who is retired lecturer.

5. During pendency of this application, learned counsel for the parties contended that dispute between the parties have been amicably settled outside the court by way of compromise. Consequently, a compromise application has been filed before court below and this Court vide order dated 18.04.2022 directed for verification of the compromise filed by the parties which was duly verified by the court concerned on 10.05.2022 and report from Chief Judicial Magistrate, Etawah has been sent to this Court on 17.05.2022.

6. It is submitted that no useful purpose shall be served by prolonging the proceedings of above mentioned case. Learned counsel for applicants further submits that interest of justice shall better be served in case entire proceeding of above mentioned case are quashed by this Court itself in exercise of its jurisdiction under Section 482 Cr.P.C. instead of relegating the parties to court below.

7. Learned A.G.A. as well as learned counsel representing opposite party no.2 could not oppose the submissions urged by learned counsel for applicants. Learned counsel for informant/opposite party no.2 further contends that once opposite party

no.2 has himself compromised the dispute with applicants and in pursuance thereof, he submitted a joint application before court concerned praying therein that case be decided on the basis of compromise, he cannot have any objection in case the matter is finally decided on the basis of said compromise. He has further invited the attention of the Court that opposite party no.2/informant was present at the time of verification of compromise.

9. This Court is not unmindful of the following judgements of Apex Court:

i. B.S. Joshi and others Vs. State of Haryana and another (2003)4 SCC 675

ii. Nikhil Merchant Vs. Central Bureau of Investigation[2008)9 SCC 677]

iii. Manoj Sharma Vs. State and others (2008) 16 SCC 1,

iv. Gian Singh Vs. State of Punjab (2012) 10 SCC 303

v. Narindra Singh and others Vs. State of Punjab (2014) 6 SCC 466.

vi. State of M.P. V/s Laxmi Narayan & Ors. [AIR 2019 SC 1296]

8. In the aforesaid judgments, Apex Court has categorically held that compromise can be made between the parties even in respect of certain cognizable and non compoundable offences. Reference may also be made to the decision given by this Court in **Shaifullah and others Vs. State of U.P. And another** *[2013 (83) ACC 278]* in which the law expounded by the Apex court. Various litigations are pending/decided between parties detailed as under :

9. From the perusal of record, it appears that one criminal case no.1925 of 2015 (State vs. Nikhil Verma and others), Case Crime No.316 of 2014 under Sections 498A, 323, 506 IPC, P.S. Kotwali, District Etawah has been decided by the Chief Judicial Magistrate, Etawah on 29.01.2019 and accused were acquitted. Another case was Hindu Marriage Act bearing Case No.555 of 2018 under Section 13(B) of Hindu Marriage Act has been decided on 28.08.2019, in which, marriage of Smt. Shalu Patel and Nikhil Verma has been dissolved. Another case no.658 of 2014 (Smt. Shalu Patel vs. Nikhil Verma), under Section 12 of Domestic Violence Act comes to an end on 10.12.2018 and application under Section 125 Cr.P.C. has been rejected on 10.12.2018. Complaint Case no.6595 of 2017 (Tej Singh Verma vs. Ghanshyam Das), under Section 500 IPC has been disposed of on 07.01.2019 as withdrawn. One case has been filed by Nikhil Verma under Section 13 of Hindu Marriage Act numbered as HMA No.20 of 2018 which has been dismissed as not pressed. Criminal Case No.4172 of 2016 (State vs. Saurabh Verma) under Sections 504, 506 IPC has been decided by Chief Judicial Magistrate, Etawah on 02.02.2019 and accused were acquitted under Sections 504, 506 IPC.

10. Considering the facts and circumstances of the case, as noted herein above, and also the submissions made by the counsel for the parties, the court is of the considered opinion that no useful purpose shall be served by prolonging the proceedings of above mentioned case. It is also submitted that case has also been compromised relating to matrimonial dispute.

11. As mentioned above, applicants as well as opposite party no.2 has filed several suit/applications against each other only with intend to create undue pressure. Such sort of unwarranted litigations create

burden over our judicial system. Courts are overburdened by such sort of litigations especially relating to family matters. Courts are used as a tool of harassment. Precious time of Courts consumed by such frivolous/vexatious litigations and due to paucity of time substantial litigations are delayed. Frivolous/vexatious incoming of cases should be checked. Legal awareness does not mean frivolous/vexatious litigations. Litigations should be for genuine cause/relief. Informant Tej Singh Verma, who is retired lecturer is well educated person. He has filed FIR against the applicants and after lodging the FIR police machinery came into motion and investigation has been completed by the police and final report has been filed. Thereafter, protest petition has been filed by the informant and on protest petition, applicant has been summoned by the concerned court. Thereafter, case is pending since 2015 and accused persons (applicants) had approached this Court under Section 482 Cr.P.C. for quashing impugned order dated 17.12.2015 in 2016 and thereafter, entire dispute has been compromised in 2022. The exercise made by the informant has created burden on the system.

12. Considering the facts and circumstances of the case, the proceedings of Misc. case No. 137 of 2015 (Case No.3648 of 2015), under Sections 147, 148, 149, 452, 504, 506, 379 I.P.C., Police Station- Kotwali, District- Etawah, is hereby quashed on the basis of compromise and the present application is allowed, subject to deposit of Rs.10,000/- as exemplary cost upon the applicants and opposite party no.2 each. The total amount of cost is Rs.20,000/- shall be deposited in the account of District Legal Services Authority, Etawah within a period of three months from the date of production of certified copy of this order. This amount shall be utilized for benefit of the litigants according to the satisfaction of Chairman, District Legal Services Authority, Etawah. Trial Court shall ensure the deposition of the said amount, before consigning the record. In default of payment of cost directed as above, order shall be deemed vacated automatically.

(2022) 9 ILRA 184
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.09.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482 No. 40942 of 2017
&
Application U/S 482 No. 40821 of 2017

Atul Saxena ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri A.K. Mishra, Sri Pankaj Sharma, Sri Sati Shanker Tripathi, Sri Sujit Kumar

Counsel for the Opposite Parties:
G.A., Sri Brijesh Sahai, Sri Pankaj Govil, Sri Praveen Kumar Singh, Sri Syed Imran Ibrahim

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 420, 467, 468, 471 & 506-Quashing of entire criminal proceedings-Complainant and his wife had commercial relationship with accused persons-they entered into an agreement with expectation of profit of amount deposited in terms of flats and share, later there was a breach of conditions, the Complainant had taken remedy available

under the Arbitration Act, 1996 and an award had been passed in their favour-Later the Complainant lodged FIR against the accused persons for cheating and forgery-The allegations of forgery as made in the complaint were in anticipation, no evidence was collected-Ingredients of offences of committing cheating and forgery are not satisfied-More so, It was a purely civil dispute which has been given criminal color and criminal proceedings are initiated only after the proceedings initiated by Complainant under the Act, 1996-The ingredients of forgery and cheating are absent as the allegations in complaint was only in anticipation without any evidence in this regard-Prima facie no offence is made out-Hence, the entire proceedings are quashed.(Para 1 to 13)

B. Quashing of criminal proceedings is called for only when the complaint does not disclose any offence, or the complaint is frivolous, vexatious, or oppressive. The criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a civil nature, if the ingredients of the alleged offence are prima facie made out in the complaint.(Para 9)

The applications are allowed. (E-6)

List of Cases cited:

1. Mitesh Kumar J. Sha Vs St. of Karn. & ors. (2021) AIR SC 5298: 2021 SCC OnLine SC 976.

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

3. Zandu Pharmaceutical Works Ltd. Vs Mohd Sharaful Haque (2005) 1 SCC 122

4. Ahmed Ali Quarashi & anr. Vs St. of U.P. (2020) SCC Online SC 107

5. Joseph Salvaraja A Vs St. of Guj. (2011) 7 SCC 59

6. Sushil Sethi & anr.. Vs St. of Arunachal Pradesh & ors. (2020) 3 SCC 240

7. Priti Saraf & anr. Vs St. of NCT of Delhi & anr. (2021) SCC Online SC 206

8. Sau. Kamal Shivaji Pokarnekar Vs St. of Mah. (2019) 14 SCC 350

9. St. of Karn. Vs M. Devendrappa (2015) 3 SCC 424

10. Indian Oil Corpn. Vs NEPC India Ltd & ors. (2006) 6 SCC 736

11. M/s Neeharika Infra. Pvt. Ltd Vs St. of Mah. & ors. (2020) 10 SCC 118

12. Ramveer Upadhyay & anr.. Vs St. of U.P. & anr.. (2022) SCC Online SC 484

13. Wyeth Ltd. & ors. Vs St. of Bih. & anr.. CRLA No. 1224 of 2022 (SLP Crl. No. 10730 of 2018)

14. Hridaya Ranjan Prasad Verma & ors. Vs St. of Bih. &anr. (2000) 4 SCC 168

15. Uma Shankar Gopalika Vs St. of Bih. & anr. (2005) 10 SCC 336

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. The facts, in brief, as evident from material on record as well as from submissions raised on behalf of rival parties are that, the Complainant and his wife have commercial relationship with accused persons so much that the Complainant was appointed as a Legal Advisor of the Company, namely, Culture Home Developer Pvt. Ltd., on remuneration. Further, wife of Complainant has entered a Memorandum of Understanding/ Agreement *(hereinafter referred to as "MOU/Agreement")* for adjusting the amount paid by Complainant and his wife towards allotment of flats as well as share.

2. It appears that relationship between parties became soar and a dispute arose to

the extent that payment of remuneration of Complainant was discontinued as well as condition of MOU/Agreement were allegedly not complied with and this led to appointment of an Arbitrator in terms of aforesaid agreement wherein an interim order was also passed and recently the Arbitrator has pronounced award dated 27.11.2021 in favour of Complainant and his wife. The said award is challenged by accused persons under the provisions of Section 34 of Arbitration and Conciliation Act, 1996 *(hereinafter referred to as "Act, 1996").*

3. During pendency of arbitration proceedings the Complainant filed a First Information Report against accused persons (applicants herein in both applications), for allegedly committing offences under Sections 420, 467, 468, 471, 506 IPC.

4. The contents of First Information Report are very lengthy, however, crux is that, very initiation of relationship between parties was based on dishonesty and accused persons allegedly, in order to deceive the Complainant and his wife, induces them to invest money and it was part of cheating that Complainant was appointed as a Legal Advisor to the Company as well as a MOU/Agreement was executed to show that all the transactions were bona fide. In the First Information Report there are further allegations that accused persons have committed forgery of valuable security, forgery for the purpose of cheating and forgery for using a genuine document, which has reason to believe to be forged.

5. Sri Sujit Kumar, learned counsel for applicants in both the applications, has vehemently argued that Complainant and his wife has already taken appropriate remedy under Act, 1996 and an award has been passed in their favour, though challenged under Section 34 of Act, 1996. The document of retainership as well as MOU/Agreement are not in dispute. The allegations of cheating or forgery are not based on any evidence. The Complainant side, with their open eyes, have entered not only into an agreement but also acted as a Legal Advisor of Company for which Complainant was paid also. Only in order to put pressure on accused/ applicants the criminal proceedings were initiated and First Information Report was lodged wherein after investigation charge sheet has been filed and cognizance has also been taken. The investigation was not fair and in absence of ingredients of aforesaid offences charge sheet was filed and without applying judicial mind, the Trial Court has taken cognizance for all the above referred alleged offences. It is a purely civil dispute which has been given criminal colour and criminal proceedings are initiated only after the proceedings initiated by Complainant under Act, 1996, therefore, the criminal proceedings as well as cognizance order are liable to be set aside.

6. The above submissions are vehemently opposed by Sri Paritosh Malviya, learned A.G.A. and Sri Syed Imran Ibrahim, Advocate for Opposite Party No. 2. They submitted that there might be some overlapping of facts but only on the ground that Complainant had availed remedy under Act, 1996 the First Information Report lodged for committing offences under Sections 420, 467, 468, 471, 506 IPC cannot be quashed, as there is no bar for lodging FIR for cognizable offence. In the criminal proceedings offences are to be proved by prosecution and it was a case of Complainant that since inception, in the relationship between parties, element to

deceive and to induce the Complainant and his wife, was present which remained continued when Complainant was appointed as Legal Advisor and further entering into MOU/Agreement with the wife of Complainant.

7. Heard learned counsel for parties and perused the material available on record.

8. Before adverting to the rival submissions it would be apposite to refer a recent judgment of Supreme Court passed in **Mitesh Kumar J. Sha vs. State of Karnataka and others, AIR 2021 SC 5298:2021 SCC OnLine SC 976,** wherein somewhat similar controversy was involved. Considering various judgments passed by Court it was held that, *"Although, there is perhaps not even an iota of doubt that a singular factual premise can give rise to a dispute which is both, of a civil as well as criminal nature, each of which could be pursued regardless of the other."* Court further held that only on the ground that complainant instituted multiple civil suit, it is not necessary that it was only to import it a criminal colour and ultimately the Court has to scrutinize, whether the relevant ingredients for a criminal case are even prima facie made out or not. The Court has also taken note that the criminal proceedings cannot be quashed solely because the dispute was referred to arbitration and arbitration proceedings had taken place thereafter.

9. Inherent Power of the High Court under Section 482 Criminal Procedure Code 1973 :-

(I) "Inherent Power" of the High Court under Section 482 Cr.P.C., an extraordinary power is with purpose and object of advancement of justice, which is to be exercised "to give effect to any order under the Cr.P.C.", or "to prevent abuse of process of any Court", or "to secure ends of justice", making arena of the power very wide, yet it is to be exercised sparingly, with great care and with circumspection, that too in the rarest of rare case.

(II) It is no more res integra that exercise of inherent power could be invoked to even quash a criminal proceeding/First Information Report/complaint /chargesheet, but only when allegation made therein does not constitute ingredients of the offence/offences and /or are frivolous and vexatious on their face, without looking into defence evidence, however such power should not be exercised to stifle or cause sudden death of any legitimate prosecution. Inherent power does not empower the High Court to assume role of a trial court and to embark upon an enquiry as to reliability of evidence and sustainability of accusation, specifically in a case where the entire facts are incomplete and hazy. Similarly quashing of criminal proceedings by assessing the statements under section 161 Cr.P.C. at initial stage is nothing but scuttling a full fledged trial.

(III) There can not be any straight jacket formula for regulating the inherent power of this Court, however the Supreme Court has summarised and illustrated some categories in which this power could be exercised in catena of judgments. Some of them are **State of Haryana Vs Bhajan Lal : 1992 Supp (1) SCC 335, Zandu Pharmaceutical Works Ltd Vs Mohd Sharaful Haque: (2005) 1 SCC 122, Ahmed Ali Quarashi and Anr Versus The State of Uttar Pradesh : 2020 SCC Online SC 107, Joseph Salvaraja A v. State of Gujarat (2011) 7 SCC 59, Sushil Sethi and another Vs The State of**

Arunachal Pradesh and others (2020) 3 SCC, 240, Priti Saraf and Anr Vs State of NCT of Delhi and Anr : 2021 SCC Online SC 206. Some categories/ circumstances as illustrations but not exhaustive are : allegations made in FIR / complaint, if are taken at their face value and accepted do not prima facie constitute any offence or are so absurd and inherently improbable to make out any case or no cognizable offence is disclosed against the accused, criminal proceedings is maliciously instituted with an ulterior motive and with a view to spite the accused due to private and personal grudge, or where there is a specific legal bar engrafted in any of the provisions of the Code or in the concerned Act to the institution and continuance of the proceedings or when dispute between the parties constitute only a civil wrong and not a criminal wrong, further Courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out.

(IV) In **Sau. Kamal Shivaji Pokarnekar v. The State of Maharashtra : (2019) 14 SCC 350,** the Apex Court has laid emphasis on the principles laid down in two of its previous judgements namely, **State of Karnataka v. M. Devendrappa : 2015 (3) SCC 424** and **Indian Oil Corporation v. NEPC India Ltd. & Ors.: (2006)6 SCC 736** and held that quashing of criminal proceedings is called for only when the complaint does not disclose any offence, or the complaint is frivolous, vexatious, or oppressive and further clarified that defences available during a trial and facts/aspects whose establishment during the trial may lead to acquittal cannot form the basis of quashing a criminal complaint. The criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a civil nature, if the ingredients of the alleged offence are prima facie made out in the complaint.

(V) The Supreme Court in **M/s Neeharika Infrastructure Pvt. Ltd Versus State of Maharashtra and Others : (2020) 10 SCC 118,** has categorically held that High Court is not justified in passing the order of not to arrest and or no coercive steps either during the investigation or till the final report/ charge sheet is filed under Section 173 Cr.P.C., while dismissing/disposing petition under Section 482Cr.P.C. and/or under Article 226 of the Constitution and even in exceptional cases where High Court is of the opinion that a prima facie case is made out for stay of further investigation,such order has to be with brief reasons, though such orders should not be passed routinely, casually and/or mechanically.

(VI) Whether the allegations are true or untrue, would have to be decided in the trial. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. (see **Ramveer Upadhyay & Anr. versus State of U.P. & Anr. 2022 SCC Online SC 484)**

(VII) "A careful reading of the complaint, the gist of which we have extracted above would show that none of the ingredients of any of the offences complained against the appellants are made out. Even if all the averments contained in the complaint are taken to be true, they do not make out any of the offences alleged against the appellants. Therefore, we do not know how an FIR was registered and a charge-sheet was also filed.....It is too late in the day to seek support from any precedents, for the proposition that if no

offence is made out by a careful reading of the complaint, the complaint deserves to be quashed." (See, **Wyeth Limited & others vs, State of Bihar & another, Criminal Appeal No.1224 of 2022 (Special Leave Petition (Crl.) No.10730 OF 2018), decided on 11th August, 2022).**

10. Now the Court proceed to scrutinize, whether the relevant ingredients for a criminal case are prima facie made out or not. Sections 420, 467, 468, 471 and 506 IPC are mentioned hereinafter:

*"**420. Cheating and dishonestly inducing delivery of property.**--Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

*"**467. Forgery of valuable security, will, etc.**--Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

*"**468. Forgery for purpose of cheating.**--Whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

*"**471. Using as genuine a forged document or electronic record.**--Whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be a forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record."*

*"**506. Punishment for criminal intimidation.**--Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc.--And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."*

11. In order to find out, whether there are prima facie case made out for committing offence of cheating and dishonestly inducing delivery of property as well as forgery of valuable security for the purpose of cheating and using as genuine any document believed to be forged with dishonest intention, the element of dishonesty and intent to commit fraud by cheating or forgery is necessary. However,

the facts are different so much as the Complainant has not only paid amount for the purpose of flats but became Legal Advisor of the Company of accused also on retainer basis and for that he was paid on month-to-month basis. Further, his wife has entered into the MOU/Agreement with accused person duly signed by both parties. Therefore, the parties have entered into a business transaction after understanding the terms of MOU/Agreement with expectation of profit of amount deposited in terms of flats and share and since the conditions were not followed and there was a breach of conditions, the Complainant has taken remedy available under Act, 1996 and recently an award has been passed in their favour, therefore, the element of inducement on the basis of fraudulent and dishonest act by accused persons is missing as well as the allegation of forgery is also not prima facie made out as there is no allegation that MOU/Agreement made was a forged document. The allegations of forgery as made in the complaint were in anticipation as well as no evidence was collected, whether any forged documents were prepared. For reference the relevant part of complaint is reproduced hereinafter:

"Inke Dwara Comapny Me Jhuthe Dastavej/ Khata/ Vivran Patra Vouchers Aadi Nuksan Pahunchane Ki Niyat Se Taiyar Kiye Gaye Hai Aut Taiyar Kiye Ja Rahe Hai Jisse Hamare Alawa Anya Niveshakon Ko Bhi Dhanrashi Ka Nuksan Ho."

12. Therefore, there was no material on record that any offence of forgery was prima faice committed.

13. Considering the above analysis, this Court come to definite conclusion that ingredients of offences of committing cheating and forgery are not satisfied since there is no element of dishonesty from inception specifically when parties have entered into MOU/Agreement duly signed and without any allegation of forgery in the said document. The essential ingredients of forgery, i.e., to make any false document with intent to commit fraud is also absent as the allegation in complaint was only in anticipation without any evidence in this regard. Accordingly, this Court finds it to be a fit case where the inherent power under Section 482 Cr.P.C. can be exercised that no offence is made out on the basis of complaint and material on record and thus the facts of present case falls under the category of exceptionally rare case where it is patently clear that allegations do not disclose any offence. It would be beneficial to extract relevant part of para 15 of **Hridaya Ranjan Prasad Verma and others vs. State of Bihar and another, (2000) 4 SCC 168** and para 6 and 7 **of Uma Shankar Gopalika vs. State of Bihar and another, (2005) 10 SCC 336:**

<u>Hridaya Ranjan Prasad Verma (supra)</u>

"15. ....that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To

hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise..."

Uma Shankar Gopalika (supra)

"6. Now the question to be examined by us is as to whether on the facts disclosed in the petition of complaint any criminal offence whatsoever is made out much less offences under Sections 420/120-B IPC. The only allegation in the complaint petition against the accused persons is that they assured the complainant that when they receive the insurance claim amounting to Rs 4,20,000, they would pay a sum of Rs 2,60,000 to the complainant out of that but the same has never been paid. Apart from that there is no other allegation in the petition of complaint. It was pointed out on behalf of the complainant that the accused fraudulently persuaded the complainant to agree so that the accused persons may take steps for moving the Consumer Forum in relation to the claim of Rs 4,20,000. It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating, hi the present case it has nowhere been stated that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC.

7. In our view petition of complaint does not disclose any criminal offence at all much less any offence either under Section 420 or Section 120-B IPC and the present case is a case of purely civil dispute between the parties for which remedy lies before a civil court by filing a properly constituted suit. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and to prevent the same it was just and expedient for the High Court to quash the same by exercising the powers under Section 482 CrPC which it has erroneously refused."

14. In the result, both the applications are allowed. Entire criminal proceedings in Criminal Case No. 2317 of 2017 (State vs. Atul Saxena and others), arising out of Case Crime No. 0726 of 2016, under Sections 420, 467, 468, 471, 506 IPC, Police Station Vrindaban, District Mathura as well as the charge sheet dated 19.01.2017 and cognizance order dated 20.04.2017, are hereby quashed.

15. There shall be no order as to costs.

(2022) 9 ILRA 191
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2022

BEFORE

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

Special Appeal No. 277 of 2022

State of U.P. & Ors. ...Petitioners
Versus
Annu Verma & Anr. ...Respondents

Counsel for the Petitioners:
Sri Ramanand Pandey (Addl. C.S.C.), Sri Ashish Pandey

Counsel for the Respondents:
Sri Ashish Tripathi

A. Education Law – Correction of Date of Birth – Limitation - Regulations framed under the Uttar Pradesh Intermediate Education Act, 1921 - Regulation 7 of Chapter III - The Rule of Limitation would not apply if the mistake is in the records maintained by the Board as distinguished from a mistake in the certificate of passing. (Para 11)

In the present case, the petitioner's DOB has been correctly recorded in all the school records, including the one wherefrom she sat the High School Examination leading to the issue of the High School Certificate. It is also not disputed that the petitioner filled her DOB in her application form submitted to the Board for the purpose of appearing in her High School Examination correctly mentioning it as 07.07.1987. The mistake was made in the records of the Board. **It is not just a mistake in the High School Certificate issued to the petitioner so as to attract the Rule of Limitation carried in Regulation 7 of Chapter III of the Regulations.**

The Rule of Limitation seeks to protect and preserve the sanctity of DOB entered in the High School Certificate against changes, where some benefit from the change may be drawn by the applicant. Invariably, the benefit may be claimed for the purpose of eligibility in matters of employment or assertion of a right or the date when a person would superannuate, if in government service. The change that is desired will enhance the age of the first respondent by about 12 years if the DOB is corrected from the one mistakenly recorded by the Board in their records. It does not ostensibly or otherwise afford any kind of gain or advantage to the petitioner-respondent no. 1. (Para 13)

Special appeal dismissed. (E-4)

<u>Precedent followed</u>:

1. Babu Ram Vs St. of U.P. & anr., 2010 SCC OnLine All 1403 (Para 11)

2. Ajay Kumar Vs Secretary Secondary Education Board, U.P., Allahabad & ors., 2014(2) AWC 1765 (Para 12)

3. Jigya Yadav (Minor) (Through Guardian/ Father Hari Singh) Vs Central Board of Secondary Education & ors., (2021) 7 SCC 535 (Para 14)

Present special appeal assails judgment and order dated 26.07.2021, passed by learned Single Judge in Civil Misc. Writ Petition No. 5412 of 2021.

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

1. This is a respondents' appeal arising out of the judgment and order dated 26.07.2021 passed by the learned Single Judge, allowing Writ-C No. 5412 of 2021.

2. The writ petitioner, who is respondent no. 1 to this appeal, passed her High School Examination in the year 2014 from the Board of High School & Intermediate Education, U.P. She was issued with a certificate-cum-marks sheet dated 30th May, 2014. Her High School Certificate-cum-Mark Sheet indicates her date of birth to be 20.07.1999. It is the petitioner's case that she passed her Primary Education (Class-V) from the Primary Vidyalya, Saraiya-I, District Basti on 20.07.1999 and her date of birth recorded in her school records, including the School Leaving Certificate, is 07.07.1987. She passed her Class-VIII examination from Janta Laghu Uchchatar Madhyamik Vidyalaya, Mahulani Bujurg Bajar, Govindpara, Basti on 30.06.2002. In the Scholar's Register and the Transfer Certificate issued by the Institution last mentioned, the petitioner's date of birth is again recorded as 07.07.1987. She sought admission to Class-IX in the Ramdas Uday Pratap Audyogik Inter College, Bhatpurwa, Chilma Bajar, Basti through an application made for the purpose. In the said

application form, jointly signed by the petitioner-respondent no. 1 and her guardian, her date of birth was accurately mentioned as 07.07.1987.

3. It is the petitioner's further case that while making her application to the Board of High School & Intermediate Education to appear in the High School Examination of the year 2014, she correctly mentioned her date of birth as 07.07.1987, which accords with her recorded date of birth in the different institutions that she has attended.

4. Nevertheless, in her High School Certificate issued, the Authorities of the Board incorrectly recorded her date of birth as 20.07.1999, instead of 07.07.1987. The petitioner thereafter married. Her husband was employed with the Medical Health Department. The petitioner's husband's employer demanded details of his family members with their names, age and other details. It was then that the petitioner noticed that her date of birth has been incorrectly mentioned in her High School Certificate-cum-Mark Sheet.

5. The petitioner-respondent no. 1 filed an application on the prescribed proforma, seeking correction of her date of birth in the month of August, 2020. The application aforesaid was made to the Regional Secretary, Board of High School & Intermediate Education, Varanasi. It was duly supported by an affidavit and other documents. Faced with inaction, the petitioner submitted, through registered post, a reminder dated 26.10.2020 and again one dated 02.11.2020, also addressed to the Regional Secretary. The Board of High School & Intermediate Education, Varanasi took no action on the petitioner's application for correction sought to her date of birth. In the circumstances, the writ petitioner-respondent no. 1 preferred Writ-C No. 5412 of 2021, which has come to be allowed by the learned Single Judge, ordering the appellant-Board and the State of U.P. in the appropriate department to correct the petitioner's date of birth in her High School Certificate-cum Mark Sheet by substituting the date as 07.07.1987 for 20.07.1999. The corrected certificate has been ordered to be issued to the petitioner within one month of the date of presentation of a copy of the judgment passed by the learned Single Judge.

6. The appellant-Board and the State of U.P. in the Department of Secondary Education have challenged the aforesaid judgment and order, seeking its reversal.

7. Heard Mr. Ramanand Pandey, learned Additional Chief Standing Counsel for the appellants and Mr. Ashish Pandey, learned counsel appearing on behalf of petitioner-respondent no. 1.

8. The appellants assail the *mandamus* issued by the learned Single Judge on the sole ground that the writ petitioner had no right to correction of her date of birth, inasmuch as she filed application beyond the period of two years of the date of issue of her High School Certificate-cum-Marks Sheet. The Rule of Limitation provided under Regulation 7 of Chapter III of the Regulations framed under the Uttar Pradesh Intermediate Education Act, 1921 (for short, 'the Act of 1921') bars the petitioner's right to seek correction. The learned Counsel for the appellants submits that the Rule of Limitation cannot be circumvented by falling back on considerations of any kind of equity. It is urged that the Rule of Limitation cannot be given a go-by.

9. On the other hand, learned Counsel appearing for the petitioner-respondent

no.1 submitted that the prohibition carried in Regulation 7 of Chapter III of the Regulations framed under the Act of 1921 is confined to cases, where there is a mistake in any "Pass Certificate' issued by the Board, and not where the mistake is in the records maintained by the Board that is reflected in the certificate.

10. We have considered the submissions advanced at the Bar on behalf of both parties, perused the record and the judgment impugned.

11. The Rule of Limitation postulated in Regulation 7 of Chapter III of the Regulations has to be understood for its true purpose and not applied to every situation where correction is sought to particulars mentioned in the certificate-cum-statement of marks. A Division Bench of this Court in **Babu Ram v. State of U.P. and another, 2010 SCC OnLine All 1403** held that the Rule of Limitation would not apply if the mistake is in the records maintained by the Board as distinguished from a mistake in the certificate of passing. It was held in **Babu Ram** *(supra):*

"In the instant case, we find that Regulation 7, referred to above, refers to correction in the certificate of passing. There is no mistake in the certificate of passing. The mistake is in the records maintained by the Board. Therefore, the said Regulation would not be applicable so far as the case of the appellant is concerned. Once the respondents themselves had issued the certificate showing the Date of Birth of the appellant as 1st September, 1949, the respondent no.2 was bound to correct the clerical mistake in the record of the Board."

12. This decision has been followed by a learned Single Judge of this Court in **Ajay Kumar v. Secretary Secondary Education Board, U.P., Allahabad and others, 2014(2) AWC 1765.** In **Ajay Kumar** *(supra)*, it was observed:

"6. From the records it is evident that in all the previous certificates of the petitioner, his date of birth is shown as 16.01.1994. Thus, the mistake appears to be clerical one. It is not the case that the petitioner wants to get his age reduced by the correction, but his age would be enhanced. Thus, the intention of the petitioner does not appear to take undue advantage by moving such application. The application is evidently bona fide.

7. A Division Bench of this Court had the occasion to deal with the similar facts and also the Regulation-7 in Special Appeal No. 1202 of 2010 (Babu Ram v. State of U.P. and another), decided on 03rd August, 2010. The Court has found that Regulation-7 refers to correction in the certificate of passing and if there is any mistake in the record maintained by the Board, Regulation-7 would not be applicable. For the sake of convenience, the relevant part of the judgment of the Division Bench is quoted below:

"Regulation 7 of Chapter III of the Regulations, which is relevant for the purpose, reads as under:-

"7. सचिव, परिषद की ओर से सफल उम्मीदवारों को परिषद् की परीक्षा में उत्तीर्ण होने का प्रमाण-पत्र विहित प्रपत्र में देगा और बाद में उसकी प्रविष्टियों में कोई शुद्धि करेगा, बशर्ते कि प्रमाण-पत्र में किसी ऐसी गलत प्रविष्टि, किसी अवचारित लिपिकीय भूल या लोप के कारण या किसी प्रेस लिपिकीय भूल के कारण की गई हो जो असावधानी से परिषद के स्तर के या उस संस्था के, जहाँ से अन्तिम बार शिक्षा

प्राप्त की हो, स्तर पर अभिलेख में हो गई हो। यह शुद्धि सचिव द्वारा उसी स्थिति में की जा सकेगी जबकि अभ्यर्थी ने सम्बन्धित परीक्षा के प्रमाण-पत्र को परिषद द्वारा निर्गमन करने की तिथि से दो वर्ष के अन्दर ही लिपिकीय त्रुटि की ओर ध्यान आकृष्ट करते हुए सम्बन्धित प्रधानाचार्य/ केन्द्र व्यवस्थापक को त्रुटि के संशोधन हेतु प्रार्थना-पत्र प्रस्तुत कर दिया हो और उसकी प्रति पंजीकृत डाक से सचिव, परिषद् को भी प्रेषित की हो।"

In the petition filed by the appellant, that plea was also taken before the learned Single Judge. However, the learned Judge held that as the application was filed beyond the time and was not maintainable, and that the appellant herein may file a civil suit for declaration of his Date of Birth.

In the instant case, we find that Regulation 7, referred to above, refers to correction in the certificate of passing. There is no mistake in the certificate of passing. The mistake is in the records maintained by the Board. Therefore, the said Regulation would not be applicable so far as the case of the appellant is concerned. Once the respondents themselves had issued the certificate showing the Date of Birth of the appellant as 1st September, 1949, the respondent no.2 was bound to correct the clerical mistake in the record of the Board."

8. Keeping in the mind the aforesaid law it is evident in the present case that the petitioner's date of birth has been correctly mentioned in the School Leaving Certificate of Class-V, School Leaving Certificate of Class-VIII as well as in the Transfer Certificate of Intermediate, however, in the record of the Board an incorrect date as 11.01.1996 has been recorded. Thus, the provisions of Regulation-7 is not attracted in the facts of the present case."

13. Here too, the petitioner's date of birth has been correctly recorded in all the school records, including the one wherefrom she sat the High School Examination leading to the issue of the High School Certificate. It is also not disputed that the petitioner filled her date of birth in her application form submitted to the Board for the purpose of appearing in her High School Examination correctly mentioning it as 07.07.1987. The mistake was made in the records of the Board. It is not just a mistake in the High School Certificate issued to the petitioner so as to attract the Rule of Limitation carried in Regulation 7 of Chapter III of the Regulations. The principle adumbrated by the Division Bench in **Babu Ram's** case squarely applies here. Quite apart, the Rule of Limitation seeks to protect and preserve the sanctity of date of birth entered in the High School Certificate against changes, where some benefit from the change may be drawn by the applicant. Invariably, the benefit may be claimed for the purpose of eligibility in matters of employment or assertion of a right or the date when a person would superannuate, if in government service. Here, the petitioner is a married woman, who avowedly seeks the rectification to ensure that the particulars of her husband's family members furnished to his employers are accurate. More so, the change that is desired will enhance the age of the first respondent by about 12 years if the date of birth is corrected from the one mistakenly recorded by the Board in their records. It does not ostensibly or otherwise afford any kind of gain or advantage to the petitioner-respondent no.1.

14. In the entirety of circumstances, in our considered opinion, the appellants have erred in resisting petitioner-respondent no.1's claim to the rectification of the date of birth in the records of the Board and her High School Certificate-cum-Mark Sheet. It may be noticed that no decision, contrary to the view expressed by the Division Bench in **Babu Ram's** case, has been brought to our notice by the learned Additional Chief Standing Counsel appearing for the appellants. Also, we are supported in the view that we take on broader principle by the holding of the Supreme Court in **Jigya Yadav (Minor) (Through Guardian/ Father Hari Singh) v. Central Board of Secondary Education and others, (2021) 7 SCC 535.**

15. In the circumstances, we do not find any infirmity in the order impugned passed by the learned Single Judge, which we hereby affirm. The appeal is **dismissed,** but without any order as to costs.

(2022) 9 ILRA 196
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2022

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Writ A No. 2956 of 2022

State of U.P. & Anr. ...Petitioners
Versus
Dinesh Kumar Katiyar ...Respondent

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondent:

A. Service Law – Disciplinary Inquiry – Punishment - Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 - Rules 7, 8 & 9 - It is well-established principle of law that if manner of doing a particular act is prescribed under any statute then the act must be done in that manner or not at all. An Inquiry Officer is a quasi-judicial authority. Therefore, he must perform his functions fairly and reasonably which is even otherwise the requirement of the principles of natural justice. (Para 14, 16)

The prosecution has to prove the charges by producing documents through witnesses and placing such witnesses to be cross examined by the charged Government servant. Even in the absence of the charged Government servant, the Inquiry Officer is obliged to examine the evidence presented by the Department to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. A perusal of the charge-sheet would show that the charges are based on the preliminary inquiry report dated 31.07.2012 of the Joint Director. **Since no oral evidence has been examined, the preliminary inquiry report dated 31.07.2012 has not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondent.**

Prejudice is evident in cases where the Department has not even proved the documents and evidence which has been presented on its own behalf, and the governing rules have been blatantly violated. In the absence of any oral inquiry, any amount of reasoning given by the Inquiry Officer regarding each and every one of the instance in the inquiry report is not going to validate the proceeding. Merely because the Respondent in his reply to the charges didn't express his desire for any cross-examination or examination of his witnesses as alleged, it would not absolve the Inquiry Officer from holding an oral inquiry against the Respondent. (Para 11)

Inquiry proceedings stood vitiated for not following the mandatory provisions of Rule 7(vii) of the Rules. (Para 17)

B. It is undoubtedly open for the disciplinary authority to deal with the delinquency and once charges are established, to award appropriate punishment. But when the charges are same and identical in relation to one and the same incident, then to deal with the delinquents differently in the award of punishment, would be discriminatory. (Para 22)

If all fish stink, to pick one and say only it stinks is unfair in the matter of unanimous decision of the Committee. (Para 21)

The fact that the disciplinary inquiry was initiated against the Respondent, T.K. Sharma, Mukhtar Khan and Javir Ali on the basis of the preliminary inquiry report dated 31.07.2021 is not in dispute is not in dispute. It is also not disputed that the other officers were exonerated by the Inquiry Officer, but on the same charges the Respondent was found guilty. In the punishment order, the St. Government has failed to give any reason or justification as to why the basis for exoneration of other three employees is inapplicable to the case of Respondent. (Para 20, 24)

C. There may be situations where because of a long time-lag or such other supervening circumstances the writ court considers it unfair, harsh or otherwise unnecessary to direct a fresh inquiry or fresh order by the competent authority. It is settled legal preposition, that once the court sets aside an order of punishment, on the ground that the inquiry was not properly conducted, it must remit the case concerned to the disciplinary authority for it to conduct the inquiry from the point that stood vitiated, and conclude the same. But that course may not have been the only course open in a given situation. (Para 25, 26)

In the present case, disciplinary inquiry was initiated against the Respondent in the year 2014. The punishment order dated 11.08.2017 was served upon him on 31.08.2017, the date on which the Respondent attained the age of superannuation and retired from service. The Respondent may by now must have turned 66 years of age. Any remand either to the inquiry officer for a fresh inquiry or to the disciplinary authority for a fresh order would thus be very harsh and would practically deny to the Respondent any relief whatsoever. Furthermore, in light of the fact that the Respondent has been discriminated against in the matter of imposition of punishment, and that he is entitled to parity *qua* other exonerated officers. The Tribunal has rightly exercised its discretion in not remanding the matter back. (Para 27)

Writ Petition dismissed. (E-4)

<u>Precedent followed</u>:

1. St. of Uttranchal & ors. Vs Kharak Singh, (2008) 8 SCC 236 (Para 11)

2. Roop Singh Negi Vs Punjab National Bank & Ors., (2009) 2 SCC 570 (Para 12)

3. St. of U.P. & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772 (Para 13)

4. Babu Verghese Vs Bar Council of Kerala, (1999) 3 SCC 422 (Para 14)

5. Brajendra Singh Yambem Vs U.O.I., (2016) 9 SCC 20) (Para 14)

6. Union of India Vs Prakash Kumar Tandon, (2009) 2 SCC 541 (Para 16)

7. Bongaigaon Refinery & Petrochemicals Ltd. v. Girish Chandra Sarma, (2007) 7 SCC 206 (Para 21)

8. St. of U.P. & ors. Vs Raj Pal Singh, (2010) 5 SCC 783 (Para 22)

9. Tata Engineering and Locomotive Co. Ltd. Vs Jitendra Prasad Singh & ors., (2001) 10 SCC 530 (Para 23)

10. Allahabad Bank Vs Krishna Narayan Tewari, (2017) 2 SCC 308 (Para 26)

(Delivered by Hon'ble Rakesh Srivastava, J.

&

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

1. In the year 2014, Dinesh Kumar Katiyar, the Respondent, was working as Soil Conservation Officer in Samadesh Bandhu, U.P. Civil Secretariat, Lucknow. The State Government issued a charge-sheet dated 21.04.2014 charging him as follows:

"आपके विरूद्ध निम्नांकित आरोप लगाये जाते हैं :–

आरोप सं0–1

भूमि संरक्षण इकाई, डी0पी0ए0पी0–उरई में प्रभारी भूमि संरक्षण अधिकारी के रूप में दिनांक 27.06.2008 से 22.04.2010 तक की तैनाती अवधि में आप द्वारा डी0पी0ए0पी0 की विभिन्न परियोजना के डब्लू0डी0एफ0 खातों से रू0 2,25,739.00 का अनाधिकृत रूप से आहरण कर राजकीय धन का छलाहरण कर दुरूपयोग किया गया है जब कि हरियाली गाइड लाइन्स के पैरा–36 के अनुसार इस धनराशि को सामुदायिक कार्यों पर व्यय किया जाना चाहिए था।

अतः आप हरियाली गाइड लाइन्स के पैरा–29 एवं 36 के अन्तर्गत प्रदत्त दिशा निर्देशों व भारत सरकार एवं शासन के निर्देशों के उल्लंघन करते हुए क्षेत्रीय कर्मचारियों के साथ मिल कर अध्यक्ष एवं सचिव के माध्यम से डब्लू0डी0एफ0 के खातों से रू0 2,25,739.00 का अनाधिकृत रूप से आहरित राजकीय धन का छलाहरण करने, प्रभारी भूमि संरक्षण अधिकारी पद के कर्तव्यों एवं दायित्वों के अनुरूप कार्य न करने तथा उ0प्र0 सरकारी कर्मचारी आचरण नियमावली–1956 के नियम–3 के विपरीत आचरण करने के दोषी है।

उक्त आरोप की पुष्टि हेतु निम्न साक्ष्य पठनीय होंगे–

1. *संयुक्त निदेशक कृषि, रामगंगा कमाण्ड परियोजना कानपुर का पत्र संख्या–शष्य/जॉच/डी0ए0पी0 उरई/2012–13 दिनांक 31.07.2012 द्वारा उपलब्ध करायी गई जॉच आख्या एवं भूमि संरक्षण इकाई उरई के कार्यालय के संरक्षित अभिलेख।*

2. उ0प्र0 सरकारी कर्मचारी आचरण नियमावली, 1956 के नियम–3 की प्रति।

आरोप संख्या–2

भूमि संरक्षण इकाई, डी0पी0पी0–उरई में प्रभारी भूमि संरक्षण अधिकारी के रूप में आपकी तैनाती अवधि में डी0पी0ए0पी0 की परियोजनाओं के डब्लू0डी0एफ0 खातों से कराये गये रू0 2,25,739.00 के उपरोक्त आहरण से सम्बन्धित कोई भी अभिलेख तथा स्टीमेट (सक्षम अधिकारी से अनुमोदित पत्रावली) माप पुस्तिका सम्बन्धित वाउचर एवं दैनिक श्रमिक चिट्ठा आदि संयुक्त निदेशक कृषि द्वारा की गई जांच के समय इकाई कार्यालय में उपलब्ध नहीं पाये गये।

अतः आप बिना अनुमोदित इस्टीमेट मापन, बाउचर एवं श्रमिक चिट्ठों के फर्जी

1. *संयुक्त निदेशक कृषि, रामगंगा कमाण्ड परियोजना कानपुर का पत्र संख्या–शष्य/जांच/डी0ए0पी0 उरई/2012–13 दिनांक 31.07.2012 द्वारा उपलब्ध करायी गई जांच आख्या एवं भूमि संरक्षण इकाई उरई के कार्यालय के संरक्षित अभिलेख।*

2. उ0प्र0 सरकारी कर्मचारी आचरण नियमावली, 1956 के नियम–3 की प्रति।"

(emphasis supplied)

2. On 13.07.2015, the State Government issued a corrigendum to the charge-sheet dated 21.04.2014, amending the figure Rs. 2,25,739/-, wherever it appeared in the charge-sheet by the figure Rs. 3,96,500/-. On 10.09.2015, a supplementary charge-sheet was issued to the Respondent with an additional charge of withdrawal of Rs. 76,500/-. On 09.08.2016, the Respondent submitted his reply denying the charges levelled against him. On 28.12.2016, the Inquiry Officer submitted his inquiry report. Thereafter, a show cause notice dated 16.01.2017 was issued to the Respondent. On 07.02.2017, the Respondent submitted his reply to the said show cause notice. The State Government passed the punishment order dated 11.08.2017, whereby the Respondent was ordered to be reverted to the initial pay scale and a sum of Rs. 4,72,000/- was ordered to be recovered from him. The

order dated 11.08.2017 was served upon the Respondent on 31.08.2017. In compliance of the order dated 11.08.2017, the Administrator, Greater Sharda Sahayak Command, passed an order dated 07.11.2017 fixing the salary of the Respondent at Rs. 35,400/- as on 11.08.2017, in the basic pay scale of Junior Engineer.

3. The Respondent assailed the punishment order dated 11.08.2017, as well as the consequential order dated 07.11.2017, before the U.P. State Public Services Tribunal (for short 'the Tribunal') in Claim Petition No. 2079 of 2017, Dinesh Kumar Katiyar v. State of U.P. and another. By its judgment and order dated 04.10.2021, the Tribunal has allowed the claim petition. The orders dated 11.08.2017 and 07.11.2017 have been quashed with all consequential benefits. The amount, if any, recovered from the Respondent has been ordered to be refunded. Aggrieved by the said judgment and order dated 04.10.2021 of the Tribunal, the Petitioners have preferred the present writ petition.

4. Shri Vivek Kumar Shukla, learned Additional Chief Standing Counsel, appearing for the Petitioners, submitted that the Respondent, at any stage of the proceedings, did not ask for any oral inquiry and in the absence of the Respondent showing any prejudice having been caused to him, the Tribunal has erred in setting aside the punishment order on the ground that no oral inquiry was held. He further submitted that, once the order of punishment was set aside by the Tribunal on the ground that the inquiry was not properly conducted, the Tribunal was obliged to remit the case to the disciplinary authority for it to conduct the inquiry from the point that it stood vitiated, and to conclude the same.

5. Shri Ajey Shanker Tewari, Advocate appearing for the Respondent has supported the impugned judgment.

6. The relevant facts for the adjudication of this case are as follows: the Respondent, was appointed as a Junior Engineer on 08.10.1980. He was promoted to the post of Soil Conservation Officer on 07.02.2013 on probation for a period of two years. On 31.07.2012, the Joint Director (Agriculture), Ramganga Command Project, Kanpur submitted a preliminary inquiry report holding the personnel named therein responsible for wastage of money. On the basis of the report dated 31.07.2012 mentioned above, disciplinary proceedings were initiated against four persons, namely, the Respondent, Shri T.K. Sharma, Deputy Director, Shri Mukhtar Khan, Assistant Soil Conservation Officer and Shri Javir Ali, Junior Engineer. The Respondent was served with a charge-sheet dated 21.04.2014, containing two charges pertaining to the period he was posted as Incharge Soil Conservation Officer in Land Development and Water Resources Department at Orai w.e.f. 27.06.2008 to 22.04.2010. The Respondent denied the charges levelled against him. The Inquiry Officer without holding any oral inquiry submitted his inquiry report which led to the passing of the orders dated 11.08.2017 and 07.11.2017.

7. Admittedly, the inquiry against the Respondent has been held under the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (for brevity "the Rules"). The said Rules have been framed by the Government of Uttar Pradesh in exercise of powers conferred by the proviso to Article 309 of the Constitution. The Rules prescribe the detailed procedure to be followed in the matters of enforcing discipline and imposing penalty/

punishment against Government servants and in appeals in case of proven misconduct. The procedure and the manner in which an inquiry has to be conducted before imposing any major penalty is laid down in Rule 7 of the Rules. Sub-rule (v), (vi), (vii) & (x) of Rule 7 being relevant are being extracted below for ready reference:

7. Procedure for imposing major penalties. - Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner:

(i) to (iv) (omitted as unnecessary)

(v) The charge-sheet, along with the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servant personally or by registered post at the address mentioned in the official records. In case the charge-sheet could not be served in aforesaid manner, the charge-sheet shall be served by publication in a daily newspaper having wide circulation:

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charge Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government servant appears and admits charges, the Inquiry Officer shall submit his report to the disciplinary authority on the basis of such admission.

(vii) *Where the charged Government servant denies the charge the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charge Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidences, the Inquiry officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence:*

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) & (ix) (omitted as unnecessary)

(x) *Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the inquiry officer shall proceed with the inquiry ex parte. In such a case the inquiry officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.*

(xi) to (xii) *(omitted as unnecessary)"*

(emphasis supplied)

8. Rule 8 of the Rules provides that after the inquiry is completed, the Inquiry Officer shall submit his inquiry report to the disciplinary authority along with all the records of the inquiry. Rule 9 of the Rules prescribes the procedure to be adopted by the disciplinary authority after receiving the inquiry report.

9. As per sub-rule (vi) of Rule 7 of the Rules, it is only where the delinquent Government servant appears and admits the charges that the Inquiry Officer is at liberty to submit his report to the disciplinary authority on the basis of such admission. However, where the delinquent Government servant denies the charges levelled against him, sub-rule (vii) of Rule 7 enjoins upon the Inquiry Officer to hold an oral inquiry in accordance with the

procedure prescribed in the said Rule. It is only after the inquiry is completed, strictly as per the procedure laid down for the purpose, that the Inquiry Officer can submit his inquiry report to the disciplinary authority. The disciplinary authority, having regard to the findings in the inquiry report, and after giving an opportunity to show cause, as specified, may by a speaking order impose any penalty whether minor or major specified in Rule 3 of the Rules.

10. By a catena of decisions, the Apex Court has laid down the principles regarding the manner in which disciplinary proceedings are to be conducted and the procedure to be followed therein. It is not necessary to refer to all these decisions. Suffice it to refer to a few decisions on this topic.

11. In *State of Uttranchal and others v. Kharak Singh, (2008) 8 SCC 236,* after referring to some leading decisions on the issue, the Apex Court consolidated the principles to be followed in disciplinary proceedings. The relevant portion of Paragraph 15 of the said report is being extracted below:

"15. From the above decisions, the following principles would emerge:

(i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(ii) omitted

(iii) *In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged and give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.*

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

(emphasis supplied)

12. In *Roop Singh Negi v. Punjab National Bank & Ors., (2009) 2 SCC 570* the Apex Court reiterated that charges levelled against the charged Government servant must be proved by leading cogent evidence. Paragraph 14 of the said report is reproduced below: -

"Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled against the delinquent officer must be found to have been proved. *The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof.* Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence."

and then in paragraph 23 of the said decision, the Apex Court held as follows:

".....The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible.

The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the Enquiry Officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."

(emphasis supplied)

13. In State of U.P. and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, where the delinquent employee had not even submitted his reply to the charge-sheet, while considering the impact of Rule 7 of the Rules, the Apex Court observed as under: -

"26. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved."

(emphasis supplied)

14. It is a well-established principle of law that if manner of doing a particular act is prescribed under any statute then the act must be done in that manner or not at all. *(see Babu Verghese v. Bar Council of Kerala, (1999) 3 SCC 422 and Brajendra Singh Yambem v. Union of India, (2016) 9 SCC 20).*

15. In the case in hand, the Respondent 1 had submitted his reply denying the charges levelled against him. Admittedly, the Inquiry Officer did not hold any oral inquiry and has given his report only on the basis of the reply submitted by the Respondent. Sub-rule (vii) of Rule 7 of the Rules mandates that in all cases where the charged Government servant denies the charges, the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in the presence of the charged Government servant, who shall then be given an opportunity to cross-examine such witness. It is no more res integra that the prosecution has to prove the charges by producing documents through witnesses and placing such witnesses to be cross examined by the charged Government servant. Even in the absence of the charged Government servant, the Inquiry Officer is obliged to examine the evidence presented by the Department to see as to whether the

unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. A perusal of the charge-sheet would show that the charges are based on the preliminary inquiry report dated 31.07.2012 of the Joint Director. Since no oral evidence has been examined, the preliminary inquiry report dated 31.07.2012 has not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the Respondent. Prejudice is evident in cases where the Department has not even proved the documents and evidence which has been presented on its own behalf, and the governing rules have been blatantly violated. In the absence of any oral inquiry, any amount of reasoning given by the Inquiry Officer regarding each and every one of the instance in the inquiry report is not going to validate the proceeding. Merely because the Respondent in his reply to the charges did not express his desire for any cross-examination or examination of his witnesses as alleged, it would not absolve the Inquiry Officer from holding an oral inquiry against the Respondent.

16. In *Union of India v. Prakash Kumar Tandon, (2009) 2 SCC 541*, while dealing with the issue of prejudice in departmental proceedings, the Apex Court observed that an Inquiry Officer is a quasi-judicial authority. Therefore, he must perform his functions fairly and reasonably which is even otherwise the requirement of the principles of natural justice and held as under:

"16. In *M.V. Bijlani v. Union of India* this Court has held: (SCC p. 95, para 25)

"25. ... Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. *He cannot shift the burden of proof.* He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

17. *If the disciplinary proceedings have not been fairly conducted, an inference can be drawn that the delinquent officer was prejudiced thereby.*

18. *In S.L. Kapoor v. Jagmohan* this Court has held that non-compliance with the principles of natural justice itself causes prejudice. We are not oblivious of the fact that the said principle has since been watered down but in a situation of this nature, we are of the opinion that the concurrent findings of the Tribunal, as also the High Court cannot be said to be unreasonable or suffering from any legal infirmity warranting interference."

(emphasis supplied)

17. In view of the above discussion, this Court is constrained to uphold the conclusion drawn by the Tribunal that the inquiry proceedings stood vitiated for not following the mandatory provisions of sub-Rule (vii) of Rule 7 of the Rules.

18. Turning to the second contention of the Petitioner, it is to be seen that in his reply dated 07.02.2017, to the show cause notice dated 16.01.2017, the Respondent had specifically stated that the departmental proceedings were initiated against him, Shri T.K. Sharma, Shri Mukhtar Khan and Shri Javir Ali and on the basis of the preliminary inquiry report dated 31.07.2012 of the Joint Director. However, except for the Respondent, all other officers were exonerated. In the punishment order dated 11.08.2017, the disciplinary authority has stated some facts and extracted the charges levelled against the Respondent, the reply submitted by him to the said charges, the findings recorded by the Inquiry Officer in connection with the respective charges and, thereafter, without even adverting to the submissions made by the Respondent, the disciplinary authority has upheld the findings recorded by the Inquiry Officer by a cryptic order.

19. The Tribunal after hearing the counsel for the contesting parties and after perusing the original records has returned a finding that there was discrimination in imposing punishment. Relevant paragraphs of the judgment dated 04.10.2021 are extracted below:

"17. Sri Shri T.K. Sharma Deputy Director, Sri Javir ali, and Mukhtar Khan all were charged along with the petitioner on the basis of report of Joint Director dated 31.07.2012.

18. Enquiry officer Sri Satyabhan, Additional Administrator found charge No.1, 2 and 5 of the main chargesheet and charge no.1 of the Supplementary Chargesheet partially proved in his enquiry report dated 28.12.2016, This enquiry was in respect of period 27.6.2008 to 22.04.2010. *Disciplinary Authority Chairman/ Administrator, Ram Ganga Command taking note of partially proved charges has observed that measurement was done in pursuance of the letter of Soil Conservation Officer and payment of the work was recommended according to standard. Shri Javir Ali, Junior engineer was exonerated as the payment was done and executed work was found to be according to the standard and up to the mark. Reference to Javir Ali Junior Engineer was specially made in his reply to enquiry officer on 09.08.2016.*

19. *Similarly, Shri Mukhtar Khan, assistant soil Conservation Officer who got repairing work done through Sri Javir Ali, Junior engineer was also chargesheeted similarly but he was let off with a warning on 13.01.2016 by the Disciplinary Authority/ Chairman of the Ram Ganga Command.* In this matter also enquiry officer had found charge No.1, 2, 4, 5 and charge no.1 of the supplementary chargesheet partially proved.

20. Shri T.K. Sharma, Deputy Director was also charged similarly and the enquiry officer had found charge no.1, 2, 3, 4 and 5 fully established and charge no.1 of the supplementary chargesheet was not found proved. State Government while passing the final order came to the conclusion that charge no.1, 2, 3, 4 and 5 were found not established and consequently, he was exonerated. *It was specially observed that in the absence of date, time and place of the enquiry, defence of non production of measurement book was liable to be accepted. Further, finding of the enquiry officer was upset on the basis of letter of Deputy Director who found that necessary work was done and disagreeing with the findings of the enquiry officer, State Govt. exonerated Sri T.K. Sharma.*

21. *Petitioner had referred to these three names as these persons were mentioned in the report dated 31.7.2012 submitted by Joint Director. This report was basis of departmental enquiry and the chargesheet was accordingly issued to the petitioner as well as Sri T.K. Sharma, then Deputy Director, Shri Javir Ali, Junior Engineer and Shri Mukhtar Khan, Assistant Soil Conservation Officer.*

22. Since report of Joint Director was made the basis of departmental enquiry, so a look of said report is also necessary.

23. The relevant part of the report dated 31.7.2012 is reproduced below: -

"पत्रावली, मापन पुस्तिका, चिट्ठा आदि उपलब्ध न होने के कारण कार्यस्थल की जांच किया जाना सम्भव नहीं हो पाया, जबकि दिनांक 10 जनवरी, 2012 को मा0 मंत्रीजी की अध्यक्षता में मासिक समीक्षा बैठक में श्री शंकरदीन उपनिदेशक, झांसी प्रथम ने अवगत कराया था कि मापन का कार्य पूर्ण हो गया है, समायोजन कर लिया जायेगा। उपलब्ध तथ्यों से यह स्पष्ट है कि जल संग्रहण समिति के धन का जो हरियाली बाइड लाइन के पैरा–36 के अनुसार सामुदायिक कार्यो पर व्यय किया जाना था, वह गाइड लाइन के अनुसार सामुदायिक कार्यो पर व्यय न होकर भूमि संरक्षण अधिकारी श्री डी0के0 कटियार व उपनिदेशक/भूमि संरक्षण अधिकारी श्री टी0के0 शर्मा के द्वारा विहरण की नियत से उक्त धनराशि का आहरण किया गया है। डब्लू0डी0एफ0 से आहरित धनराशि को निकालने का अधिकारी भूमि संरक्षण अधिकारी, हरियाली गाइड लाइन के प्रस्तर–29 एवं 36 का उल्लंघन करते हुए आहरण किया गया है।

उक्त के अलावा आई0डब्लू0डी0पी0 योजनान्तर्गत आई0डब्लू0डी0पी0 प्रथम कुठौत ब्लाक की 10 परियोजनाओं में डब्लू0डी0एफ0 खतों में जमा धनराशि रु0 28,80,459 में से रु0 22,96,900 07 अगस्त 2010 से 20 सितम्बर 2010 तक श्री टी0के0शर्मा उपनिदेशक/भूमि संरक्षण अधिकारी के कार्यकाल में आहरित की गई है। इस प्रकार की टी0के0शर्मा के कार्यकाल में डी0पी0ए0पी0 एवं आई0डब्लू0डी0पी0 के विभिन्न परियोजनाओं के डब्लू0डी0एफ0 खातों से रु0 60,71,372 एवं श्री डी0के0 कटियार प्रभारी भूमि संरक्षण अधिकारी के कार्यकाल में रु0 2,25,739,00 का अध्यक्ष एवं सचिव के माध्यम से आहरण कराया गया। उक्त सम्पूर्ण आहरण से संबंधित कोई स्टीमेट, श्रमिक चिट्ठा, माप पुस्तिका समायोजन हेतु कार्यालय में उपलब्ध नहीं है। .....

अतः भूमि संरक्षण अधिकारी एवं उनके क्षेत्रीय कर्मचारियों द्वारा डब्लू0डी0एफ0 में उपलब्ध धनराधि का पूर्णतया दुरुपयोग किया गया, जो भूमि संरक्षण अधिकारी/उपनिदेशक के अधिकार क्षेत्र में नहीं था। *इस प्रकार धन के अपव्यय के लिए विभागीय सचिव, अवर अभियन्ता, तथा भूमि संरक्षण अधिकारी पूर्णतया जिम्मेदार है। शासन को सही जानकारी न देने के लिए लिये श्री शंकरदीन उप निदेशक, झांसी प्रथम भी अपने दायित्वों के निर्वहन में विफल रहें है।"*

On the basis of this report enquiry was instituted against the petitioner, Sri T.K. Sharma, Deputy Director, Shri Mukhtar Khan, Assistant Soil Conservation Officer and Sri Javir Ali, Junior Engineer, Enquiry Officer submitted his enquiry report finding most of the charges established against all four persons. shri Javir Ali, Junior Engineer was exonerated and Shri Mukhtar Khan, Assistant Soil Conservation Officer was given stern warning by their punishing authority. Tri T.K. Sharma, Deputy Director was exonerated without without any punishment by State Government. Only petitioner has been punished on the basis of said enquiry report."

(emphasis supplied)

20. The fact that disciplinary inquiry was initiated against the Respondent, T.K. Sharma, Mukhtar Khan and Javir Ali on the basis of the preliminary inquiry report dated 31.07.2012 is not in dispute. It is also not disputed that the other officers were exonerated by the Inquiry Officer, but on the same charges the Respondent was

found guilty. In the punishment order, the State Government has failed to give any reason or justification as to why the basis for exoneration of other three employees is inapplicable to the case of the Respondent.

21. In *Bongaigaon Refinery & Petrochemicals Ltd. v. Girish Chandra Sarma,* (2007) 7 SCC 206, while dealing with discrimination in imposition of punishment, the Apex Court has stated as under: -

"18. After going through the report and the finding recorded by the Division Bench of the High Court, we are of opinion that in fact the Division Bench correctly assessed the situation that the respondent alone was made a scapegoat whereas the decision by all three Committees was unanimous decision by all these members participating in the negotiations and the price was finalised accordingly. *It is not the respondent alone who can be held responsible when the decision was taken by the Committees. If the decision of the committee stinks, it cannot be said that the respondent alone stinks; it will be arbitrary. If all fish stink, to pick one and say only it stinks is unfair in the matter of unanimous decision of the Committee."*

(emphasis supplied)

22. In yet another case in *State of U.P. and others v. Raj Pal Singh, (2010) 5 SCC 783,* the Apex Court has observed as under: -

"5. Though, on principle, the ratio in aforesaid cases would ordinarily apply, but in the case in hand, the High Court appears to have considered the nature of charges leveled against the 5 employees who stood charged on account of the incident that happened on the same day and then the High Court came to the conclusion that since the gravity of charges was the same, it was not open for the disciplinary authority to impose different punishments for different delinquents. The reasonings given by the High Court cannot be faulted with since the State is not able to indicate as to any difference in the delinquency of these employees.

6. It is undoubtedly open for the disciplinary authority to deal with the delinquency and once charges are established, to award appropriate punishment. *But when the charges are same and identical in relation to one and the same incident, then to deal with the delinquents differently in the award of punishment, would be discriminatory.* In this view of the matter, we see no infirmity with the impugned order requiring our interference under Article 136 of the Constitution."

(emphasis supplied)

23. In *Tata Engineering and Locomotive Co. Ltd. v. Jitendra Prasad Singh and others, (2001) 10 SCC 530,* the Apex Court has upheld the finding recorded by the High Court by observing as under: -

"Since as many as three workmen on almost identical charges were found guilty of misconduct in connection with the same incident, though in separate proceedings, and one was punished with only one month's suspension, and the other was ultimately reinstated in view of the findings recorded by the Labour Court and affirmed by the High Court and the Supreme Court, it would be denial of justice to the appellant if he alone is singled out for punishment by way of dismissal from service."

24. For the reasons stated above, it is apparent that the Respondent has been discriminated against in the matter of imposition of penalty. In the facts and circumstances of the case, the Respondent is entitled to parity qua Shri T.K. Sharma, Shri Mukhtar Khan and Shri Javir Ali.

25. It is a settled legal proposition, that once the court sets aside an order of punishment, on the ground that the inquiry was not properly conducted, it must remit the case concerned to the disciplinary authority for it to conduct the inquiry from the point that it stood vitiated, and conclude the same.

26. That course could have been followed even in the present case. The matter could be remanded back to the disciplinary authority or to the inquiry officer for a proper inquiry and a fresh report and order. But that course may not have been the only course open in a given situation. There may be situations where because of a long time-lag or such other supervening circumstances the writ court considers it unfair, harsh or otherwise unnecessary to direct a fresh inquiry or fresh order by the competent authority. (see *Allahabad Bank v. Krishna Narayan Tewari, (2017) 2 SCC 308)*

27. In the present case, disciplinary inquiry was initiated against the Respondent in the year 2014. The punishment order dated 11.08.2017 was served upon him on 31.08.2017, the date on which the Respondent attained the age of superannuation and retired from service. The Respondent may by now must have turned 66 years of age. Any remand either to the inquiry officer for a fresh inquiry or to the disciplinary authority for a fresh order would thus be very harsh and would practically deny to the Respondent any relief whatsoever. Furthermore, in light of the fact that the Respondent has been discriminated against in the matter of imposition of punishment, and that he is entitled to parity qua Shri T.K. Sharma, Shri Mukhtar Khan and Shri Javir Ali, this Court is of the opinion that the Tribunal has rightly exercised its discretion in not remanding the matter back.

28. Resultantly, we do not perceive any merit in this writ petition and the same is, accordingly, dismissed.

(2022) 9 ILRA 207
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2022

BEFORE

THE HON'BLE RAJAN ROY, J.

Writ A No. 6045 of 2022

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

Counsel for the Petitioner:
Vinod Kumar Pandey

Counsel for the Respondents:
C.S.C., Ravi Singh

A. Service Law – Compassionate Appointment - Uttar Pradesh Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 - Rule 5(1) - The exception in Rule 5(1) will not come into play where the spouse of the deceased was not in employment on the date of her death and was also not getting any pension, subject, of course, to an enquiry in this regard as to the financial condition of the family. (Para 7)

The words 'is not already employed' occurring in Rule 5(1) implies an existing

employment and does not cover a scenario where the spouse has retired on the date of death. If such retired spouse is getting pension then this aspect can be considered separately while assessing the financial condition of the family, but then, in such a situation the exception carved out in Rule 5(1) would not be applicable. (Para 7)

Apparently the opposite parties have misconstrued Rule 5(1), the same will have no application where the spouse who was in service had already retired prior to the death of the wife. The opposite parties are under an obligation to reconsider the claim of the petitioner in the light of the law on the subject, meaning thereby, they shall ascertain financial condition of the family as to whether the petitioner has adequate means to sustain herself and then take a considered decision in the light of the Full Bench decision. The impugned order dated 22.01.2021 is quashed. Let a fresh decision be taken within two months from the date of receipt of certified copy of this order. (Para 8, 9)

Writ Petition disposed of. (E-4)

Precedent followed:

1. Shiv Kumar Dubey Vs St. of U.P. & ors., Special Appeal No. 356 of 2012, Full Bench decision dated 06.04.2012.

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

1. There is no need to call for a counter affidavit in the matter as the facts as stated in the impugned order, if they are taken on their face value, even then the same cannot sustain.

2. Counsel for the petitioner, learned Standing Counsel and Mr. Ravi Singh, learned counsel for opposite party no. 2 have been heard.

3. The petitioner filed an application seeking compassionate appointment consequent to the death of her mother, namely, Vimla, who died on 11.06.2018. Annexure-3 is the death certificate mentioning the date of death of Vimla as 11.06.2018. The claim of the petitioner has been denied by relying upon Rule 5 (1) of U.P. Recruitment of Dependents of Government Servants (Dying-in-Harness) Rules, 1974 on the ground that husband of late Vimla was employed as Sweeper under UPSRTC, therefore, in view of the exception carved out in the said Rule, the petitioner is not entitle to compassionate appointment. Though the said Rules are applicable to Government Servants, but, it appears that they have been applied in Nagar Nigam also as this is the Rule which is referred in the impugned order. Rule 5 reads as under:

*"**5. Recruitment of a member of the family of the deceased.-** (1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person-*

(i)fulfills the educational qualifications prescribed for the post,

(ii) is otherwise qualified for government service; and

(iii) makes the application for employment within five years from the date of the death of the government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

Provided further that for the purpose of the aforesaid proviso, the person concerned shall explain the reasons and give proper justification in writing regarding the delay caused in making the application for employment after the expiry of the time limit fixed for making the application for employment along with the necessary documents/proof in support of such delay and the Government shall, after taking into consideration all the facts leading to such delay take the appropriate decision.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

(4) Where the person appointed under sub-rule (1) neglects or refuses to maintain a person to whom he is liable to maintain under sub-rule (3), his services may be terminated in accordance with the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time."

4. Rule very clearly says that in case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules.

5. The impugned order itself says that the husband of Vimla i.e. father of the petitioner was employed as Sweeper in Uttar Pradesh State Road Transport Corporation and he retired on 31.12.2015 i.e. prior to the death of Vimla.

6. On a specific query being put, learned counsel for the petitioner submitted that the post of Sweeper in UPSRTC was not pensionable and paltry sum of couple thousand was paid as post retiral dues which was inadequate for sustenance.

7. The Court finds merit in the submission of petitioner that the exception in Rule 5(1) will not come into play where the spouse of the deceased was not in employment on the date of her death and was also not getting any pension, subject, of course, to an enquiry in this regard as to the financial condition of the family in the light of the Full Bench decision dated 06.04.2014 in ***Special Appeal No. 356 of***

2012 (Shiv Kumar Dubey vs. State of U.P. and others). The words 'is not already employed' occurring in Rule 5 (1) implies an existing employment and does not cover a scenario where the spouse has retired on the date of death. If such retired spouse is getting pension then this aspect can be considered separately while assessing the financial condition of the family, but then, in such a situation the exception carved out in Rule 5(1) would not be applicable.

8. Apparently the opposite parties have misconstrued Rule 5 (1), the same will have no application where the spouse who was in service had already retired prior to the death of the wife. The opposite parties are under an obligation to reconsider the claim of the petitioner in the light of the law on the subject, meaning thereby, they shall ascertain financial condition of the family as to whether the petitioner has adequate means to sustain herself and then take a considered decision in the light of the aforesaid Full Bench decision.

9. The impugned order dated 22.01.2021 is quashed. Let a fresh decision be taken within two months from the date of receipt of certified copy of this order.

10. It is open for the opposite parties to verify as to whether the father of the petitioner was receiving any pension or had received any other post retiral dues, if so, what was the amount in this regard.

11. The writ petition is ***disposed of.***

(2022) 9 ILRA 210
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ A No. 10089 of 2020

Sanjay Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Rai

Counsel for the Respondents:
C.S.C.

A. Service Law – Transfer – Administrative exigencies – Punitive in nature, how far ground to quash it – Somesh Tiwari's case relied upon – Employer is entitled to pass an order of transfer in administrative exigencies but an order of transfer cannot be passed by way of, or in lieu of punishment and that when an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal – High Court found the transfer order passed not in lieu of or by way of any punishment. (Para 22 and 23)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Somesh Tiwari Vs U.O.I. & ors.; AIR 2009 SC 1399

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

1. The petitioner has challenged the order dated 13.07.2020 passed by State Radio Officer (Administration), U.P. Police Radio Headquarter, Mahanagar, Lucknow, as well as the relieving orders dated 14.07.2020 and 15.07.2020 passed by Radio Inspector, Gyanvapi, Varanasi. The petitioner has also challenged the order dated 07.10.2020 passed by Additional

Director General of Police (Telecom), Uttar Pradesh, Lucknow.

2. It has been argued by the learned counsel for the petitioner that the petitioner was working on the post of Head Operator (Mechanic) in U.P. Police Radio Department and was posted in District Mau from July, 2001 to July, 2019. The petitioner made a request for his transfer to Varanasi because his mother was being treated at Varanasi. The petitioner was transferred from District Mau to District Varanasi on 8.7.2019 by the Competent Authority i.e. Deputy Inspector General of Police (Telecom), U.P. Police Radio Headquarter, Mahanagar, Lucknow.

It has been argued that while the petitioner was working in Mau, he had made a complaint against his higher officials alleging personal animosity with the petitioner. When the petitioner had made application for transfer from District Mau to District Varanasi, an adverse report was made on such application by the Additional State Radio Officer, Varanasi Zone, Varanasi on 30.05.2019, a perusal of which would go to show that the Additional State Radio Officer, Varanasi Zone, Varanasi was inimical to the petitioner and did not want his transfer to Varanasi. Now the Senior Superintendent of Police, Varanasi Zone, Varanasi on the recommendation of Additional State Radio Officer, Varanasi Zone, Varanasi had recommended the transfer of the petitioner to a different district. His recommendation dated 24.05.2020 was relied upon and without any opportunity of hearing being given to the petitioner and without seeking approval of the Competent Authority i.e. Deputy Inspector General of Police (Telecom), the petitioner was transferred from Varanasi to Fatehpur on 13.07.2020. The petitioner went on leave. Suddenly relieving order was issued on 14.07.2020 by the State Radio Officer (Administration), U.P. Police Radio Headquarter, Mahanagar, Lucknow and he was relieved in absentia and the order was pasted at his residence on 15.07.2020.

3. The petitioner being aggrieved, filed writ petition before this Court namely Writ-A No. 6619 of 2020 (Sanjay Kumar Singh Vs. State of U.P. and others).

4. This Court noted the submission made by the learned counsel for the petitioner that the order was passed with malicious intent and that it was passed by an incompetent authority and also noted the submissions made by the learned Standing Counsel that under the Uttar Pradesh Police Radio Sub-ordinate Officers' Service Rules, 2015, the Appointing Authority of the petitioner is the State Radio Officer and the Appointing Authority can also transfer the petitioner. Moreover, such transfer order had been issued after recommendation dated 13.07.2020 of the U.P. Police Radio Establishment Board of which Deputy Inspector General of Police (Telecom) and Inspector General of Police (Telecom) are members and an employee of the Police Radio Department can be transferred from one Zone to another Zone only by the U.P. Police Radio Establishment Board. This Court was not satisfied with the submission of the learned counsel for the parties but observed that the petitioner had already approached the authority concerned by moving a representation and the matter be looked into and decided by the Competent Authority i.e. Deputy Inspector General of Police within a period of two weeks from the date of passing of the order dated 28.09.2020 and that for a period of two weeks, since the petitioner was already on

medical leave, no action be taken against him for not joining at his transferred place of posting and the final decision of the Authority be awaited.

5. It has been argued that in pursuance of the order passed by this Court, the petitioner again made a representation along with a copy of the order of this Court to the Deputy Inspector General of Police (Telecom) and now the impugned order has been passed by the respondent reiterating their earlier stand and affirming the transfer order dated 13.07.2020, without considering any of the grounds mentioned by the petitioner in his representation.

6. It has been argued by the learned counsel for the petitioner that the transfer order is punitive in nature and has referred to the judgment rendered by the Hon'ble Supreme Court in the case of **Somesh Tiwari v. Union of India and others reported in AIR 2009 SC 1399.** An ex parte enquiry had been conducted by the Superintendent of Police Varanasi and the Assistant State Radio Officer against the petitioner and it was made the basis of the order of transfer dated 13.07.2020. It amounted to punishing the petitioner without giving opportunity of hearing to him.

7. It has also been argued that the three grounds raised by the petitioner in his representation against the transfer order dated 13.07.2020 have been mentioned in the impugned order but none of the grounds taken by him have been considered or discussed and no finding has been recorded by the respondents.

8. It has been argued by the learned counsel for the petitioner that power of transfer of the government employees of the Police Department/Police Radio Department is vested with the Inspector General of Police (Telecom) / Deputy Inspector General of Police (Telecom) and even recommendation for transfer had to be made by such officers as per the Standing Order No. 32/1-2001 dated 27.10.2001. In paragraph 5 of the said Standing Order, the control / administration of working staff in the concerned district of the Radio Wing would be vested with the concerned State Radio Officer. It has been argued that the disciplinary proceedings initiated on a complaint made by the Additional State Radio Officer, Varanasi Zone, Varanasi against the petitioner are still continuing and during the continuance of such proceeding, the transfer order could not have been passed.

9. The learned Standing Counsel, Shri Sharad Upadhyay on the basis of the counter affidavit filed by the State-respondents has argued that the petitioner was posted at Shri Kashi Vishwanath Temple/Gyanvapi Mosque, Varanasi. The Senior Superintendent of Police, Varanasi Zone, Varanasi conducted an enquiry against the petitioner where it was found that the petitioner is habitual of making representations against his higher officers of the department on misconceived and incorrect grounds. As the conduct of the petitioner was unbecoming of a member of disciplined force, and had the tendency to have a deleterious effect on other employees posted at a very sensitive place i.e. Shri Kashi Vishwanath Temple/Gyanvapi Mosque, Varanasi, recommendation had been made for his transfer outside District Varanasi by the Senior Superintendent of Police, Varanasi Zone, Varanasi on 24.05.2020.

10. It has been argued by the learned Standing Counsel that by a Government Order dated 25.05.2015, an Establishment Board has been constituted for transfer of

non-gazetted employees of the Police Radio Department wherein the Director General of Police/Additional Director General of Police (Telecom.) is the Chairman and the Inspector General of Police/Director (Telecom) is a Member and the State Radio Officer (Admn.) is a Member. A copy of the Government Order has also been filed as Annexure C.A.1 to the counter affidavit. On the recommendation of the Senior Superintendent of Police, Varanasi Zone, Varanasi, the Police Radio Establishment Board held a meeting on 13.07.2020 which was attended by the Additional Director General of Police (Telecom.) and the State Radio Officer (Admin.). The matter of transfer of the petitioner along with 14 other Police Radio Employees was considered and consequently recommendations were made. A copy of the minutes of meeting dated 13.07.2020 have been filed as Annexure-C.A.3 to the counter affidavit. In pursuance to the said meeting, a direction was issued by the Radio Establishment Board to the State Radio Officer (Admin.) U.P. Police Radio Headquarters, Mahanagar, Lucknow to issue the transfer order. Consequently, the State Radio Officer (Admin.) had issued transfer order of the petitioner on 13.07.2020 and the decision of the Police Radio Establishment Board was communicated to the petitioner. It has been argued by the learned Standing Counsel that as per the Service Rules of 2015, the Appointing Authority of the petitioner is the State Radio Officer.

11. The petitioner however went on leave without any prior approval of the Competent Authority and consequently the relieving order was passed in absentia on 14.07.2020. Information was given to the petitioner and others concerned on 15.07.2020 by the Radio Inspector, Shri Kashi Vishwanath Temple/Gyanvapi Mosque, Varanasi.

12. On the disposal of the petitioner?s Writ Petition Number 6619 of 2020, the representation of the petitioner dated 30.09.2020 was received which representation was considered and disposed of by the Additional Director General of Police (Telecom), Uttar Pradesh, Lucknow by his order dated 7.10.2020, after fresh consideration of the same was made in a meeting of the Police Radio Establishment Board attended by the Additional Director General of Police (Telecom.) and the State Radio Officer (Admin.) at the Headquarters, Lucknow. In pursuance of the transfer order dated 7.10.2020, the petitioner has joined his transferred place of posting at district Fatehpur on 10.10.2020. In paragraph 7, 8 and 9 of the counter affidavit, the report of the Additional Radio Officer, Varanasi dated 30.05.2019 and also the recommendation of the Senior Superintendent of Police, Varanasi Zone, Varanasi for the petitioner to be transferred outside Varanasi.

It has been submitted that the petitioner was found habitual of making representations/complaints against the higher officers of the department on misconceived and incorrect grounds. As the conduct of the petitioner was unbecoming of a member of a disciplined force and had the tendency to have a bad effect on other employees posted at a very sensitive place at Shri Kashi Vishwanath Temple/Gyanvapi Mosque, Varanasi. Such recommendation was duly considered by the Police Radio Establishment Board which has taken a decision for transfer of the petitioner on its own, although it has also considered the recommendation made by Senior

Superintendent of Police, Varanasi. A copy of recommendation made by the Senior Superintendent of Police, Varanasi Zone, Varanasi dated 24.05.2020 has been filed as Annexure-C.A.1 to the counter affidavit.

13. The counsel for the petitioner in rejoinder has submitted that it has been admitted by the respondents that the petitioner was transferred on the recommendation of the Senior Superintendent of Police, Varanasi. Only the Deputy Inspector General of Police (Telecom) is competent to make any recommendation and only the Deputy Inspector General of Police (Telecom) can transfer the petitioner. It has also been submitted on the basis of the Government Order dated 1.7.2020 issued by the Additional Chief Secretary, Department of Home, Government of U.P. that Zero Transfer Session has been declared in pursuance of Covid-19 pandemic by the State Government for State Government Employees but such Government Order dated 12.05.2020 was not applicable to police employees and the recommendation of the various Police Establishment Boards constituted under the Government Order No. 408/6-POO-10-2018-27(45)/2008 dated 09.05.2018 were exempted from the operation of the Government Order dated 12.05.2020 issued by the Karmik Anubhag-4. It has been submitted that U.P. Police Radio Establishment Board had not been mentioned in the Government Order dated 1.7.2020 issued by the Grah (Police) Anubhag-1, therefore it shall be deemed that the Police Radio Establishment Board could not have transferred the petitioner during the subsistence of the Government Order dated 12.05.2020 issued by the Karmik Anubhag-4.

Learned counsel for the petitioner in rejoinder has also pointed out Annexure-5 to the writ petition and submitted that the petitioner is being harassed repeatedly by his superior officers and that if the petitioner is indeed guilty or has committed any mistake, the respondents should have started disciplinary proceedings against him but no disciplinary proceeding have been initiated against him and he has been transferred on the basis of an ex parte report.

14. This Court has perused the Annexure-5 of the writ petition which is a report dated 30.05.2019 sent by the State Radio Officer, Varanasi Zone, Varanasi to the Deputy Inspector General of Police (Telecom), U.P. Police Radio Headquarter, Mahanagar, Lucknow. It refers to the petitioner?s complaint dated 26.04.2019 which was forwarded to the Radio Inspector, Mau on 15.05.2019 and detailed comments were asked for from the Assistant Radio Officer, Azamgarh. The Assistant Radio Officer, Azamgarh sent his comments on 27.05.2019 where reference was made to several complaints made by the petitioner against various officers who were superior to him. It was stated in the said comments that the petitioner was in the habit of making frivolous complaints and making unnecessary correspondence just to hamper smooth functioning of the Police Radio Office at Azamgarh. Not only was the smooth functioning of the Radio Office at Azamgarh being affected but it had the tendency to generated indiscipline amongst fellow officers, therefore, a request was made for his transfer outside Mau. The Additional State Radio Officer, Varanasi Zone, Varanasi thereafter had carefully perused the record of the petitioner and had found that when the petitioner was posted on election duty in Shrawasti he had made a representation that he was not fit to perform strenuous duty and he be assigned

duty somewhere else. Not only was such representation made to the Radio Inspector but also to the Additional State Radio Officer, Azamgarh Zone, Azamgarh. A report was called for from the concerned officer and it come out that the petitioner was habitual of making unnecessary correspondence against his higher officer and when directed to perform duty he tendered unwillingness on the ground of his health and on the ground that he had filed a case in Court which required him to be present for its proper persecution and that he was afraid for safety of his life from various political persons. It was also found on enquiry into another complaint made by the petitioner that when the petitioner was not assigned VVIP duty but had been nominated to do maintenance work for Radio Sets established in rural areas, to avoid doing duty in rural areas he had made such complaints. It was reported that the petitioner was making unnecessary correspondence only to avoid performing duties that were assigned to him. In all such representations of the petitioner, the petitioner had given excuses that he was afraid of his life from political persons and therefore, he did not wish to leave Headquarters. The petitioner did not perform any election duty as was assigned to him and went on unauthorized leave. Later on a compromise was arrived at between the Assistant Radio Officer, Mau and the petitioner. Thereafter, the petitioner by his letter dated 23.3.2019 addressed to Deputy Inspector General of Police (Telecom), U.P. Police Radio Headquarter, Mahanagar, Lucknow stated that all misunderstanding had been resolved and the same had been due to communication gap and that he had made several complaints earlier and he did not wish to pursue the matter further and that no action be taken on his complaints.

Again comments were called for by the Police Radio Headquarter and the 43 pages of complaints/representation that were made by the petitioner were sent to the U.P. Police Radio Headquarter by letter dated 6.4.2019. Reference was also made in the report dated 30.05.2019 of an earlier occasion when the petitioner was deputed to work at Flood Control Room at Turtipur Shrinagar Bandh Chandpur, the petitioner had avoided duty and started making unnecessary allegations and complaints against the then Assistant Radio Officer, Azamgarh, regular disciplinary proceedings were initiated against him and on the basis of Inquiry Report dated 04.02.2017, the petitioner was awarded Censure Entry on 8.8.2017 by the State Radio Officer (Admin.) as he was on unauthorized leave and his absence was regularized as 30 days leave without pay.

15. It has been argued by the learned counsel for the petitioner that it is evident from the perusal of Annexure-5 to the writ petition, as also Annexure-5 to the counter affidavit filed by the Respondents that the petitioner is being harassed repeatedly by the Superior Officers and the order of transfer has been passed with malicious intention.

16. This Court had carefully perused the earlier order passed by this Court on 28.9.2020 wherein although the petitioner had raised similar arguments, this Court had not found it appropriate to address the same or to quash the transfer order dated 13.7.2020. The writ petition was disposed of without entering into the merits of the controversy by referring the matter to the Competent Authority to decide the representation of the petitioner by a reasoned and speaking order. Now a reasoned and speaking order has been

passed by the respondents which has been challenged in this writ petition.

17. This Court has perused the impugned order dated 07.10.2020 and finds that it refers to the recommendations made by the Senior Superintendent of Police, Varanasi dated 24.05.2020 regarding an enquiry conducted by him on a complaint made by the petitioner regarding entry given to him. The Senior Superintendent of Police, Varanasi had found no substance in the complaint made by the petitioner dated 27.03.2020 on conducting a fact finding enquiry on the same and he had also referred to several such complaints being made earlier by the petitioner, and that he was apprehensive of the fact that such conduct of the petitioner would have a deleterious effect on other employees as he was posted at a very sensitive place at Shri Kashi Vishwanath Temple/Gyanvapi Mosque, Varanasi. A request was therefore made that the petitioner be transferred to some other place outside Varanasi.

18. The Police Radio Establishment Board which is the Competent Authority to consider all recommendations for transfer made by Superintendent of Police/Senior Superintendent of Police and other District Level Officers considered the recommendation of the Senior Superintendent of Police, Varanasi and eventually passed transfer order dated 13.07.2020. The petitioner went on leave without prior sanction and such order was served upon him at his current place of residence of Varanasi and he was relieved in absentia. After this Court passed an order on 28.09.2020, the Police Radio Establishment Board again held a meting on 07.10.2020 chaired by Additional Director General of Police (Telecom), Uttar Pradesh, Lucknow which was attended by the State Radio Officer (Administration). The allegation of the petitioner to the effect that the order was passed maliciously was considered and it was found to have no substance although reference was made duly to the recommendation made by the Senior Superintendent of Police, Varanasi dated 24.05.2020. Reference was also made to the petitioner?s allegation that the impugned transfer order has been passed by an incompetent authority i.e. State Radio Officer (Administration). It was found that as per the relevant Government Order, the recommendation of transfer was made by the Police Radio Establishment Board which had considered the recommendation of transfer for the petitioner and recommendations with regard to four other employees of the Police Radio Establishment. The order was only communicated by the State Radio Officer. After this Court?s order dated 28.09.2020, the petitioner?s representation was again considered by the same Police Radio Establishment Board and they did not find any merit in the grounds taken by the petitioner regarding recommendation of the Senior Superintendent of Police Varanasi in violation of relevant Government Order.

19. This Court having carefully perused the order dated 07.10.2020 which has been communicated by the Deputy Inspector General of Police (Telecom) does not find any good ground to show interference as it is well considered detailed order, referring to the power of the Police Radio Establishment Board to consider recommendations of transfers made by District Level Officers and to pass orders in turn for transfer of subordinate officers of the Police Radio Establishment.

20. The counsel for the petitioner has referred to judgment rendered by the

Hon?ble Supreme Court in the case of **Somesh Tiwari (surpa).** This Court has carefully perused the order passed by the Supreme Court. The question that was being considered by the Supreme Court has been mentioned in paragraph 1 of the said judgment which is being quoted hereinbelow :

?A short but an interesting question that arises for consideration in this appeal is as to whether the High Court while quashing an order of transfer passed against the appellant was correct in directing that he would not be entitled to salary for the period commencing 15 days after the modified order of transfer to Ahmedabad was passed till the date he again joined his duties at the original place.?

21. The Supreme Court was considering the case of an officer of the Indian Revenue Services who was posted as a Deputy Commissioner of Central Excise at Bhopal. The employees posted at the Bhopal office of the respondents apprehending disciplinary as also criminal proceedings at the hands of the appellant, on the basis of reassessment of the files undertaken by him, had sent an anonymous complaint alleging caste-bias on his part; pursuant whereto an order of transfer was passed against him on 22.08.2005. The appellant had contended before the Supreme Court that since he had taken action against some erring officers, they were instrumental in sending the said anonymous complaint and no action should have been taken on such a complaint in the light of the circulars/letters issued by the Central Vigilance Commission. However, an enquiry was got conducted by an Assistant Commissioner, Directorate of Vigilance, and the allegation made against the appellant were not found to be true. Still recommendations were made that he be transferred outside Bhopal, consequently, he was transferred to Shillong. The appellant had made a representation for his retention on humanitarian grounds which was not considered. He therefore filed Original Application before the Central Administrative Tribunal, Jabalpur where the Tribunal directed the respondents to consider and decide the representation of the appellant by a reasoned and speaking order and till such decision is taken, the appellant be not disturbed. The representation of the appellant was rejected. He filed another representation which was again rejected. The appellant then filed another Original Application before the Tribunal at Jabalpur and during the pendency of the said Original Application, the respondents promoted him and posted him to Ahmedabad. The appellant amended his Original Application suitably which was disposed of by the Tribunal by observing that the transfer order was on administrative exigencies and the appellant was an All India Service Officer liable to be transferred throughout India and that Tribunal cannot substitute its own decision in the matter of transfer and that his transfer order being passed by the Competent Authority was after consideration of administrative needs and requirements of the station concerned.

The appellant had approached the High Court against such order of the CAT while also challenging his transfer. The High Court of Madhya Pradesh at Jabalpur noted that during the pendency of the writ petition, disciplinary proceeding had been initiated against the appellant on the ground that he had not joined at the place of posting at Ahmedabad. The Court therefore

directed that during the pendency of the writ petition, disciplinary proceeding should not be conducted and then finally disposed of the writ petition of the appellant quashing the transfer order and he was directed to join at Bhopal but he was not held entitled to be paid his salary for the period he had not worked. The Supreme Court observed after recording in detail the observations in the judgment rendered by the High Court, that while quashing the transfer order, no such observation could have been made as was done by the High Court.

It also referred to the transfer order being an administrative order but nevertheless having been passed on the ground of complaint against the appellant alleging caste bias which anonymous complaint was not found to be true on enquiry being conducted in the matter. Having regard to the directives of the Central Vigilance Commission, it held that no enquiry could have been initiated against him but it is beyond any doubt or dispute that in the said enquiry, the allegations were found to be untrue. The Court also observed that respondents knew that the matter was pending before the Tribunal but they did not approach the Tribunal to obtain leave before passing the second order of transfer of the appellant from Shillong to Ahmedabad. They passed the order of transfer while considering the cases for promotion and transfer of a large number of officers and the order of transfer suffered from a total non application of mind in so far as it proceeded on the premise that the appellant had already joined his post at Shillong.

22. Certain observations were no doubt made by the Supreme Court on the principles of *malice in law* and *malice in fact* and it had observed that transfer order was based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. The Supreme Court had also observed that employer is entitled to pass an order of transfer in administrative exigencies but an order of transfer cannot be passed by way of, or in lieu of punishment and that when an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.

23. Having considered the judgment rendered by the Supreme Court in **Somesh Tiwari (surpa)**, this Court finds that the order of transfer dated 13.07.2020 was not passed in lieu of or by way of any punishment. In Pratap Singh Vs. Union of India; 2006 (8) SCC 1, measure to insulate police machinery from political/executive interference and to make it more effective and efficient to strengthen the rule of law in the country were considered. The Supreme Court had observed that there should be a Police Establishment in each State which shall decide all transfers, postings, promotions and other service related matters of officers below the rank of Deputy Superintendent of Police. This Court in its Full Bench decision in Constable Vinod Kumar v. State of U.P. and others; (2010) 7 ADJ 315 had approved the validity of different Police Establishment Board set up by the Government for different branches of the Police Force and for different cadres and it being headed by Inspector Generals of Police instead of by the Director General of Police for non-gazetted officers. The Police Radio Establishment Board is the Competent Authority to consider recommendations of the District Officers and then to pass appropriate orders. Several complaints had been made by the petitioner which ran into 43 pages and such 43 pages had been duly

forwarded by the Senior Superintendent of Police, Varanasi to the Police Radio Establishment Board for its consideration, the Police Radio Establishment Board had of its own come to the conclusion that indeed it was not conducive to the discipline of unit incharge of safety and security of a highly sensitive place i.e. Shri Kashi Vishwanath Temple/Gyanvapi Mosque, Varanasi for such a person as the petitioner to continue to be posted there. Such an order cannot be faulted with.

15. The writ petition is dismissed as being devoid of merit. No order as to costs.

(2022) 9 ILRA 219
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ A No. 14029 of 2022

Abhishek Mishra ...Petitioner
Versus
Hon'ble High Court of Judicature at Allahabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nikhil Kumar, Sri Prashant Kanha

Counsel for the Respondents:
Sri Ashish Mishra, Sri Rahul Agarwal

A. Service Law – Compassionate Appointment - Dying in Harness Rules - *"suitable appointment"* so indicated in Rule 5 should be understood with the reference to the post held by the deceased employee and in the present case since the deceased employee was holding Class-III post, therefore, any suitable appointment to his dependent should be given in the same category if the petitioner is having all required qualifications. (Para 13)

Liberty be given to the petitioner to furnish all required documents before the opposite parties including any document/certificate relating to his knowledge of Urdu as well as of Hindi & English typing with required speed within a period of two weeks from the date of this order supporting with an exhaustive representation and if such representation along with the required documents is produced before the concerned opposite party, the appropriate decision shall be taken in favour of the petitioner in view of what has been considered and directed and any suitable appointment shall be provided to the petitioner strictly in accordance with law with expedition preferably within a period of four weeks thereafter. (Para 15, 16)

Writ Petition allowed. (E-4)

Precedent followed:

1. Suneel Kumar Vs St. of U.P. & ors., 2022 Live Law (SC) 675 (Para 8)

Present writ petition assails report dated 22.02.2022, passed by Chairman, Consultative Committee/1st Additional District Judge, Agra and letters/orders dated 03.03.2022 and 16.08.2022, issued by District Judge, Agra.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Nikhil Kumar, learned counsel for the petitioner and Sri Rahul Agarwal, learned counsel for the High Court/respondents.

2. The prayer of this petition is as under:

(a) issue a writ order or direction in the nature of certiorari calling for the record of the case and quashing the impugned order dated 16.08.2022 passed by the Respondent no. 2 and letter no. 1378/I Agra dated 03.03.2022 written by the respondent no. 2 to respondent no. 1 and report dated 22.02.2022 submitted by

the Committee headed by the respondent no. 3 (Annexure 1,2 & 3 to the Writ Petition).

(b) issue a writ, order or direction in the nature of mandamus commanding the respondent no. 2 to consider the appointment of the petitioner on any suitable class III post on the compassionate ground as expeditiously as possible preferably within a period of one month or as may be fixed by this Hon'ble Court and pay salary regularly every month to the petitioner.

(c) issue a writ, order or direction in the nature of mandamus commanding the respondent no. 1 to decide the representation of the petitioner dated 18.05.2022 in accordance with law as expeditiously as possible preferably within a period of one month or as may be fixed by this Hon'ble Court."

3. The order under challenge is the impugned order dated 16.8.2022 issued by the opposite party no. 2 (Annexure no. 1) offering an appointment to the petitioner on Class-IV post on compassionate ground on the recommendation report of opposite party no. 3 dated 22.2.2022 (Annexure no. 3). The petitioner has also assailed the order dated 3.3.2022 issued by the opposite party no. 2 addressing to the opposite party no. 1 seeking approval of appointment of the petitioner on Class III post. Precisely, the request of the petitioner for seeking appointment under Dying in Harness Rules was placed before the opposite party no 3 i.e. Consultative Committee at Agra which submitted its report on 22.2.2022 before the District Judge, Agra. The District Judge, Agra placed such report before this Court through Registrar General vide letter dated 3.3.2022 seeking approval of the appointment of the petitioner on Class-IV post and thereafter the District Judge, Agra issued an offer of appointment to the petitioner vide letter dated 16.8.2022. Therefore, the foundation of impugned orders dated 3.3.2022 and 16.8.2022 is the report of the Committee dated 22.2.2022.

4. As per the impugned report dated 22.2.2022, though the petitioner has not produced 'CCC Certificate' but he is having qualification of B.C.A. (Bachelor of Computer Application), therefore, it may be presumed that he is having sufficient knowledge of computer application but the petitioner has not produced any document or certificate to show that he is having knowledge of Urdu and Hindi / English typing with the speed of 20/30 words per minute, therefore, his candidature may not be presumed to be sufficient for offering him appointment on Class-III post. Therefore, the petitioner has been offered an appointment on Class-IV post.

5. The precise facts of the case is that the father of the petitioner was serving on the post of 'Personal Assistant' in the office of opposite party no. 2 and after his demise the petitioner approached the competent authority to provide any suitable appointment under the Dying in Harness Rules.

Undoubtedly, the petitioner is otherwise eligible to be appointed on Class-III post as he is having other requisite qualifications but he could not produce any document / certificate to show that he is having knowledge of Urdu and typing certificate showing his knowledge of Hindi / English typing with the speed of 20/30 words per minute so, such appointment has not been offered to him and he has been offered appointment on Class-IV post. Though the impugned report says that the petitioner has not produced

any document relating to the knowledge of typing but such document has been filed with this petition which may be perused and considered by the opposite parties.

6. Learned counsel for the petitioner has shown result of petitioner, which is enclosed as Annexure no. 5, relating to the 'Master in Computer Application' (MCA). He has also shown the document / certificate showing that the petitioner has completed the course of English and Hindi typing. So far as the certificate relating to the knowledge of Urdu is concerned the petitioner has clearly indicated in para 15 of the writ petition that the petitioner is having special knowledge of Urdu. In para 15 the petitioner has indicated the reason as to why such certificate has not been produced. As per the petitioner since those documents were not required to be filed, therefore, he could not file those documents. For convenience para 15 reads as under :

"15. That, it is respectfully submitted that the petitioner is having special knowledge of Urdu and the petitioner is also having certificate of typing of Hindi/English as required by the respondent no. 2, however, since no demand of any certificate of typing and special knowledge of Urdu was made from the petitioner and as such, he could not supply the certificate of typing and special knowledge of Urdu. Although, the petitioner supplied the copy of certificate of typing test later on when he obtained the certificate from the Unique Computer Solution, but it appears that the respondent no. 3 has not taken into consideration the certificate of typing course submitted by the petitioner."

7. So as to substantiate the aforesaid arguments learned counsel for the petitioner has drawn attention of this Court towards para 19 explaining the relevant portion of the Rule wherein it has not been indicated that those documents should be produced before the competent authority. For the convenience para 19 is being reproduced herein below :

"19. That, as per the Uttar Pradesh State District Court Service Rules, 2013 for appointment on the post of Junior Assistant following qualifications is prescribed :-

Intermediate with maths with special knowledge of Urdu and Hindi along with a CCC Certificate issued by DOEACC Society and 25/30 words per minute for Hindi/English typing on computer, (as per G.O. No. 1595/VII-Nyaya-2-2011-68G/2011 dated 17.02.2012 (Arithmetic mensuration) elementary land Surveying and Mapping, Order XXVI of Act No. V of 1908 and Rules (Civil) relating to the work and duties of the Junior Assistant."

8. Sri Nikhil Kumar, learned counsel for the petitioner has drawn attention of this Court towards the dictum of Apex Court in re: ***Suneel Kumar vs. State of U.P. & others reported in 2022 Live Law (SC) 675*** referring para 10 which reads as under :

"10. At the same time, as far as the question relating to the entitlement as it were of the appellant to be considered to the post of Gram Panchayat Officer is concerned, it is without doubt a post borne in Class-III. The father of the appellant was working as a Sweeper borne in Class-IV post. We have noticed the view taken by this Court in ***Premlata*** *(supra). In other words, the law as declared is to the effect that the words "suitable employment" in Rule 5 must be understood with reference to the post held by the deceased employee. The superior qualification held by a dependent*

cannot determine the scope of the words "suitable employment".

[Emphasis Supplied]

9. Per contra, the learned counsel for the High Court has submitted that the opposite party nos. 2 and 3 has taken a liberal approach considering the other qualifications of the petitioner sufficient but since he could not produce any document / certificate showing his knowledge of Urdu and typing in Hindi and English, therefore, he may not be provided any appropriate appointment in Class III post.

10. On being confronted the learned counsel for the High Court on the point that if the petitioner produces those documents with expedition, as to whether any appropriate decision may be taken considering his qualification and suitability in the light of dictum of Apex Court in re: ***Suneel Kumar (supra)***, learned counsel for the High Court has submitted that if the petitioner would be fulfilling all requisite conditions bringing on record the required documents, the competent authority may consider his case strictly in accordance with law, if this Court so directs.

11. Heard learned counsel for the parties and perused the material available on record.

12. Notably, it it not disputed that the petitioner is otherwise eligible to be considered for appointment on Class- III post so he may be offered such appointment under Dying in Harness Rules in view of the dictum of Apex Court in re: ***Suneel Kuamr (supra).***

13. The analogy of para 10 of the judgment in re: ***Suneel Kumar (supra)*** is that the term "suitable appointment" so indicated in Rule 5 should be understood with the reference to the post held by the deceased employee and in the present case since the deceased employee was holding Class-III post, therefore, any suitable appointment to his dependent should be given in the same category if the petitioner is having all required qualifications.

14. The qualification of the petitioner is Masters in Computer Application (MCA) and he has got knowledge of Hindi and English typing. As per learned counsel for the petitioner he can produce the document / certificate showing that he has got knowledge of Urdu.

15. In view of the specific recital vide para 15 and 19 of the petition, the required documents, so enclosed with the writ petition as well as the dictum of Apex Court in re: ***Suneel Kumar (supra),*** I find it appropriate that the liberty be given to the petitioner to furnish all required documents before the opposite parties including any document / certificate relating to his knowledge of Urdu as well as of Hindi & English typing with required speed within a period of two weeks from today supporting with an exhaustive representation and if such representation along with the required documents is produced before the concerned opposite party, the appropriate decision shall be taken in favour of the petitioner in view of what has been considered and directed above and any suitable appointment shall be provided to the petitioner strictly in accordance with law with expedition preferably within a period of four weeks thereafter.

16. In view of the aforesaid observations and directions, I also find it appropriate that the impugned report dated

22.2.2022 passed by the opposite party no. 3 i.e. Chairman, Consultative Committee / 1st Additional District Judge, Agra as well as the consequential letters / orders dated 3.3.2022 and 16.08.2022 are hereby ***set aside and quashed*** and a fresh decision shall be taken strictly in accordance to law in terms of the aforesaid directions within aforesaid stipulated time.

17. Accordingly the ***writ petition is allowed.***

18. No order as to costs.

(2022) 9 ILRA 223
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ A No. 55825 of 2015

Surendra Kumar Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Arun Kumar Gupta

A. Service Law – UP Intermediate Education Act, 1921 – Regulations framed under the Act of 1921 – Reg. 32 & 33 – UP High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 – Punishment of withholding two increments – Prior approval of the Board not obtained, how far invalidate punishment – Held, assuming that the punishment of withholding two increments, has been inflicted in accordance with Law, after following the procedure prescribed under the Regulations contained in Chapter III of the Regulations framed under the Act of 1921, the punishment would still be void, unless there was prior approval thereof by the Board constituted under the Act of 1982. (Para 23)

B. Service Law – Regulations framed under the Act of 1921 – Reg. 72 & 73 – Entitlement of promotion and promotion grade salary – Adverse entry in service book – Non-communication of adverse entry to the teacher – No opportunity to represent against it – Effect – Held, recording adverse entries behind the petitioner's back, which were never communicated to him, contrary to the provisions of Regulation 72, cast a shadow of grave doubt about the authenticity the resultant validity of the adverse entries, on which the respondents rely – Uncommunicated adverse ACRs/entries cannot be relied upon for the purpose of consideration for promotion. (Para 38 and 39)

C. Service Law – Promotion – Entitlement – Pendency of criminal case – Effect – Held, the Law relating to promotion, grant of promotion pay scale etc. against an employee, who is facing disciplinary proceedings or criminal charges, is not that such an employee is not to be considered for the grant of promotion or promotion pay scale at all. (Para 42)

D. Interpretation of Statute – Mandate of statute – Mala fide in Law – If statutory regulations require a particular thing to be done in a specified manner, it has to be done in that manner – If a mandatory provision in a statutory regulation, that has adverse civil consequences on the rights of an employee, is observed in breach, there is a clear case of mala fides in Law. (Para 38)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Ramesh Chandra Mishra Vs U.P. Secondary Education Services Commission, Allahabad & ors.; (1990) 1 UPLBEC 488

2. Sukhdev Singh Vs U.O.I. & ors.; (2013) 9 SCC 566

3. Rukhsana Shaheen Khan Vs U.O.I. & ors.; (2018) 18 SCC 640

4. U.O.I. & ors. Vs K.V. Jankiraman & ors.; (1991) 4 SCC 109

5. U.O.I. & ors. Vs Anil Kumar Sarkar; (2013) 4 SCC 161

(Delivered by Hon'ble J.J. Munir, J.)

1. The reliefs sought in this petition are so many and so much lavish in detail, that it would be wise to quote the prayer clause verbatim. The prayer clause (limited to the material reliefs alone here) reads:

i) issue, a writ, order or direction in the nature of certiorari quashing the part of the impugned order 12.12.2014 whereby the benefits for which the Petitioner is entitled have been rejected.

ii) issue, a writ, order or direction in the nature of mandamus directing the respondents to pay the arrears of increment of July 2009 for the period July 2009 to November 2010 alongwith interest.

iii) issue, a writ, order or direction in the nature of mandamus directing the respondents to pay the arrears of increment of July 2010 for the period July 2010 to November 2010 alongwith interest.

iv) issue, a writ, order or direction in the nature of mandamus directing the respondents that the petitioner may be given the benefit of revised pay scale of Grade Pay of Rs. 5400/- with effect from 1.2.2010 alongwith interest.

v) issue, a writ, order or direction in the nature of mandamus directing the respondents that the petitioner may be provided the payment of difference of salary and subsistence allowance with effect from 1.04.2009 to 31.05.2010 alongwith interest.

vi) issue, a writ, order or direction in the nature of mandamus directing the respondents that the petitioner may be paid the salary with effect from 25.03.2009 to 31.03.2009 alongwith interest.

vii) issue, a writ, order or direction in the nature of mandamus directing the respondents that the salary of the strike period of 35 days (with effect from 16.01.1984 to 19.02.1984) may be paid to the petitioner alongwith interest.

viii) issue, a writ, order or direction in the nature of mandamus directing the respondents that a sum of Rs. 385/- of G.P.F. may be paid to the petitioner alongwith interest."

2. Out of these manifold reliefs, the learned Counsel for the petitioner in his wisdom has not pressed Relief Nos. (vii) and (viii) at the hearing.

3. In order to appreciate the petitioner's grievance, the redressal whereof he seeks, it would be apposite to refer to facts that have given rise to this petition. The Ram Prasad Bismil Higher Secondary School, Divnapur, District Bareilly is a recognized College under the Uttar Pradesh Intermediate Education Act, 1921 (for short, 'the Act of 1921'). The aforesaid intermediate college shall hereinafter be referred to as 'the College'. The College is in receipt of grant-in-aid from the State Government and salaries to its teachers and other employees are paid out of funds provided by the State Government under

the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971. The said Act shall hereinafter be called as 'the Act of 1971'.

4. The petitioner was appointed as a teacher in the College in the B.T.C. Grade on 01.02.1973. After completion of five years' service in the B.T.C. Grade, the petitioner was appointed as an assistant teacher in the C.T. Grade. Upon the C.T. Grade being declared a dying cadre and the petitioner completing ten years' service in the C.T. Grade, he automatically became a teacher in the L.T. Grade. He was absorbed in the L.T. Grade w.e.f. 01.02.1988. Upon completion of ten years of regular service in the L.T. Grade, the petitioner was granted L.T. Selection Grade w.e.f. 01.02.1998. He was appointed as the ad hoc Principal vide order dated 06.01.2010 passed by the District Inspector of Schools, Bareilly and worked as such up to April, 2011. He retired from service on 30.06.2012 upon attaining the age of superannuation. At the time of his retirement, he was serving the College as an assistant teacher in the L.T. Grade (placed in the Selection Grade).

5. At this stage, it is necessary to look at some events that happened in the year 2009 and their cascading effect upon the petitioner's service record, emoluments and post retiral benefits. While the petitioner was the seniormost L.T. Grade Teacher in the College, he was given the charge of Centre Superintendent for the purpose of holding the Board Examinations, conducted by the U.P. Board of High School and Intermediate Education in the year 2009. On 19.03.2009, a Flying Squad of the Intermediate Education Board alighted on the College premises, just 10 minutes into the examinees commencing writing their scripts. No examinee was using or found to be using unfair means by the Flying Squad.

6. A First Information Report dated 24.03.2009, giving rise to Case Crime No.209 of 2009, under Section 3/10 of the Uttar Pradesh Public Examination (Prevention of Unfair Means) Act, 1998 (for short, 'the Act of 1998'), Police Station Hafijganj, District Bareilly, was lodged against the petitioner at the behest of the Principal of the College, who is now the Manager, inasmuch as the Principal had not been entrusted with the assignment of the Centre Superintendent by the Board. The petitioner further asserts that no examinee was found using unfair means by the Board, in consequence whereof results of all the examinees were declared by the Board. Nevertheless, a charge sheet dated 26.05.2009 was filed against the petitioner in the crime under Section 3/10 of the Act of 1998.

7. The petitioner challenged this charge sheet before this Court through an application under Section 482 of the Code of Criminal Procedure. In the aforesaid case, being Application u/s 482 No. 34506 of 2009, this Court vide order dated 04.01.2010 ordered issue of notice to the other side and directed that till the next date of listing, no coercive action shall be taken against the petitioner.

8. On account of the FIR, that was lodged against the petitioner, the petitioner points out that he was placed under suspension by the Management on 29.03.2009. Later on, by an order dated 29.05.2010 passed by the Committee of Management of the College, the suspension was revoked, subject to the following conditions:

"(1) Two increments shall be denied to the petitioner until time that the Court of competent jurisdiction delivers judgment. After judgment by the Court alone, the Management would consider reviewing its decision about withholding the two increments;

(2) The petitioner would not receive any emolument for the period that he remained under suspension in addition to the subsistence allowance; and,

(3) The petitioner would not be entrusted with any administrative work of the College."

9. In terms of the aforesaid order, the petitioner was reinstated in service on 01.06.2010.

10. It is emphasized by the learned Counsel for the petitioner that neither any disciplinary proceedings were initiated against him nor any charge sheet ever issued. Pursuant to the resolution to suspend the petitioner, no disciplinary proceedings were taken, but in terms of the order of reinstatement, the petitioner has been virtually punished without inquiry, with an order withholding two increments until the competent Criminal Court delivered judgment in the case. It is submitted by the learned Counsel for the petitioner that unless disciplinary proceedings were initiated and brought to their logical conclusion, the respondents never had the right to withhold two increments, which constitute one of the punishments envisaged under the regulations framed under the Act of 1921.

11. It is argued that in order to inflict punishment of any kind upon a teacher serving an institution governed by the Act of 1921, approval has to be obtained from the U.P. Secondary Education Service Selection Board constituted under the Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982 (for short, 'the Act of 1982'). The aforesaid mandatory permission by the Board, before infliction of any of the penalties upon a teacher contemplated under Section 21 of the Act of 1982, is essential. If the requisite permission is not taken, the resolution of the Management inflicting any of the punishments envisaged under Section 21 of the Act of 1982 would be void. The learned Counsel for the petitioner has drawn the Court's attention to Section 21 of the Act of 1982, which reads:

"21. Restriction on dismissal etc. of teachers.-The Management shall not, except with the prior approval of the Board, dismiss any teacher or remove him from service, or serve on him any notice of removal from service, or reduce him in rank or reduce his emolumcnis or withhold his increment for any period (whether temporarily or permanently) and any such thing done without such prior approval shall be void."

12. It is urged on behalf of the petitioner that upon reinstatement w.e.f. 01.06.2010, the petitioner is entitled to payment of the difference, between his salary for the period of his suspension and the subsistence allowance, that he received during the relevant period of time, in view of the provisions of Regulation 40 of Chapter III, framed under the Act of 1921. However, the petitioner was paid nothing beyond the subsistence allowance in enforcement of the order dated 29.05.2010 passed by the Management, which is manifestly illegal. It is next submitted that the petitioner is entitled to receive the promotion pay scale with the grade pay of Rs.5400/- w.e.f. 01.02.2010 as he

completed 12 years of service in the L.T. Selection Grade, reckoned with effect from 01.02.1998. It is pointed that this denial has come owing to the criminal case pending against him under Section 3/10 of the Act of 1998. It is urged that the pendency of the aforesaid case cannot be held against the petitioner to deny his due promotion pay scale.

13. The petitioner, aggrieved by the aforesaid myriad denials of his service dues, approached this Court by instituting Writ-A No.67465 of 2012, seeking restoration of all the benefits due to him. The said petition was disposed of, granting liberty to the petitioner to represent his case before the District Inspector of Schools, Bareilly, who was directed to look into the petitioner's grievances and redress the same, in accordance with law, by means of a reasoned and speaking order, within two months next of the date of receipt of the petitioner's representation, accompanied by a certified copy of this Court's order dated 20.12.2012.

14. In order to avail of whatever relief this Court extended, the petitioner submitted a representation to the District Inspector of Schools, Bareilly, a copy whereof is annexed as Annexure No.2 to the writ petition. All the legal and other infirmities pointed out hereinabove, vitiating the conditions imposed by the respondent Management while reinstating the petitioner, were set forth in the representation and pleaded to be illegal in view of the various statutory provisions above indicated, or the law generally applicable. It was, amongst other things, pointed out in the representation to the District Inspector of Schools that the petitioner was entitled to the promotion pay scale upon completion of 12 years' service in the L.T. Selection Grade w.e.f. 31.01.2010, but the said claim of the petitioner was rejected by the respondent Management on ground that his services were not satisfactory. It was pleaded in the representation addressed to the District Inspector of Schools that the petitioner had never been communicated with any adverse entry nor the service-book placed before him for signatures. The petitioner was not allowed to examine the service-book. The petitioner's representation was rejected by the District Inspector of Schools, Bareilly vide the order impugned dated 12.12.2014.

15. Disillusioned by the order impugned dated 12.12.2014, the petitioner has preferred the present writ petition.

16. Heard Mr. Santosh Kumar Mishra, learned Counsel for the petitioner, Mr. Sharad Chandra Upadhyay, learned State Law Officer appearing on behalf of respondent nos. 1 to 5 and Mr. Arun Kumar Gupta, learned Counsel appearing on behalf of respondent nos. 6 and 7.

17. The record has been perused, in particular, the petitioner's service-book that was produced before the Court in sealed cover, since opened and placed on record.

18. The most unusual feature of this case is that the petitioner stands punished in terms of the order dated 29.05.2010, by which he has been reinstated in service. There are apparently no disciplinary proceedings taken against the petitioner, for which there is an elaborate procedure provided under Regulations 31 to 45 of Chapter III of the Regulations framed under the Act of 1921. He has also not been convicted while in service by the Court of criminal jurisdiction, where a charge sheet has been filed against him. Thus, until his

superannuation on 30.06.2012, the petitioner was neither held guilty in disciplinary proceedings nor by a Court of criminal jurisdiction for an offence involving moral turpitude. In the absence of either, it was not at all open to the respondents to punish the petitioner by stopping his increments until judgment by the Criminal Court, in connection with the charge on the basis of which he was placed under suspension. The respondents have called it a condition for the petitioner's reinstatement, but in substance the condition is virtually another name for the postulated penalty of stoppage of increments. The increment no doubt has been stopped until the happening of an event i.e. the judgment of the Criminal Court. It is not known when the Criminal Court would deliver judgment. Therefore, the jurisdiction exercised by the respondents to stop the petitioner's increments numbering two, is absolutely ultra vires the powers conferred upon them under Chapter III of the Regulations framed under the Act of 1921. The power to inflict any of the punishments, postulated under Regulations 32 and 33 of Chapter III, can be exercised at the end of disciplinary proceedings, duly drawn and concluded or taking cognizance of the judgment of a Court of criminal jurisdiction, convicting the employee on a charge involving moral turpitude. The exercise of the power to withhold the petitioner's increments, numbering two in this case, pending a decision of the relative criminal case by the Court is not a valid exercise of power by the respondents.

19. There is an averment to be found in Paragraph No. 17 of the counter affidavit filed on behalf of the respondent-Management to the effect that the petitioner is not entitled to arrears of the difference in salary and the subsistence allowance for the period 01.04.2009 to 31.05.2010, as the charges levelled against him in the departmental proceedings were found well proved and he was also punished, stopping two increments. Nothing has been brought to the notice of the Court during the hearing that any order of punishment was ever passed against the petitioner. The punishment, as the respondent-Management unwittingly concede in Paragraph No.17 of the counter affidavit filed on their behalf, was imposed through the exercise of a most anomalous jurisdiction, besides being *ultra vires,* in the form of an order reinstating the petitioner in service subject to terms and conditions. It is the terms and conditions of reinstatement that carry the order of punishment, withholding two increments. This, as already said, could never have been done.

20. There is nothing said in the counter affidavit filed on behalf of respondent Nos. 1 to 5 or the State-respondents, that may show that any order of punishment was ever passed against the petitioner, and that too with the due approval of the competent Authority, an issue to which allusion would shortly be made. In Paragraph No.8 of the counter affidavit filed on behalf of respondent Nos. 1 to 5, all that is said in defence of the order withholding increments is that since a final order has not been passed in the criminal case, some conditions to the petitioner's reinstatement have been imposed. This, as already said, more than once is not a valid ground to punish a teacher or an employee by withholding his increment, as done in the present case.

21. A perusal of the impugned order dated 12.12.2014 passed by the District

Inspector of Schools shows that he has utterly failed to understand the deep flaw in punishing a teacher, without following the procedure envisaged in Regulations 32 and 33 of Chapter III of the Regulations, framed under the Act of 1921. There is nothing, for a fact, noticed in the impugned order passed by the District Inspector of Schools that an order of punishment has ever been passed against the petitioner. All that is said is that he was found involved by the Flying Squad in some activity, while acting as the Centre Superintendent, leading to the registration of an FIR against him under Section 3/10 of the Act of 1998 and suspended from service-pending inquiry, investigation or prosecution, is not at all indicated by the District Inspector of Schools in the order impugned. It also does not appear anywhere from the records of the case, produced by the Management, as to what was the character of the order of suspension. The District Inspector of Schools in his order has also held it a valid exercise of power by the Management that as a condition for the petitioner's reinstatement, they could withhold two of his increments, pending decision of the Criminal Court. The District Inspector of Schools, untrained in law as he is, cannot be expected to understand the subtlety of the law about the valid exercise of power to punish an employee or a teacher, generally in disciplinary proceedings or in consequence of a conviction by a Court, and particularly, with reference to the provisions of Chapter III of the Regulations framed under the Act of 1921. The District Inspector of Schools has proceeded to uphold the validity of the order punishing the petitioner in an absolutely invalid exercise of jurisdiction, by withholding two of his increments by the Management while reinstating him in service, depending on vague reasoning and on irrelevant considerations. Thus, on this score alone, the impugned order, insofar it upholds the punishment of withholding two increments due to the petitioner, is vitiated.

22. The other reasoning, on the basis of which this part of the impugned order is criticized by the learned Counsel for the petitioner, is that no order of punishment can be validly passed, unless a prior approval thereof is granted by the Board, constituted under the Act of 1982, in terms of Section 21 of the said Act. This contention would proceed on the supposition that a valid order of punishment has been made against the petitioner. Here, we have found that there is no valid order of punishment made against the petitioner after following the procedure prescribed in Regulations 32 and 33 of Chapter III of the Regulations framed under the Act of 1921. The matter can, therefore, be left at that and the contention not examined at all.

23. Assuming, however, that the punishment of withholding two increments, has been inflicted in accordance with law, after following the procedure prescribed under the Regulations contained in Chapter III of the Regulations framed under the Act of 1921, the punishment would still be void, unless there was prior approval thereof by the Board constituted under the Act of 1982. This plea was raised by the petitioner in his representation to the District Inspector of Schools, Bareilly dated 08.01.2013, annexed as Annexure No.2 to the writ petition, but does not find mention in the order impugned.

24. The necessity of obtaining prior permission of the Board constituted under the Act of 1982, before the valid imposition of any punishment, fell for consideration of

a Division Bench of this Court in **Ramesh Chandra Mishra v. U.P. Secondary Education Services Commission, Allahabad and others, (1990) 1 UPLBEC 488.** In **Ramesh Chandra Mishra** *(supra)*, it was held:

"13. In the year 1982 U.P. Secondary Education Services Commission and Selection Boards Act, 1982 (U.P. Act No. V of 1982) was promulgated by the Uttar Pradesh Legislature. This Act shall hereinafter be referred to as the 'Commission Act'. The object of this Act was to establish Secondary Education Services Commission and Selection Board for the selection of teachers in the institution recognised under the Education Act. Section 21 of the Act provides for restriction on dismissal removal or reduction in rank of teachers. Section 21 provides that no teacher specified in the schedule shall be dismissed or removed from service or reduced in rank and neither his emoluments may be reduced nor he may be given notice of removal from service by the Management unless prior approval of the Commission has been obtained. Section 21 came into force with effect from January 1, 1984 by notification issued by the State Government on 27th December, 1983. The resultant effect was that on or after 1st January, 1984 if any action of dismissal, removal or reduction in rank of teacher, Head master or Principal is taken then such action can only be taken after obtaining prior approval of the Commission in accordance with the Scheme of the Education Act, Regulations framed thereunder and the Commission Act. The action for dismissal, removal or reduction in rank against a teacher, Headmaster or Principal can only be taken in the manner prescribed viz. holding an enquiry under Regulation 35 and thereafter following the procedure as required in Regulations 36 and 37 and subsequent thereto taking prior approval of the Commission. If any of the steps which are condition precedent for taking action are not followed, the action in our opinion would be vitiated in law and would be void. Section 21(3) of the Commission Act also specifically provides that after the order of dismissal, removal or reduction in rank of removal from service or reduction in emoluments of a teacher in contravention of the provisions of sub-section (1) or sub-section (2) shall be void."

25. There being nothing to show that the punishment of withholding two increments, if at all there be any punishment validly imposed, was inflicted with the prior approval of the Board, under the Act of 1982, would vitiate the order directing withholding of the petitioner's increments, in any case. Though, this question, as already noticed, does not arise in the present case, because there is indeed no order of punishment passed in accordance with Chapter III of Regulations, the validity of the order passed by the Management and upheld by the District Inspector of Schools, directing withholding of increments, has been examined on all possible scores. It must be recorded that the learned Counsel for the parties elaborately addressed this Court on this point. Hence, these remarks.

26. This Court is, therefore, of opinion that the order withholding the petitioner's increments cannot be countenanced at all.

27. The next facet of the petitioner's grievance is that he has been denied his promotion pay scale in the L.T. Grade that fell due w.e.f. 01.02.2010. The said denial

has come in the wake of the petitioner being involved allegedly in aiding candidates using unfair means during the High School and Intermediate Education Board Examination, 2009, where he was functioning as the Centre Superintendent. The aforesaid misdemeanour attributed to the petitioner led to the registration of Case Crime No.209 of 2009, under Section 3/10 of the Act of 1998 against him and a charge sheet being filed in Court. The petitioner is facing trial in the said case. No disciplinary proceedings have been initiated against the petitioner on the basis of the aforesaid misconduct. He was placed under suspension, though as said earlier, it is not clear if the suspension was pending investigation, trial or disciplinary proceedings. Certainly, no disciplinary proceedings were initiated against the petitioner, but the criminal case is pending. He has been reinstated in service subject to certain conditions, one of which about infliction of the penalty or withholding two increments, has been found invalid by this Court in terms of the findings recorded hereinabove.

28. Now, there could be two sources to deny the petitioner's promotion pay scale. One is the award of adverse entries in his Annual Confidential Report (for short, 'the A.C.R.') and the other could be just the fact that a criminal case is pending against him in the Court, where judgment is still awaited. The objection to the latter limb of the obstacle to the grant of promotion pay scale, is based upon the principle that so long as a person is facing disciplinary proceedings, i.e., post the issue of a departmental charge-sheet or a criminal case, subsequent to filing of a charge-sheet in the Criminal Court, he/ she is not to be denied consideration for promotion or the grant of selection grade, crossing the efficiency bar or award of a higher scale of pay, but implementation of the decision is to be postponed until the outcome of the disciplinary proceedings or the criminal case, as the case may be. In case of promotion, properly so called 'sealed cover procedure' is to be adopted, but not a denial of consideration for promotion.

29. Before this Court, the award of promotion pay scale was resisted by the respondents taking up a plea that the petitioner is not entitled, because his services were not satisfactory, during the relevant period of time. This submission came forth on behalf of the State through the supplementary counter affidavit dated 14.09.2021 filed on behalf of the District Inspector of Schools, Bareilly. In the said affidavit, a photostat copy the petitioner's service-book was annexed, and it was averred that under a Government Order dated 20.12.2001, a copy whereof is annexed to the supplementary counter affidavit under reference as Annexure No. SCA-1, the grant of selection grade and promotion pay scale to teachers working in secondary institutions depends upon 12 years of satisfactory service in the selection grade. Though not much is said in the affidavit itself about the petitioner's service record, the relevant ACR entries in the photostat copy of the service-book were brought to the Court's notice by Mr. Upadhyay, learned State Law Officer and Mr. Arun Kumar Gupta, learned Counsel appearing on behalf of respondent Nos. 6 and 7 to submit that the petitioner's service record has not been satisfactory.

30. The learned Counsel for the respondents have drawn the attention of the Court to the character roll of the petitioner and the adverse entries awarded to him for the years 2000-01, 2001-02, 2002-03 and

2003-04. A reading of the character roll for the aforesaid years do show that the petitioner was awarded adverse entries. Learned Counsel for the respondents submits that it was for these service entries that the petitioner's services for the period of 12 years in the selection grade were not found satisfactory, so as to entitle him to award of promotion pay scale.

31. The learned Counsel for the petitioner has submitted that this contention of the respondents was the outcome of *mala fides* on the Management's part. The relevant entries in the service record that the Xerox copy of the service-book showed, were never communicated to him, as required by Regulation 72 of Chapter III of the Regulations framed under the Act of 1921. He submits that if the entries had been communicated, he would have made a representation against the relevant entries in his character roll to the Committee of Management. It is argued that since these entries were not communicated, they cannot be relied upon to hold that the petitioner's services were not satisfactory during the entire period of 12 years while functioning in the selection grade. It was further pointed out by the learned Counsel for the petitioner, during the course of hearing, that the service-book, a xerox copy whereof was annexed to the supplementary counter affidavit filed on behalf of the District Inspector of Schools, was a duplicate copy, as appeared from its face. It was not his original service-book. The Management has deliberately removed his original service-book and substituted it by a duplicate and interpolated entries in his character roll, adverse to him.

32. It was, particularly, pointed out that the adverse entries were not there up to the year 1999-00, but suddenly appeared in the year 2000-01. The respondent Management had not obtained the petitioner's signatures of acknowledgement on the relative adverse entries in his character roll, as required by Regulation 72. This clearly proved that the service-book was an interpolated document and the adverse entries made there, apart from being fabricated, were never communicated to the petitioner. In the circumstances, this Court summoned the petitioner's original service-book vide order dated 25.08.2021. It was after some adjournment that the service-book was produced before the Court on 14.09.2021 by Mr. Sharad Chandra Upadhyay, learned State Law Officer. It was retained in a sealed cover and ordered to be kept in the safe custody of the Registrar General. During the hearing, the petitioner's service-book has been produced in Court and perused, opening the sealed cover.

33. At the hearing, the learned Counsel for the petitioner pointed out that the service-book was duplicate and not the original, when it was opened on 30.09.2021 and the parties inspected it on the said day. The Court also found that it was indeed duplicate. This Court then directed the State to produce the original service-book, duplicate whereof had been produced. The District Inspector of Schools was required to file his personal affidavit, indicating why a duplicate service-book has been produced. The duplicate service-book that was produced before the Court was inspected by the Court and indeed in the confidential roll up to the year 1999-00, there are no entries; neither adverse nor favourable to the petitioner. However, for the years 2000-01, 2001-02, 2002-03, 2003-04 and 2004-05, there are stringing adverse entries, but none appears to be communicated. There are no signatures of

acknowledgement by the petitioner in accordance with the mandate of Regulation 72 of the Regulations framed under Chapter III.

34. In compliance with the Court's order dated 30.09.2021, the District Inspector of Schools filed his personal affidavit dated 07.10.2021. This Court must remark that the personal affidavit of the District Inspector of Schools, Dr. Amar Kant Singh, is a candid disclosure of all relevant facts. It has been explained there, on the basis of information received from Dr. Saudan Singh Shakya, the Principal of the institution, that after being transferred and taking over the Krishak Samaj Inter College, Ghughli, Tabibpur, District Bijnore, he found that the institution had a duplicate service-book of the petitioner alone. The said book was handed over to the District Inspector of Schools for production before this Court. Upon inquiry by the District Inspector of Schools as to why a duplicate service-book alone was available, it was brought to his notice that the first page of the duplicate service-book had been signed by the then Manager, Dushyant Kumar, the Principal, Ayodhya Lal and the petitioner. The petitioner did not deny his signatures on the first page of the service-book. It was also pointed out that the entries on the first page of the duplicate service-book were made in the petitioner's handwriting. The District Inspector of Schools asserted that the petitioner was fully aware about the circumstances attending the preparation of a duplicate service-book. It is then said further in his affidavit that the petitioner's service-book, along with that of four other employees, was lost. An FIR in this regard was lodged by the then Clerk, the late Tek Chand on 20.11.1998 at P.S. Hafijganj, Nawabganj, District Bareilly. It was, thereafter, that the duplicate service-book was constructed under the directions of the then Manager, Dushyant Kumar Gangwar. A copy of the written information given to the S.O., P.S. Hafijganj, Bareilly by the Institution's Clerk is annexed as Annexure No.3 to the District Inspector of Schools' personal affidavit.

35. It, thus, appears that the duplicate service-book that has been constructed is well within the petitioner's knowledge. It was not seriously disputed before this Court that the entries on the first page of the service-book were signed by the petitioner or in his hand. There are fingerprints of the petitioner too on the second page, attested by the then Principal on 23.11.1998. Still, what baffles one is that if the duplicate service-book was reconstructed in the year 1998, as the information to the Police also would corroborate, what would be the material on the basis of which entries in the service-book were made for the period 01.02.1973 to 31.03.1998. It is no matter of surprise that the service-book does not carry any remarks for the period 01.02.1973 to 31.03.1998. Possibly, there was no material left with the institution to post those entries in the service-book, after the original was lost. Nevertheless, it is true that there is no adverse entry against the petitioner for the period 01.04.1998 to 31.03.1999 and 01.04.1999 to 31.03.2000. In fact, there is no entry of any kind for the said period. These two years relate to the period of time when the current duplicate service-book was in use. It is only for the period 01.04.2000 to 31.03.2001, and thereafter, that adverse entries have suddenly cropped up. As said earlier, none of these entries have been got acknowledged by the petitioner.

36. The position of the law that uncommunicated service entries cannot be

made the basis of denying promotion or promotion pay scale would be dealt with a little later.

37. At this stage, it is of the prime importance to notice the stand of the District Inspector of Schools about the adverse entries awarded to the petitioner during the years 2001-02, 2002-03, 2003-04 and 2004-05. The stand of the District Inspector of Schools in this regard is disclosed in Paragraph Nos. 17 and 18 of his personal affidavit dated 07.10.2021. The said paragraphs read:

17. That bare perusal of the duplicate service book of the petitioner it clearly transpires that uptill 2000 there was no any adverse entry against him and in the year 2001-02, 2002-03, 2003-04, 2004-05 adverse remarks were made against the service of the petitioner as the same was not found satisfactory and even his integrity was also found doubtful as such warning as well as adverse entry, withholding of increment as well as deduction from salary, such type of orders were found but there was not a single whisper about this respect that whether prior to awarding the aforesaid punishment due procedure was followed or not and even the petitioner was whether provided opportunity of hearing or not and bare perusal of the said orders it clearly transpires that the then manager and Principal done the alleged proceedings against the petitioner without following any procedure with ill intention as such the said entries are itself void and on the basis of the same no benefit of the petitioner can be stopped on the basis of said illegal entries.

18. That bare perusal of the aforesaid service book it also clearly transpires that vide order dated 29.03.2009 a decision was taken by the respondent No. 6 to suspend the petitioners and the approval of the same was also alleged to be granted by the then D.I.O.S. on 26.05.2009 and later on vide final order dated 28.05.2010 passed by the respondent no. 6 two increment of the petitioner was directed to withheld and even the salary during the suspension period was also directed to be forfieted except the subsistence allowance and later on the petitioner was reinstated in service but as provided under Regulation 21 no approval of the said order was ever done by Secondary Education Service Selection Board as such the said punishment order is also illegal and void."

38. Indeed, the act of the Manager in recording adverse entries behind the petitioner's back, which were never communicated to him, contrary to the provisions of Regulation 72, cast a shadow of grave doubt about the authenticity and the resultant validity of the adverse entries, on which the respondents rely. If statutory regulations require a particular thing to be done in a specified manner, it has to be done in that manner, is a principle too well-known. If a mandatory provision in a statutory regulation, that has adverse civil consequences on the rights of an employee, is observed in breach, there is a clear case of *mala fides* in law. Here, the District Inspector of Schools has opined breach of the regulation in failing to communicate the adverse entries and getting them signed by the petitioner to be an instance of mala fide in fact. The circumstances, indeed, indicate that the non-communication was mala fide. The *mala fides* were clearly on the Management's part in not getting the adverse entries duly acknowledged by the petitioner under his signatures on the service-book, which would be due notice to him. The petitioner could then represent

against those adverse entries in the manner provided under Regulation 73. All this has not all been done. Apart from the provisions of Regulations 72 and 73, the law is clear on the point that the remarks entered in the ACRs must be communicated to the employee concerned within a reasonable period of time, as held by the Supreme Court in **Sukhdev Singh v. Union of India and others, (2013) 9 SCC 566. In Sukhdev Singh** *(supra)*, it was held:

3. Subsequent to the above two decisions, in *Dev Dutt v. Union of India [Dev Dutt v. Union of India*, (2008) 8 SCC 725:(2008) 2 SCC (L&S) 771], this Court had an occasion to consider the question about the communication of the entry in the ACR of a public servant (other than military service). A two-Judge Bench [Dev Dutt v. Union of India, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] on elaborate and detailed consideration of the matter and also after taking into consideration the decision of this Court in *U.P. Jal Nigam [U.P. Jal Nigam v. Prabhat Chandra Jain*, (1996) 2 SCC 363 : 1996 SCC (L&S) 519 : (1996) 33 ATC 217] and principles of natural justice exposited by this Court from time to time particularly in *A.K. Kraipak v. Union of India* [(1969) 2 SCC 262] ; Maneka Gandhi v. Union of India [(1978) 1 SCC 248] *; Union of India v. Tulsiram Patel* [(1985) 3 SCC 398 : 1985 SCC (L&S) 672]; *Canara Bank v. V.K. Awasthy* [(2005) 6 SCC 321: 2005 SCC (L&S) 833] and *State of Maharashtra v. Public Concern for Governance Trust* [(2007) 3 SCC 587] concluded that every entry in the ACR of a public servant must be communicated to him within a reasonable period whether it is poor, fair, average, good or very good entry. This is what this Court observed in paras 17 and 18 of the Report in *Dev Dutt [Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] at SCC p. 733:

"17. In our opinion, every entry in the ACR of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways: (1) had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future; (2) he would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248] that arbitrariness violates Article 14 of the Constitution.

18. Thus, it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder."

(emphasis in original)

4. Then in para 22 at SCC p. 734 of the Report this Court in Dev Dutt case [*Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] made the following weighty observations:

"22. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidical structure where

often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted."

5. In paras 37 and 41 of the Report this Court then observed as follows: (*Dev Dutt case* [*Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] , SCC pp. 737-38)

"37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

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41. In our opinion, non-communication of entries in the annual confidential report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution."

6. We are in complete agreement with the view in *Dev Dutt [Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] particularly paras 17, 18, 22, 37 and 41 as quoted above. We approve the same.

7. A three-Judge Bench of this Court in *Abhijit Ghosh Dastidar v. Union of India* [(2009) 16 SCC 146 : (2010) 1 SCC (L&S) 959] followed *Dev Dutt [Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] . In para 8 of the Report this Court with reference to the case under consideration held as under: *(Abhijit Ghosh Dastidar case* [(2009) 16 SCC 146 : (2010) 1 SCC (L&S) 959] , SCC p. 148)

"8. Coming to the second aspect, that though the benchmark "very good' is required for being considered for promotion, admittedly the entry of "good' was not communicated to the appellant. The entry of "good' should have been communicated to him as he was having "very good' in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or getting other benefits. Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution. The same view has been reiterated in the abovereferred decision *(Dev Dutt case [Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] , SCC p. 738, para 41) relied on by the appellant. Therefore, the entries "good' if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the

higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him."

8. In our opinion, the view taken in *Dev Dutt [Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR--poor, fair, average, good or very good--must be communicated to him/her within a reasonable period.

39. The precise point, that uncommunicated adverse ACRs/ entries cannot be relied upon for the purpose of consideration for promotion, was subject matter of consideration before the Supreme Court in **Rukhsana Shaheen Khan v. Union of India and others, (2018) 18 SCC 640**. Their Lordships in **Rukhsana Shaheen Khan** *(supra)* held:

1. The sole issue involved in this appeal is whether the uncommunicated Annual Confidential Reports (ACRs), which are adverse to the appellant, should have been relied upon for the purpose of consideration of the appellant for promotion.

2. In view of the decision of this Court in *Sukhdev Singh v. Union of India [Sukhdev Singh v. Union of India*, (2013) 9 SCC 566 : (2014) 1 SCC (L&S) 279] , there cannot be any dispute on this aspect. This Court has settled the law that uncommunicated and adverse ACRs cannot be relied upon in the process.

3. This appeal is, accordingly, allowed and the impugned judgment *[Rukhsana Shaheen Khan v. Union of India*, 2006 SCC OnLine Del 1840] is set aside with the following directions:

(a) The competent authority is directed to ignore the uncommunicated adverse ACRs and take a fresh decision in accordance with law.

(b) The appellant shall be afforded an opportunity of hearing in the process.

4. It will be open to the appellant to make all available submissions, including the reference to the judgment of this Court in *Prabhu Dayal Khandelwal v. UPSC [Prabhu Dayal Khandelwal v. UPSC*, (2015) 14 SCC 427 : (2016) 1 SCC (L&S) 825].

40. The legal position being clear that uncommunicated adverse entries cannot form the basis to deny promotion and a *fortiori* denial of promotion pay scale to an employee, the action of the respondents in seeking to deny consideration for grant of promotion pay scale to the petitioner on the basis of uncommunicated ACRs/ entries for the years 2000-01, 2001-02, 2002-03, 2003-04 and 2004-05, cannot be countenanced. The District Inspector of Schools in his affidavit has, on larger grounds, opined those entries to be inherently vitiated.

41. Be that as it may, this Court is of the firm opinion that the adverse ACRs/ entries in the petitioner's service-book cannot be made the basis of denying him consideration for the grant of promotion pay scale. It is, accordingly, held.

42. The other ground, on the basis of which the petitioner's right to be granted, or so to speak, considered for grant of promotion pay scale, has been denied by the respondents, is that a criminal case is pending against him under Section 3/10 of the Act of 1998. During the course of hearing, it has not been disputed before this Court that the aforesaid criminal prosecution is pending and during its pendency, the petitioner has retired from service. The law relating to promotion, grant of promotion pay scale etc. against an employee, who is facing disciplinary proceedings or criminal charges, is not that such an employee is not to be considered for the grant of promotion or promotion pay scale at all. A distinction has been drawn in such cases based on the stage of proceedings against an employee, be these departmental or criminal. If departmental proceedings are in contemplation, say pending consideration at the stage of a preliminary inquiry or a fact finding inquiry, the employee concerned is to be considered for promotion like any other. Similarly, if there is just an FIR lodged against an employee, his case for promotion is to be considered on merits and the process remains unaffected. However, in both cases, that is to say, disciplinary proceedings or criminal charges, the decisive point is the issue of a departmental charge-sheet in the former and the submission of a police report (charge-sheet) in Court in the latter.

43. In cases, where either a charge-sheet has been issued in departmental proceedings or a police report (charge-sheet) filed in Court after investigation by the Police/ other competent Investigating Agency, the employee's case for promotion is still to be considered; but not disposed of like that of any other employee. Post consideration, the recommendations of the Departmental Promotion Committee (DPC) or the other body or Authority competent to consider promotion or the grant of promotion pay scale are to be kept in a sealed cover, awaiting outcome of the disciplinary proceedings or the criminal trial, as the case may be. The question fell for consideration before the Supreme Court in **Union of India and others v. K.V. Jankiraman and others, (1991) 4 SCC 109,** where broad principles were laid down that have been since followed. The questions that fell for consideration in **K.V. Jankiraman** *(supra)* are set out in Paragraph No.8 of the report, which reads:

8. The common questions involved in all these matters relate to what in service jurisprudence has come to be known as "sealed cover procedure". Concisely stated, the questions are: (1) What is the date from which it can be said that disciplinary/criminal proceedings are pending against an employee? (2) What is the course to be adopted when the employee is held guilty in such proceedings if the guilt merits punishment other than that of dismissal? (3) To what benefits an employee who is completely or partially exonerated is entitled to and from which date? The "sealed cover procedure" is adopted when an employee is due for promotion, increment etc. but disciplinary/criminal proceedings are pending against him at the relevant time and hence, the findings of his entitlement to the benefit are kept in a sealed cover to be opened after the proceedings in question are over. Hence, the relevance and importance of the questions.

44. The questions were dealt with in **K.V. Jankiraman** with their Lordships holding thus:

16. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows: (ATC p. 196, para 39)

"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

(2) ***

(3) ***

(4) the sealed cover procedure can be resorted to only after a charge memo is served on the concerned official or the charge-sheet filed before the criminal court and not before;"

17. There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion No. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions.

18. We, therefore, repel the challenge of the appellant-authorities to the said finding of the Full Bench of the Tribunal.

19. The Full Bench of the Tribunal, while considering the earlier Memorandum dated January 30, 1982 has, among other things, held **[Ed.**: See (1987) 3 ATC 174, 195 in para 36] that the portion of paragraph 2 of the memorandum which says "but no arrears are allowed in respect of the period prior to the date of the actual promotion" is violative of Articles 14 and 16 of the Constitution because withholding of salary of the promotional post for the period during which the promotion has been withheld while giving other benefits, is discriminatory when compared with other employees who are not at the verge of promotion when the disciplinary proceedings were initiated against them.

20. The Tribunal has, therefore, directed that on exoneration, full salary should be paid to such employee which he would have received on promotion if he had not been subjected to disciplinary proceedings.

21. We are afraid that the Tribunal's reference to paragraph 2 of the Memorandum is incorrect. Paragraph 2 only recites the state of affairs as existed on January 30, 1982 and the portion of the Memorandum which deals with the relevant point is the last sentence of the first sub-paragraph after clause (iii) of paragraph 3 of the Memorandum which is reproduced above. That sentence reads as follows:

"But no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion."

22. This sentence is preceded by the observation that when the employee is completely exonerated on the conclusion of the disciplinary/court proceedings, that is, when no statutory penalty, including that of censure, is imposed, he is to be given a notional promotion from the date he would have been promoted as determined by the Departmental Promotion Committee. This direction in the Memorandum has also to be read along with the other direction which follows in the next sub-paragraph and which states that if it is found as a result of the proceedings that some blame attaches to the officer then the penalty of censure at least, should be imposed. This direction is in supersession of the earlier instructions which provided that in a case where departmental disciplinary proceedings have been held, "warning" should not be issued as a result of such proceedings.

23. There is no doubt that when an employee is completely exonerated and is not visited with the penalty even of censure indicating thereby that he was not blameworthy in the least, he should not be deprived of any benefits including the salary of the promotional post. It was urged on behalf of the appellant-authorities in all these cases that a person is not entitled to the salary of the post unless he assumes charge of the same. They relied on F.R. 17(1) of the Fundamental Rules and Supplementary Rules which reads as follows:

"F.R. 17. (1) Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties:

Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence."

24. It was further contended on their behalf that the normal rule is "no work

no pay". Hence a person cannot be allowed to draw the benefits of a post the duties of which he has not discharged. To allow him to do so is against the elementary rule that a person is to be paid only for the work he has done and not for the work he has not done. As against this, it was pointed out on behalf of the concerned employees, that on many occasions even frivolous proceedings are instituted at the instance of interested persons, sometimes with a specific object of denying the promotion due, and the employee concerned is made to suffer both mental agony and privations which are multiplied when he is also placed under suspension, When, therefore, at the end of such sufferings, he comes out with a clean bill, he has to be restored to all the benefits from which he was kept away unjustly.

25. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases.

26. We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does, the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated in disciplinary/criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardise public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not approve of the said last sentence in the first sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum, viz., "but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion", we direct that in place of the said sentence the following sentence be read in the Memorandum:

"However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent, will be decided by the concerned authority by taking into consideration all the facts and

circumstances of the disciplinary proceeding/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so."

27. To this extent we set aside the conclusion of the Tribunal on the said point.

28. The Tribunal has also struck down the following portion in the second sub-paragraph after clause (iii) of paragraph 3 which reads as follows: "If any penalty is imposed on the officer as a result of the disciplinary proceedings or if he is found guilty in the court proceedings against him, the findings in the sealed cover/covers shall not be acted upon" and has directed that if the proceedings result in a penalty, the person concerned should be considered for promotion in a Review DPC as on the original date in the light of the results of the sealed cover as also the imposition of penalty, and his claim for promotion cannot be deferred for the subsequent DPCs as provided in the instructions. It may be pointed out that the said sub-paragraph directs that "the officer's case for promotion may be considered in the usual manner by the next DPC which meets in the normal course after the conclusion of the disciplinary/court proceedings". The Tribunal has given the direction in question on the ground that such deferment of the claim for promotion to the subsequent DPCs amounts to a double penalty. According to the Tribunal, "it not only violates Articles 14 and 16 of the Constitution compared with other employees who are not at the verge of promotion when the disciplinary proceedings are initiated against them but also offends the rule against double jeopardy contained in Article 20(2) of the Constitution". The Tribunal has, therefore, held that when an employee is visited with a penalty as a result of the disciplinary proceedings there should be a Review DPC as on the date when the sealed cover procedure was followed and the Review DPC should consider the findings in the sealed cover as also the penalty imposed. It is not clear to us as to why the Tribunal wants the Review DPC to consider the penalty imposed while considering the findings in the sealed cover if, according to the Tribunal, not giving effect to the findings in the sealed cover even when a penalty is imposed, amounts to double jeopardy. However, as we read the findings of the Tribunal, it appears that the Tribunal in no case wants the promotion of the officer to be deferred once the officer is visited with a penalty in the disciplinary proceedings and the Tribunal desires that the officer should be given promotion as per the findings in the sealed cover.

29. According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when the penalty imparted is of reduction in rank. On principle, for the same reasons, the officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a

clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion. For these reasons, we are of the view that the Tribunal is not right in striking down the said portion of the second sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum. We, therefore, set aside the said findings of the Tribunal.

45. The principles laid down in **K.V. Jankiraman** have been followed in **Union of India and others v. Anil Kumar Sarkar**, (2013) 4 SCC 161. Though, both in **K.V. Jankiraman** and **Anil Kumar Sarkar**, the Court before it had office memoranda issued by the Government dealing with the issue as to in what manner cases for promotion are to be considered in the case of employees, against whom disciplinary proceedings or criminal cases are pending, which is not the case here, the broad principles laid down in **K.V. Jankiraman** and subsequently followed, would apply to the case of any employee governed by a statutorily protected tenure, where the rules provide for promotion or the grant of a selection grade or promotion pay scale.

46. In the circumstances, this Court is of opinion that the petitioner's case for the grant of promotion pay scale is to be considered by the Management and the District Inspector of Schools w.e.f. the date the petitioner became entitled to such consideration, that is to say, 12 years service as an Assistant Teacher in the selection grade. The consideration of the petitioner's case for the grant of promotion pay scale shall not take into account the uncommunicated adverse entries entered in his ACR and shall receive requisite consideration ignoring those adverse entries. In assessing the satisfactory service of 12 years in the selection grade for the purpose of grant of promotion pay scale, the adverse entries shall be ignored. The result of the consideration shall, however, be kept in a sealed cover or in abeyance through some other suitable mode, as may be in practice or sanctioned by rules, until such time that the judgment in the criminal case is pronounced. Depending on the outcome of the decision of the criminal Court, the result of the consideration for the

grant of promotion pay scale shall be implemented by the respondents.

47. So far as the question of payment of the difference in salary and the subsistence allowance for the period of suspension is concerned, the same shall also abide by the outcome of the decision that the criminal Court renders. In case, the petitioner is acquitted in the criminal case honourably, he will be entitled to payment of the difference between the salary and the subsistence allowance for the period 01.04.2009 to 31.05.2010, without reservation and promptly so.

48. In the above conspectus of facts, this petition succeeds and is **allowed in part**. The impugned order dated 12.12.2014 passed by the District Inspector of Schools, Bareilly is hereby **quashed. A mandamus** is issued to the respondents to grant the petitioner's two increments withheld i.e. for the period July, 2009 to November, 2010. The petitioner's salary, by adding those increments, shall be revised and the arrears paid within two months of the date of receipt of a copy of this order together with simple interest @ 6% per annum from the date it fell due until payment. The petitioner shall be entitled to consideration for the grant of promotion pay scale without reference to the adverse entries made in his ACRs for the years 2000-01, 2001-02, 2002-03 and 2003-04, the result whereof shall be kept in a sealed cover, or otherwise in abeyance as the rules or the practice may permit until delivery of judgment by the Criminal Court in Case Crime No.209 of 2009, under Section 3/10 of the Act of 1998, Police Station Hafijganj, District Bareilly. Depending on the outcome of the criminal case, the result of the consideration for the grant of promotion pay scale shall be implemented, within **six weeks** of the delivery of the Criminal Court's judgment. Likewise, the petitioner's entitlement to subsistence allowance shall depend on the outcome of the judgment in Case Crime No.209 of 2009, under Section 3/10 of the Act of 1998, Police Station Hafijganj, District Bareilly, which too shall be decided by the respondent Management and the Authorities within six weeks of the delivery of that judgment. It is made clear that the respondent Management and the respondent Authorities shall carry out all directions in this judgment, strictly in point of time and in the terms made, without delay. Considering the circumstances of the case, there shall be no order as to costs.

49. Let the petitioner's service-book be returned to the Registrar General for its onward and secure transmission to the District Inspector of Schools, Bareilly.

(2022) 9 ILRA 244
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 4895 of 1982

Kunvar Bahadur & Ors. ...Petitioners
Versus
Deputy Director of Consolidation, Kanpur Campt, Fatehpur & Ors. ...Respondents

Counsel for the Petitioners:
Sri Hausihla Prasad Mishra, Sri Rahul Mishra, Sri S.R. Singh

Counsel for the Respondents:
S.C., Sri Madhusudan Dixit, Sri P.N. Kushwaha, Sri S.K. Pandey, Sri L.P. Singh, Sri L.K. Singh

Civil Law - U.P. Consolidation of Holdings Act (5 of 1954) - Section 9A(2), 11A & 12 - Only where any fresh cause of action has arisen, to a party, after publication of the revised record u/s 10 (1) of the Act, which was not available when the proceedings under Sections 7 to 9 were started or where in progress, filing of objection under Section 12 of the act could be permitted – one cannot file objection u/s 12 of U.P.C.H. Act first and get it decide as uncontested by Assistant Consolidation Officer without filing regular objection under Section 9-A of U.P.C.H. Act - regular objection u/s 9A(2) of U.P.C.H. Act cannot be held to be bar by res judicata due to decision/order passed u/s 12 of U.P.C.H. Act. (Para 8, 9)

Facts : Petitioners filed objection u/s 12 of the U.P.C.H. Act to have their names recorded on the basis of the sale deed - A.C.O. allowed the objection & ordered their names to be recorded -Respondent filed an objection u/s 9A(2) of the U.P.C.H. Act - C.O. held that he could not sit in appeal over the earlier order of the A.C.O. & rejected the objection filed by respondent - Respondent filed an appeal which was allowed, and the matter was remanded for a fresh decision - petitioners filed a revision which was dismissed- Held - No objection u/s 9A(2) of U.P.C.H. Act was filed by petitioners laying claim on the basis of sale-deed, dated 18.02.1975 and 03.02.1975, which was before the notification under Section-9A of U.P.C.H. Act - rather petitioners wrongly initiated proceedings u/s 12 and got an order passed, which was without jurisdiction - regular objection under Section 9A(2) of U.P.C.H. Act at the instance of the respondents cannot be held to be bar by res judicata due to decision/order alleged to be passed under Section 12 of U.P.C.H. Act - ends of justice requires that objection u/s 9A(2)of U.P.C.H. Act in respect to disputed plot be adjudicated on merit, in which both parties will have opportunity to contest their claim on merit (Para 7,8,10)

Dismissed. (E-5)

List of Cases cited:

1. Aparbal Yadav & anr. Vs. Deputy Director of Consolidation, Gorakhpur & ors. 2003 (95) R.D.44

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. H. P. Mishra, learned counsel for the petitioners and Mr. Madhusudan Dixit, learned counsel for contesting respondent Nos.5 and 6.

2. Brief facts of the case are that in the Basic year of the Consolidation operation, Chandra Shekhar and Laxmi Shanker sons of Ram Dularey were recorded over plot of Khata Nos.5 and 13 situated in village-Shivpur, Pargana-Hathgaon, District-Fatehpur while Ram Kishore son of Ram Dularey and Vidya Sagar sons of Brij Kishore were recorded over Khata No.13. On 18.02.1975 Ram Kishore and Vidya Sagar transferred their interest in the land of Khata No.13 to petitioners by means of a registered sale deed. Chandra Shekhar and Laxmi Shanker also transferred their interest in favour of the petitioners by means of the registered sale deed dated 03.02.1975. An objection under Section 12 of U.P.C.H. Act was filed by petitioners to record their names on the basis of sale deed, the Assistant Consolidation Officer by his order dated 22.04.1975 ordered to record the names of petitioners on the basis of sale deed. Respondent No.4 Vidya Sagar filed an objection under Section 9A(2) of U.P.C.H, Act claiming right in the disputed plot but Consolidation Officer by his order dated 25.01.1979 held that order dated 22.04.1975 passed by Assistant Consolidation Officer is binding on the parties and he could not sit in appeal over the order of Assistant Consolidation Officer passed under Section 12 of U.P.C.H. Act

accordingly, objection filed by respondent No.4 under Section 9A(2) of U.P.C.H,. Act was rejected. An appeal under Section 11 of U.P.C.H. Act was filed by respondent Nos.5 and 6 before Settlement Officer of Consolidation, the appeal was allowed vide order dated 05.12.1979 and matter was remanded before Consolidation Officer for fresh decision of objection on merit. Although, no appeal was filed by respondent No.4 against the order of Consolidation Officer dated 25.01.1979. Against the appellate order dated 05.12.1979 revision under Section 48 of U.P.C.H,. Act was filed by petitioners, Deputy Director of Consolidation by order dated 18.03.1982 dismissed the revision filed by petitioners as well as exercising the power under Section 48 of U.P.C.H. Act order dated 22.04.1975 passed under Section 12 of U.P.C.H.Act was set aside being without jurisdiction. Hence this writ petition.

3. Counsel for the petitioners submitted that one order under Section 12 of U.P.C.H,. Act has been passed in favour of petitioners and the order has attained finality then objection under Section 9A(2) of U.P.C.H. Act filed by respondent No.4 cannot be entertained as order passed under Section 12 of U.P.C.H. Act between the parties will operate as res judicata in the proceedings under Section 9A (2) of U.P.C.H. Act. He further submitted that order dated 22.04.1975 passed in the proceedings under Section 12 of U.P.C.H,. was not challenged in Appeal or revision as such the same cannot be set aside in the present proceedings under Section 9A (2) of U.P.C.H,. Act exercising suo motu power under Section 48 of U.P.C.H. Act accordingly counsel for the petitioners submitted that impugned revisional order dated 18.03.1982 passed by revisional Court and order dated 5.12.1979 passed by appellate Court be set aside.

4. On the other hand, counsel for the respondent Nos.5 and 6 has submitted that order passed in the proceeding under Section 12 will not operate as res judicata in the title proceedings under Section 9 A(2) of U.P.C.H,. Act. He placed provisions of Sections 9A, 11-A and 12 of U.P.C.H. Act which are as follows:

*" **[9A. Disposal of Cases relating to claims to land and partition of joint holdings. -***

(1) The Assistant Consolidation Officer shall -

(i) where objections in respect of claims to land or partition of joint holdings are filed, after hearing the parties concerned, and

(ii) where no objections are filed after making such enquiry as he may deem necessary, settle the disputes, correct the mistakes and effect partition as far as may be by conciliation between the parties appearing before him and pass orders on the basis of such conciliation :

[Provided that where the Assistant Consolidation Officer, after making such enquiry as he may deem necessary, is satisfied that a case of succession is undisputed, he shall dispose of the case on the basis of such enquiry.]

(2) All cases which are not disposed of by the Assistant Consolidation Officer under sub-section (1), all cases relating to valuation of plots and all cases relating to valuation of trees, wells or other improvements, for calculating compensation therefor, and its apportionment amongst co-owners, if there be more owners than one, shall be forwarded by the Assistant Consolidation Officer to the Consolidation Officer, who

shall dispose of the same in the manner prescribed.

(3) The Assistant Consolidation Officer, while acting under sub-section (1) and the Consolidation Officer, while acting under sub-section (2), shall be deemed to be a Court of competent jurisdiction, anything to the contrary contained in any other law for the time being in force notwithstanding.]

[11A. Bar on objection. *- No question in respect of -*

(i) claims to land,

(ii) partition of joint holdings, and

(iii) valuation of plots, trees, wells and other improvements, where the question is sought to be raised by a tenure-holder of the plot or the owner of the tree, well or other improvements recorded in the annual register under Section 10,

relating to the consolidation area,] [which has been raised under Section 9 or which might or ought to have been raised under that section], but has not been so raised, shall be raised or heard at any subsequent stage of the consolidation proceedings.]

[12. Decision of matters relating to changes and transactions affecting rights or interests recorded in revised records. *-*

(1) All matters relating to changes and transfers affecting any of the rights or interests recorded in the revised records published under sub-section (1) of Section 10 for which a cause of action had not arisen when proceedings under Sections 7 to 9 were started or were in progress, may be raised before the Assistant Consolidation Officer as and when they arise, but not later than the date of notification under Section 52, or under sub-section (1) of Section 6.

(2) The provisions of Sections 7 to 11 shall mutatis mutandis, apply to the hearing and decision of any matter raised under sub-section (1) as if it were a matter raised under the aforesaid sections.]"

5. On the basis of the provisions contained in Section 9A, 11A and 12 of U.P.C.H. Act counsel for the respondents submitted that order passed under Section 9A(2) of U.P.C.H. Act will operate as res-judicata in the subsequent proceedings but alleged order passed under section 12 of U.P.C.H. Act cannot operate as res-judicata in the proceedings under Section 9A(2) of U.P.C.H. Act. He further submitted that appellate Court has rightly allowed the appeal of respondents and remitted the matter back to the court of Consolidation Officer for decision of proceedings under Section 9A(2) of U.P.C.H. Act on merit. He next submitted that Deputy Director of Consolidation rightly set aside the order dated 22.04.1975 passed under Section-12 of U.P.C.H. Act exercising power under Section 48 of U.P.C.H. Act on the ground that order was without jurisdiction according to the provisions contained under Sections 9A, 11-A and 12 of U.P.C.H. Act. He lastly submitted that interest of both parties will be examined under Section 9A(2)of U.P.C.H. Act in pursuance of the impugned appellate order and revisional order as such writ petition filed by petitioners is liable to be dismissed.

6. I have considered the arguments advanced by learned counsel for the parties and perused the records.

7. There is no dispute about the fact that no objection under Section 9A(2) of U.P.C.H. Act was filed by petitioners under Section 9A(2)of U.P.C.H. Act rather alleged proceeding under Section-12 of U.P.C.H.

Act was initiated at the instance of petitioners and order dated 22.04.1975 was passed under Section-12 of U.P.C.H. Act on the basis of alleged sale deed dated 18.02.1975 and 03.02.1975, which was before the notification under Section-9A of U.P.C.H. Act. Proceeding under Section 9A(2) of U.P.C.H. Act was initiated at the instance of respondents, according to the provisions of Section 9-A of U.P.C.H. Act, which has been ordered to be adjudicated on merit by Consolidation Officer under impugned orders.

8. On the basis of provisions contained under Section 9A, 11A and 12 of U.P.C.H. Act as quoted above, there appears to be no scope to file objection under Section 12 of U.P.C.H. Act first and get it decide as uncontested by Assistant Consolidation Officer without filing objection under Section 9-A of U.P.C.H. Act. In the case in hand cause of action for filing objection and laying claim on the basis of sale-deed had already arisen for which steps were not taken by petitioners under Section 9A(2) of U.P.C.H. Act rather initiated proceedings under Section 12 of U.P.C.H. Act and got the order passed by Assistant Consolidation Officer, which appears to be without jurisdiction as Section 11-A of U.P.C.H. Act will come in picture. The regular objection under Section 9A(2) of U.P.C.H. Act at the instance of the respondents cannot be held to be bar by res judicata due to decision/order alleged to be passed under Section 12 of U.P.C.H. Act.

9. This Court in a case reported in 2003 (95) R.D.44 Aparbal Yadav and another vs. Deputy Director of Consolidation, Gorakhpur and others has considered the scope of Section 9A and 12, the relevant paragraph No.7 of the judgment is as follows:

....7. In view of the aforesaid it is clear that in the event a question had already arisen when proceedings under Sections 7 to 9 were started or were in progress and an objection under Section 9-A(2) of the U.P.C.H. Act claiming right in the land on the basis of the sale deed dated 27.06.67 was already filed by the predecessor of the petitioners, there appears to be no scope of filing fresh objection under Section 12 of the U.P.C.H. Act. Section 11-A of the Act clearly bars raising of any question in respect to claim of the land, which has been raised under Section 9 or which might or ought to have been raised under that Section. It is clearly mentioned in sub-section (2) of Section 12 that provisions of Sections 7 to 11 shall mutatis mutandis apply to the hearing and decision of any matter raised under Sub-Section (1) of the Act. In view of this it is clear that the objection and claim in respect to the land in dispute on the basis of the sale-deed. In question was not only decided on merits but also concurred by all three Consolidations Courts which was never challenged before this court. Whatever law as existed to that time the judgment of the Consolidation Courts attained finality. it is in the case where any fresh cause of action has arisen to a party after publication of the revised record under Section 10 (1) of the Act which was not available when the proceedings under Sections 7 to 9 were started or where in progress filing of objection under Section 12 of the act could be permitted. Hence in the case in hand, as the cause of action for filing objection and laying claim on the basis of the sale-deed dated 27.06.67 had already arisen for which steps were also taken in the proceedings under Sections 9-A(2) of the Act the finality which has attained cannot be permitted to be re-opened in the garb of filing of objection

under Section 12 of the Act which was filed in the year 1976 after the final judgment of the Deputy Director Consolidation which was passed in the year 1970. Three Consolidation Courts have rightly not permitted the petitioner to get fresh inning opened for adjudication of their claim on the merits in the garb of the proceedings under Section 12 of the Act. It could only be entertained when the matter relating to change and transfer affecting any of the right or interest recorded in the revised records published under Sub-Section (1) of Section 10 for which a cause of action had not arisen when proceedings under Sections 7 to 9 were started or were in progress. This being not the situation, so far the case in hand is concerned rather cause of action having already arisen, to which petitioner's predecessor having reacted had filed objection under Section 9-A (2) of the Act has failed and thus filing of the fresh objection under Section 12 of the Act by the petitioners is clearly barred under Section 11-A of the Act read with Section 12 (2) of the Act. It is not to be repeated that by change of law or if earlier judgment has been over ruled, that do not give any cause of action for re-adjudicating the claim on the merits and to get earlier order reviewed as has been clearly opined by the Apex Court in the decision given in case of ***Shanti Devi (Supra).*** *Thus arguments of the learned counsel for the petitioner that as vendor has got Bhumidhari rights in view of the subsequent declaration of law petitioner's claim is to be accepted, on the facts of present case of no help to them. Other decisions also as cited by the learned counsel for the petitioners on the fact and reasoning given above have no application to the case in hand."*

10. Considering the provisions of Section 9A, 11A and 12 of U.P.C.H. Act, ratio of law laid down by which Court in Aparbal Yadav (supra) as well as facts and circumstances of the case ends of justice requires that objection under Section 9A(2)of U.P.C.H. Act in respect to disputed plot initiated at the instance of respondents be adjudicated on merit, in which both parties will have opportunity to contest their claim on merit under the impugned order, the same things has been done as such no interference is required against the impugned orders. Writ petition filed by petitioners fails and is dismissed. No order as to costs.

11. Since the matter is very old, it is directed that Consolidation Officer Fatehpur, shall decide the objection under Section 9A(2) of U.P.C.H. Act after notice and opportunity of hearing to both parties on merit expeditiously preferably within six months from the date of production of certified copy of this Judgment.

(2022) 9 ILRA 249
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ C No. 1441 of 2022

Sukhdev Kumar Chaubey ...Petitioner
Versus
Commissioner Varanasi Mandal, Varanasi, & Ors. ...Respondents

Counsel for the Petitioner:
Sri Udai Chandani, Sri Anjani Kumar

Counsel for the Respondents:
C.S.C.

A. Civil Law – UP Revenue Code, 2006 – Sections 33, 34 & 35 – Mutation – Claim on the basis of decree passed in a suit u/s 229-B – No appeal against decree filed –

Mutation proceeding – maintainability – Phrase 'upon facts otherwise coming to his knowledge' is used – Effect – Held, the words and phrase 'upon facts otherwise coming to his knowledge' is indication of intended of litigation to cover all such cases that may require mutation – A declaratory decree of a competent revenue court holding and declaring a person to be title holder of a land falling in a revenue village, would be such a case and, therefore, in such circumstances, if decree holder takes a plea before the Tehsildar that he having been declared owner in possession of the land, is entitled for mutation. (Para 11 and 13)

Writ petition disposed of. (E-1)

List of Cases cited:-

1. Parabhu Vs Board of Revenue, U.P., Allahabad; 1968 SCC OnLine All 398 : 1968 RD 195,

2. Satpal Singh & ors. Vs St. of Har. & ors. decided by the Punjab & Haryana High Court

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

1. In view of office report dated 19.4.2022 service upon respondent nos. 4 and 5 is deemed sufficient.

2. Heard Udai Chandani learned counsel for the petitioner and Sri J.P.N.Raj, learned Additional Chief Standing Counsel for the State.

3. By means of this writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged the order of the Tehsildar (Judicial), Tehsil - Sadar, Varanasi (Respondent no. 3) dated 18.01.2020, whereby he has rejected the application of the petitioner for mutation holding that on the basis of decree of compromise or settlement made by the competent court, mutation proceedings cannot be initiated.

4. Petitioner's appeal against the order dated 18.01.2020 has also come to be rejected by the Sub-Divisional Officer (Revenue)/ Dy. Collector (Revenue), Tehsil - Sadar, Varanasi (Respondent no. 2) by order dated 20.12.2021 confirming the order of respondent no. 3.

5. It is argued by the learned counsel for the petitioner that once suit has been decreed under section 229-B of UPZA & LR Act, 1950 and the said decree has remained un-appealed against and has thus attained finality, then the name of decree holder is required to be mutated in the revenue records. He submits that the application for correction of records would lie in those cases only where wrong entry has been carried out on the part of the revenue authorities or any omission has taken place. He submits that here is a case where petitioner filed a suit for declaratory rights under section 229-B of UPZA & LR Act, 1950 and was decreed on the basis of compromise reached between recorded tenure holder and the petitioner and, therefore, the petitioner's application for mutation was absolutely maintainable.

6. *Per contra*, it is argued by the learned Standing Counsel that once revenue authorities have entered the name in the revenue records of a tenure holder, who is a rightful claimant and if somebody has obtained the order on the basis of compromise, it is a case were right is to be taken as to have always existed and so no entry of such a person in revenue records be taken as omission and so application would lie for correction of records. It is further submitted that under the UP Revenue Code, 2006 under section 34 and 35 mutation may not be permissible on the basis of a decree of court of law in view of other provisions contained in U.P. Revenue Code, 2006.

7. Having heard learned counsel for the parties and their respective arguments raised across the bar, I find that Sections 34 and 35 of UP Revenue Code, 2006 provides for mutation to be carried out in the revenue records by way of succession or transfer which also includes family settlement. Sections 33, 34 and 35 of UP Revenue Code, 2006 are reproduced herein below.

Section 33. *(1) Every person obtaining possession of any land by succession shall submit report of such succession to the Revenue Inspector of the circle in which the land is situate in such form as may be prescribed.*

(2) On receipt of a report under sub-section (1) or on facts otherwise coming to his knowledge, the Revenue Inspector shall -

(a) if the case is not disputed, record such succession in the record of rights (Khatauni);

(b) in any other case, make such inquiry as may appear to him to be necessary and submit his report to the Tahsildar.

[(3)] Any person whose name has not been recorded by Revenue Inspector or is aggrieved by the order passed by the Revenue Inspector [under clause (a) or (b) of sub-section (2)] may move an application before Tahsildar.

[(4)] The provisions of this section shall mutatis mutandis apply to every person admitted as a Bhumidhar with non-transferable rights or as an asami by the Bhumi Prabandhak Samiti in accordance with the provisions of this Code or any enactment repealed by it.

34. Duty to report in cases of transfer *- [(1)] Every person obtaining possession of any land by transfer, other than transfer referred to in sub-section (3) of Section 33 shall report such transfer, in the manner prescribed, to the Tahsildar of the Tahsil in which the land as situate.*

Explanation. - (1) For the purposes of this section, the word transfer includes a family settlement [***].

[(2) State Government may fix a scale of fees for getting entry recorded in the record of rights on the basis of transfer. A fee in respect of any such entry shall be payable by the person in whose favour the entry is to be made.]

35. Mutation in cases of succession or transfer. *(1) On the receipt of a report under Section 33 or Section 34, or* ***upon facts otherwise coming to his knowledge****, the Tahsildar shall issue a proclamation and make such inquiry as appears and -*

(a) if the case is not disputed, he shall direct the record of rights (Khatuani) to be amended accordingly;

[***]

[(c) if the case is disputed, he shall decide the dispute and direct, if necessary, the record of rights (khatauni) to be amended accordingly.]

[(2) Any person aggrieved by an order of the Tahsildar under sub-section (1) may prefer an appeal to the Sub-Divisional Officer within a period of thirty days from the date of such order.]

8. Section 38 of UP Revenue Code, 2006 talks about correction or error and omission. the main substantive provision of Section 38(1) is reproduced herein below.

38. ***Correction of error and omission.*** *(1) An application for correction of any error or omission in the map, field-book (Khasra) or record of rights (Khatauni) shall be made to the Tahsildar in the manner prescribed.*

(Emphasis added).

9. The language of Sub-section 4 of the Section 33 provides for mutation in the event a person is admitted as Bhumidhar with non-transferable rights or Asami by Land Management Committee. So the legislature intended mutation not only in cases of transfer and succession but also where rights are created under the provisions of U.P. Revenue Code, 2006.

10. Upon reading of section 34, it clearly transpires that in case of succession by way of transfer which includes family settlement, mutation application would be maintainable.

11. The words and phrase *"upon facts otherwise coming to his knowledge"* is indication of intended of litigation to cover all such cases that may require mutation as and end right of any lawful proceedings drawn to enable Tehsildar to carryout mutation after holding due enquiry.

12. From a bare reading of provisions of section 38 of UP Revenue Code, 2006, I find that an application for correction of any error or omission in the map, field book (Khasra) or record of rights, shall be made to the Tehsildar in the manner prescribed. Sub section 5 deals with those cases where the entries are manipulated in the records of Khasra and Khatauni, they may have to be expunged. Thus the two provisions operate in two different directions: while one permits the revenue authorities to entertain the mutation application to enter the name in the revenue records on the basis of succession/transfer which includes family settlement; the other provision provides that where entry may have been entered for some mistake on the part of the revenue authorities and if such an entry is found fraudulent, the entries are required to be expunged.

13. Besides what is discussed above, I find that section 34(1) uses words and expression *"upon facts otherwise coming to his knowledge"*. These words and expressions denote a situation where facts placed before the Tehsildar indicate a situation where a person's name is required to be entered into the records of rights as such rights got accrued. This power of Tehsildar besides being *suo motu*, can also be exercised upon application being made in that behalf. A declaratory decree of a competent revenue court holding and declaring a person to be title holder of a land falling in a revenue village, would be such a case and, therefore, in such circumstances, if decree holder takes a plea before the Tehsildar that he having been declared owner in possession of the land, is entitled for mutation, Tehsildar concerned shall have to pass order thereupon and if someone disputes, he will decide the case on merits.

14. In such above view of the matter, therefore, in so far as the view taken by the Teshildar qua maintainability of mutation application appears to be misplaced. In my considered view, if a person who is in possession of any land either by succession or otherwise having rightful claim, can apply for mutation by virtue of provisions contained under Section 34 of the UP Revenue Code, 2006 and therefore, the person who has obtained decree, would be entitled to move an application under Section 34 of the UP Revenue Code, 2006, to get the name mutated in the revenue records. A declaratory suit under Section 229-B of U.P. Zamindari Abolition & Land Reforms Act, 1950 or under Section 144 of the U.P. Revenue Code, 2006 is a lawful

proceeding under the Act and therefore, a suit if decreed, may be upon a compromises reached between the parties, such a decree unless and until set aside, is binding and mutation application for carrying out entry in revenue records would be maintainable under the Act.

15. The authorities cited by learned counsel for the petitioner are worth consideration. In the case of **Parabhu Vs. Board of Revenue, U.P., Allahabad reported in 1968 SCC OnLine All 398 : 1968 RD 195,** the Court declined to interfere in the order of the Board of Revenue whereby it had directed the Naib Tehsildar concerned to proceed and conclude the matter of mutation on the basis of decree passed by civil court, Vide paragraph Nos. 5,6,7 and 8 it has been hed thus :

5. The Sub-Divisional Officer dismissed the application on the ground that there was no evidence to show that plot No. 71 corresponds to the old plot No. 789 in respect of which civil litigation took place between the parties. The petitioners' revision was dismissed by the Additional District Magistrate by affirming this finding and also on the ground that the civil court decree did not entitle the applicants to any right in respect of the whole of the plot No. 789 and that it could not be found out from the civil court judgments and decree as to in respect of what portion the right was granted in favour of the petitioners. He also doubted whether the finding of the civil court given in the suit for injunction had any binding effect on the parties. The Board of Revenue dismissed the petitioners' revision on the ground that it agreed with the lower court.

6. It has been stated in the present petition that there was no dispute between the parties that the old plot No. 789 was renumbered as plot No. 71 during consolidation operations. In fact, respondent No. 5, who had appeared in the witness-box, had admitted this fact. The authorities below were, therefore, in error in presuming that there was no evidence on the point. Further, the appellate judgment in the civil suit shows that the appellate court had demarcated the area over which the petitioners were held entitled as owners in the map of the commissioner dated October 13, 1959. It cannot, therefore, be said that the decree was not executable or that the land given to the plaintiffs was not identifiable. The view of the Additional District Magistrate that the judgments of the civil courts were not binding on the parties does not appear to have any substance. Since the plot had been excluded from consolidation operations the title in respect of it could be adjudicated upon by the regular courts. The decree of the appellate court in the civil suits had become final and did operate as binding upon the parties. It was incumbent upon the revenue authorities to mutate the names according to that judgment.

7. It was urged that since the records were revised during consolidation operations, no application lay before the revenue authorities for mutation under Section 33 of the Land Revenue Act. In view of the further fact that the civil court decree declared the rights of the parties, that decree had to be effectuated in the revenue records. The application could not, therefore, be rejected on that ground.

8. The petition, therefore, succeeds and is allowed. The impugned orders of the courts below are set aside. The matter is sent back to the Sub-Divisional Officer, Sadar, Azamgarh with a direction to decide the petitioners' application afresh in accordance with law

and in the light of the observations made above. The petitioners will be entitled to their costs.

16. In the case of **Satpal Singh and others Vs. State of Haryana and others,** the issue before Punjab and Haryana High Court was that application for mutation had been rejected on the ground that earlier mutation orders passed on the basis of Will and succession were not set aside by any declaratory decree in a suit in terms of Section 45 of the Punjab Land Revenue Act. It was argued before the High Court that decree of the civil court had attained finality up to the Supreme Court and, therefore, the Naib Tehsildar-cum-Assistant Collector, Ambala Cantt. was not justified in rejecting mutation application merely on the ground that earlier mutation orders were not challenged in civil suit proceedings and so those orders were binding.

17. The High Court referred to various authorities and finally held that the mutation application was maintainable and directed Naib Tehsildar concerned to decide the same. The discussions and observations made and the ultimate order passed by the Punjab and Haryana High Court are reproduced hereunder:

"In reply, learned senior counsel for the petitioners, in support of his arguments, has relied upon a judgment of this Court in **Sube Singh Vs. Financial Commissioner, Revenue, Haryana, 2001 (4) RCR (Civil) 766**, to submit that it has been held by the Division Bench that the approach adopted by the revenue authorities ignoring the decree of Civil Court, merely because a subsequent suit is pending, is erroneous, as the revenue authorities have to sanction the mutation on the basis of Civil Court decree.

Learned senior counsel has further relied upon another judgment of Division Bench of this Court in **Bachan Singh and others Vs. Financial Commissioner, Appeal (I), Punjab and others, 2008 (3) RCR (Civil) 887**, wherein a similar view has been taken that the order passed by the Civil Court is binding on the revenue authorities and there is no requirement of a formal direction for incorporating the verdict of the Civil Court in the revenue record by sanctioning the mutation.

Learned senior counsel has also relied upon judgment in **Baljit Singh Vs. Financial Commissioner, Animal Husbandry, Punjab, Chaandigarh and others, 2012 (2) RCR (Civil) 384**, wherein this Court has held that where under Section 34 of Punjab Land Revenue Act, mutation of inheritance is sanctioned ignoring the Civil Court decree, a revenue officer has no jurisdiction to disregard the judgment and decree passed by the Civil Court.

Learned senior counsel has next relied upon judgment in **Rajesh Kumar Vs. Financial Commissioner and others, 2009 (11) RCR (Civil) 316**, wherein this Court held that the mutations according to decree of the Court are to be given effect even if an appeal is pending against the decree and the revenue authorities are not bound to wait for order of the Court.

It is argued that in this case, both the proprietary body as well asw private individuals, who were contesting against the petitioners, lost their cases up to the Hon'ble Supreme Court, therefore, on all counts, Naib Tehsilar-cum-Assistant Collector, 2nd Grade, Ambala Cantt has erroneously ignored the Civil Court decree, as upheld up to the Hon'ble Supreme Court.

It is further submitted that the ground taken by the Naib Tehsildar-cum-Assistant Collector 2nd Grade, Ambala Cantt is that earlier mutations sanctioned in the year 1961-62 were already put up as defence before the Civi Court and once the Will dated 09.06.1917 in favour of Bhondu was upheld, those two mutations No. 543 and 735 looses their sanctity. It is also argued that during the aforesaid mutation proceedings, it is recorded that Thakur Singh made some concession, also stands tested by the Civil Court and this ground was never upheld by the Civil Court.

The next ground taken by Naib Tehildar-cum-Assistant Collector 2nd Grade, Ambala Cantt that no specific suit for declaration under Section 45 of Punjab Land Revenue Act has been filed challenging the mutations and for setting aside the same, is totally illogical and illegal, as once the decree has been passed, in which predecessor of the petitioners Bhondu was held to be owner of the land by way of Will dated 09.06.1917, it amounts to declaration regarding their title over the land in dispute.

After hearing learned counsel for the parties, I find merit in the present writ petition. None of the reasons given in the impugned order dated 18.05.2022 passed by Naib Tehsildar-cum-Assistant Collector 2nd Grade, Ambala Cantt are sustainable in the eyes of law, in view of the observations made above.

Naib Tehsildar-cum-Assistant Collector 2nd Grade, Ambala Cantt has daringly ignored the judgment of the Civil Court, holding the Will dated 09.06.1917 to be a valid Will in favour of predecessor of the petitioners and this finding is upheld upto the Hon'ble Supreme Court. Therefore, it is duty of revenue officials to incorporate the decree in the revenue record in letter and spirit and the impugned order dismissing the application for entering the mutations, cannot be upheld in any manner. Though this Court finds that the impugned order has been passed to violate the mandate of the decree, however, instead of initiating contempt proceedings, one opportunity is granted to Naib Tehsildar-cum-Assistant Collector 2nd Grade, Ambala Cantt to pass a fresh order, strictly in compliance of the decree dated 14.08.1978, as upheld upto the Hon'ble Supreme Court of India."

18. Thus in view of the above legal prepositions as referred and discussed and since I do not find any reason to take a different view, the order of the Tehsildar (Judicial), Tehsil - Sadar, Varnasi (Respondent no. 3) dated 18.1.2020 and the order dated 20.12.2021 passed by Sub-Divisional Officer (Revenue)/ Dy. Collector (Revenue), Tehsildar - Sadar, Varanasi (Respondent no. 2) confirming the order dated 18.01.2020 are held unsustainable in the eye of law and accordingly both the orders are hereby set aside. Mutation application of the petitioner before the Tehsildar stands restored and the Tehsildar (Respondent no. 3) is directed to proceed in the matter strictly in accordance with law by ensuring service of notice upon the parties concerned through an advertisement such as may be prescribed for and shall proceed to decide the matter after recording satisfaction regarding service of the notice upon all the parties concerned and also will give opportunity of hearing to the appearing parties. The entire proceeding shall be concluded by the Tehsildar (Respondent no. 3) positively within a period of five months from the date of receipt of copy of this order.

19. With the aforesaid observations and directions this writ petition is disposed of with no order as to cost.

(2022) 9 ILRA 256
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2022

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Matters U/A 227 (Criminal) No. 6372 of 2021

Kamlesh Kumar Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Tripathi

Counsel for the Respondents:
G.A., Sri Padmaker Pandey, Sri V.P. Srivastava (Senior Counsel), Sri Sunil Kumar Srivastava, Sri Manish Tiwari (Senior Counsel)

Criminal Law - Code of Criminal Procedure, 1973- Section 311- The CMM suo-motu recalled the passed by CMM, Court No. IX, District Kanpur by which summoned the N.O.C. as well as other documents from the concerned department further directed for obtaining the handwriting expert against which order-Specific allegation against the petitioner is that he in order to grab the company without any resolution of Board of Directors as well as without any permission of Registrar of Companies submitted a renewal form before the Assistant Director Factory (Karkhana), Uttar Pradesh, Kanpur Division, Kanpur alleging himself to be a proprietor and when the authority asked for the resolution passed by Board of Directors, the petitioner submitted a forged and fabricated document along with N.O.C. alleged to have been issued by the respondent no.2/complainant, thus to arrive at a just decision of the case it was incumbent upon the learned Magistrate to summon those documents from the concerned authority and therefore, there is no illegality in the impugned order, which has been rightly upheld by the learned Sessions Court.

Settled law that it is mandatory for the court tol recall and re-examine any person if his evidence appears to it to be essential to the just decision of the case, hence no illegality committed in summoning the documents by the Magistrate. (Para 8)

Petition rejected. (E-3)

Case law/ Judgements relied upon:-

1. Hanuman Ram Vs The St. of Raj. & Ors 2009 (1) ACR 789 (SC)

2. Birla Corp. Ltd. Vs Adventz Investments & Holdings Ltd. & ors, AIR 2019 Supreme Court 2390

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. The instant petition under Article 227 of the Constitution of India has been filed for setting aside the order dated 16.11.2019 passed by learned Chief Metropolitan Magistrate, Kanpur Nagar in Complaint Case No. 6077 of 2018 (Dinesh Kumar Gupta Vs. Kamlesh Kumar Gupta and another) under Sections 420, 467, 468, 471, 504, 506, 120-B I.P.C. Police Station Kakadeo, District Kanpur Nagar, whereby the learned Magistrate after exercise its powers under Sections 311 and 202 Cr.P.C. to arrive at just decision of the case has summoned the N.O.C. along with relevant documents from the concerned department as well as to set aside the Judgement and order dated 29.09.2021 passed by learned Sessions Judge, Kanpur Nagar (Kamlesh Kumar Gupta Vs. State of U.P. and another), whereby criminal revision filed by the petitioner against the order dated 16.11.2019 has been rejected.

2. Brief facts of the case are that the respondent no.2 lodged a first information report against the petitioner and his son namely, Aseem Gupta with the averments that the petitioner and the respondent no.2 are real brother. Sri Chunni Lal, the father of the petitioner as well as of the respondent no.2 had established a company in the year 1983 in the name and style of M/s Hazari Lal Laxmi Narayan Private Limited, of which company, the father was the Managing Director, on the other hand, the petitioner and the respondent no.2 were Directors. In the meantime, the company purchased another company running in the name and style of Kannico Cleaners from its erstwhile owners and since then the company was running in the name and style of Kannico. On 30.03.2007, Sri Chunni Lal died. After his death, the petitioner was looking after the finance and account of the company and the petitioner in order to grab the company without any resolution of Board of Directors as well as without any permission of Registrar of Companies submitted a renewal form before the Assistant Director Factory (Karkhana), Uttar Pradesh, Kanpur Division, Kanpur alleging himself to be a proprietor and when the authority asked for the resolution passed by Board of Directors, the petitioner submitted a forged and fabricated document along with N.O.C. alleged to have been issued by the respondent no.2/complainant and Sri Aseem Gupta, the son of the petitioner also conspired in the act of the petitioner. Upon aforesaid averments, a first information report was lodged in Case Crime No. 0213 of 2018 under Sections 420, 467, 468, 471, 504, 506, 120-B I.P.C. at Police Station Kakadeo, District Kanpur Nagar. Thereafter, the matter was entrusted for investigation and on 31.07.2018, the Investigating Officer submitted charge sheet on the ground that another Complaint Case No. 4961 of 2016 was filed by the respondent no.2 against the accused person, wherein the accused persons are facing trial and thus it is not legally tenable to initiate another criminal proceedings but on the protest petition, the learned Magistrate directed for further investigation pursuant to which, again final report dated 16.02.2019 was submitted, again another protest petition was filed upon which, the learned Magistrate, vide order dated 22.05.2019 treated the case as a complaint case. The case was registered as Complaint Case No. 6077 of 2018 (Dinesh Kumat Gupta Vs. Kamlesh Kumar Gupta) under Sections 420, 467, 468, 471, 504, 506, 120-B I.P.C., in which statement of the respondent no.2 was recorded under Section 200 Cr.P.C. During the pendency of the proceedings, the respondent no.2 moved an application under 91 Cr.P.C. for summoning the N.O.C. as well as other documents from the concerned department as a documentary evidence but the same was rejected vide order dated 19.08.2019, which order was never challenged before any Court as such the order dated 19.08.2018 became final. Thereafter, the statement of son of Shubam Gupta was recorded under Sections 200 Cr.P.C. and during the course of trial, the learned Chief Metropolitan Magistrate suo-motu recalled the order dated 19.08.2019 passed by Chief Metropolitan Magistrate Court No. IX, District Kanpur by which summoned the N.O.C. as well as other documents from the concerned department further directed for obtaining the handwriting expert against which order, the petitioner preferred a criminal revision no. 580 of 2021 CNR No. UPKN01-006606 of 2021 (Kamlesh Kumar Gupta Vs. State of U.P. and another) which was also rejected. It is these two orders which are under challenge before this Court.

3. Sri Manish Tiwary, learned Senior Counsel submits that prior to initiation of the instant proceedings civil suit was filed by the respondent no.2 as well as his wife being its Original Suit No. 984 of 2017 for

permanent injunction whereby restraining the petitioner to run the dry cleaning business in the name of Kannico Dry Cleaners as the trade mark was allocated to them since 2002 and another Original Suit No. 148 of 2017 was filed by the petitioner against the respondent no.2 being its Original Suit No. 148 of 2017 which suits are pending consideration. He further submits that apart from the aforesaid civil suits, the respondent no.2 in order to cause harm and harassment had also filed a complaint before the Senior Superintendent of Police, Kanpur Nagar for lodging of the F.I.R. against the petitioner upon which an enquiry was conducted by the Circle Officer, Swaroop Nagar, District Kanpur Nagar, stating therein that on the same set of allegations another Complaint Case No. 4961 of 2016 was filed by the respondent no.2 as well as Civil Suit No. 148 of 2018 are also pending consideration. Again another complaint was filed for registration of the F.I.R. against the petitioner upon which a report was submitted stating therein that on the same set of facts a complaint case no. 4961 of 2016 is pending consideration thus no further police proceedings is required. The sole malafide intention of the respondent no.2 to exert pressure and influence upon the pending suits and lastly the respondent no.2 succeded in getting the F.I.R. lodged against the petitioner upon which twice final report was submitted inpsite of the same, the learned Magistrate has treated the case as a complaint case. He further submits that once the application under Section 91 Cr.P.C. filed by the respondent no.2 itself, for summoning the N.O.C. as well as other documents from the Assistant Registrar Director Factory (Karkhana) has been rejected vide order dated 19.08.2018, which order was never challenged before any Court by the respondent no.2, and recording of the statement of son of the respondent no.2 under Section 202 Cr.P.C. the respondent himself has made an endorsement on the order sheet that he does not want to file any evidence which was also observed in the order dated 02.11.2019 then there was no occasion for the learned Magistrate to suo-motu recalled its order dated 19.08.2018 vide order dated 16.11.2019 and the same is also barred by Section 362 Cr.P.C. He next submits that even the handwriting expert came to the conclusion that disputed signature respondent no.2 was not executed by petitioner on the N.O.C. and therefore, the impugned order is not tenable in the eyes of law.

4. The petitioner being aggrieved by the order dated 19.08.2018 had preferred a criminal revisional before the learned Sessions Court but the learned Sessions Court instead of setting aside the order dated 19.08.2018 has rejected the revision in the illegal and arbitrary manner. Learned counsel has lastly argued that the learned Magistrate while exercise its powers under Sections 311 and 202 Cr.P.C. had passed the impugned order dated 16.11.2019 suo-motu whereas Section 311 Cr.P.C. specifically provides powers that at any stager of any inquiry or trial or other proceedings under the Code, the Court may summon any person as a witeness or examine any person in atteance, though not summoned as a witness or recall and re-examine any person already examined and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case, while in the instant case, the learned has not summoned or recall any witness.

5. Advocate Gaurav Kakkar, appeared before this Court and expressed his desire to assist the Court upon which there is no objection. Sri Kakkar has provided some material to the court to decide this issue. He

placed the reliance of **Hanuman Ram Vs. The State of Rajasthan and Ors 2009 (1) ACR 789 (SC)**. Paragraph Nos.. 5,6 and 9 are mentioned below:

"5. Reference may be made to Section 311 of the Code which reads as follows:

311. Power to summon martial witness, or examine person present,-

Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness or examine any person in attendance, though not summoned as a witness or recall and re-examine any person if his evidence appears to it to be essential to the just decision of the case.

6. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re- examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court by duty of examining a material witness who would not be brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

9. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant. These aspects were highlighted in Jagat Ravi v. State of Maharashtra (AIR 1968 SC 178), Rama Paswan and Ors. v. State of Jharkhand (2007 (11) SCC 191) and Iddar and Ors. v. Aabida and Anr. (2007 (11) SCC 211)."

6. On the other hand, learned counsel for the respondent no.2 as well as learned A.G.A. for the State has vehemently opposed the contentions as advanced by learned counsel for the petitioner. Learned counsel for the respondent no.2 has submitted that the learned Magistrate has committed no illegality in recalling the

order dated 19.08.2018 vide order dated 16.11.2019 to arrive at a just decision of the case. He next submits that Sri Arun Kumar Assistant Director (Factories) submitted all the original documents, which were five in numbers) including the forged NOC filed by the accused person and on 07.12.2019 , the respondent no.2 filed an application requesting the Court to keep all the original documents produced by the Factory Director under the sealed cover and the learned trial Court after considering the evidence under Section 200 and 202 Cr.P.c. came to the conclusion that the accused persons has to be summoned and thus has rightly summoned the petitioner as well as his son Aseem Gupta under Sections 420, 467, 468, 471, 504, 506, 120-B I.P.C. vide order dated 13.12.2019 against the said summoning order, the petitioner filed a Criminal Revision No.81 of 2020 before the learned Sessions Court, which too has been dismissed. He next submits that the petitioner also preferred a Criminal Misc. (482) Application No. 9738 of 2021 against the summoning order as well as order passed by the revisional Court, before this Court which was dismissed as withdrawn vide order dated 22.07.2021. In the meantime, the petitioner also filed a Anticipatory Bail Application before the learned Sessions Judge which was rejected and the same is under challenge before this Court and is now pending consideration. He also submits that the order dated 16.11.2019 by which the learned Magistrate has summoned the relevant documents in exercise of powers under Section 200 Cr.P.C. is a fresh order and independent order, which cannot be said to recalling the earlier order dated 19.08.2018 .Learned counsel for the respondent no.2 has placed reliance upon the Judgement of Hon'ble Apex Court ***reported in AIR 2019 Supreme Court 2390*** in the matter of ***Birla Corporation Limited Vs. Adventz Investments and Holdings Limited and ors, reported in AIR 2019 Supreme Court 2390*** wherein it has been held that the order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that the Magistrate is not to act as a post office in taking cognizance of the complaint, At the stage of issuance of process to the accused, the Magistrate is not required to record detailed orders. But based on the allegations made in the complaint or the evidence led in support of the same, the Magistrate is to be prima facie satisfied that there are sufficient grounds for proceeding against the accused. Extensive reference to the case law would clearly show that the allegations in the complaint and complainant's statement and other materials must show that there are sufficient grounds for proceeding against the accused..While ordering issuance of process against the accused, the Magistrate must take into consideration the averments in the complaint, statement of the complainant examined on oath and the statement of witnesses examined. since it is a process of taking a judicial notice of certain facts which constitute an offence, there has to be application of mind whether the materials brought before the court would constitute the offence and whether there are sufficient grounds for proceeding against the accused. It is not a mechanical process. the object of an enquiry under Section 202 Cr.P.C. is for the Magistrate to scrutinize the material produced by the

complainant to satisfy himself that the complaint is not frivolous and that there is evidence/material which forms sufficient ground for the Magistrate to proceed to issue process under Section 204 Cr.P.C. It is the duty of the Magistrate to elicit every fact that would establish the bona fides of the complaint and the complainant. Since number of accused are residents beyond the local limits of the trial court, as per amended provision of Section 202 Cr.P.C., it is obligatory upon the Magistrate that before summoning the accused, he shall enquire into the case or direct the investigation to be made by a police officer or by such other person as he thinks fit for finding out whether or not there are sufficient grounds for proceeding against the accused. In the present case, the learned Magistrate has opted to hold such enquiry himself.

7. Heard Sri Manish Tiwari, learned senior counsel assisted by Sunil Kumar, learned counsel for the applicant, learned A.G.A. for the State, Sri V.P.Srivastava, learned Senior Counsel assisted by Sri Padmakar Pandey, learned counsel for respondent no.2 and Sri Gaurav Kakkar, Advocate and perused the record.

8. After hearing the learned counsel for the parties and after perusing the material on record, it is evident that the question before this Court as to whether the order dated 16.11.2019 has been passed in correct perspective or not? This Court is of the opinion that the learned Magistrate in exercise powers conferred under Section 202 Cr.P.C. the Magistrate may inquire into the case himself or direct an investigation to be made by the police officer or by such person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. In the instant case, specific allegation against the petitioner is that he in order to grab the company without any resolution of Board of Directors as well as without any permission of Registrar of Companies submitted a renewal form before the Assistant Director Factory (Karkhana), Uttar Pradesh, Kanpur Division, Kanpur alleging himself to be a proprietor and when the authority asked for the resolution passed by Board of Directors, the petitioner submitted a forged and fabricated document along with N.O.C. alleged to have been issued by the respondent no.2/complainant, thus to arrive at a just decision of the case it was incumbent upon the learned Magistrate to summon those documents from the concerned authority and therefore, there is no illegality in the impugned order dated 16.11.2019, which has been rightly upheld by the learned Sessions Court vide its Judgement and order dated 29.09,2021.

9. In view of above, the instant petition lacks merit and is accordingly, dismissed

10. This Court appreciate the assistance rendered by Sri Gaurav Kakkar, Advocate in the instant case.

(2022) 9 ILRA 261
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.08.2022

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Criminal Revision No. 817 of 2022

Manjeet Tanwar @ Manjeet Tanker
...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Irfan Raza Khan, Sr. Adv.

Counsel for the Opposite Parties:
G.A.

Criminal Law- Code of Criminal Procedure, 1973-Section 397/ 401- U.P Prevention of Cow Slaughter Act- 1955 -Sections 3/5A/8 –Transportation of Leather Skins-Release of vehicle- From perusal of Section 5A Cow Slaughter Act, it is very much clear that there is no contravention of transportation of cow skin leather from outside of the State- In case where the provisions of this Act or the related rules in context of such, acquisition, disposal and seizure are silent, the provision of Criminal Procedure Code, 1973 shall be affected thereto- In such a matter, the District Magistrate/Commissioner of the Police has no jurisdiction to confiscate such vehicle in the event of seizure of vehicle by law enforcement officer- In above circumstances, the Judicial Magistrate has jurisdiction to release the Canter DL1GC5909 as being the case property- It is, prima facie, established that the skin leather of cow was not transported in contravention of the provisions of Cow Slaughter Act or rule of Uttar Pradesh Cow Slaughter Rules. In above circumstances, the Special Magistrate, Agra has jurisdiction to decide the release of the vehicle in question by which the skin leather of cow or its progeny was transported. Learned Magistrate has jurisdiction to decide the release application of the revisionist/applicant and learned lower court has illegally held that he has no jurisdiction to hear on the release application of Canter DL1GC5909.

As Section, 5A of the Cow Slaughter Act does not take into its ambit transportation of leather skins hence the proceedings will be under the Code of Criminal Procedure and not the Cow Slaughter Act therefore, the Judicial Magistrate has jurisdiction to release the seized vehicle as being case property.(Para 12, 13, 14, 15)

Criminal Revision allowed. (E-3)

Judgements/ Case law relied upon:-

1. Crl. Misc. Application No.20507 of 2008 (Mohd. Haneef Vs St. of U.P. & ors. dec. on 08.01.2010)

2. Yaash Mohammad Vs St. of U.P & Ors., 2021 SCC Online Allahabad 608

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

1. Heard Sri Irfan Raza Khan, learned counsel for revisionist, Sri L.D. Rahbhar, learned A.G.A. for the State and perused the record.

2. The instant revision has been preferred against the impugned order dated 11.11.2021 passed by learned Special Chief Judicial Magistrate, Agra by which the application of the revisionist/applicant for release of Vehicle No. Eicher Canter DL 1 GC 5909 in Case Crime No. 36 of 2021, under Sections 3/5A/8 Prevention of Cow Slaughter Act, Police Station- Saiyan, District- Agra was rejected.

3. The brief facts necessary for disposal of this case are that on 24.03.2021 Sub-Inspector Virendra Kumar along with his companion Constables Lalit Kumar, Ravi Kant Yadav and Saurabh Kumar and Driver Brij Kumar proceeded from Police Station Sainya vide entry in general diary report no. 27 at about 14:10 hours and were busy in patrolling duty and when they reached at Saiyan crossing they were informed by the informer that a red colour Tata Eicher Canter loaded with banned cow skin was coming from the side of Dhaulpur, Rajasthan to Agra. On the information, Sub-Inspector Virendra Kumar started checking the vehicles by putting barrier near Saiyan Toll for apprehending the aforesaid Canter and tried to take public witnesses, but none agreed to testify, under that compulsion the police party searched each other and no

incriminating articles was found from any members of the police party. As soon as the informer saw the red colour Tata Eicher Canter bearing Registration No. DL 1 GC 5909, he pointed out the police party and left from the place, thereafter, the policemen signalled the driver of the aforesaid Canter to stop the vehicle. On seeing the police party, the driver stopped the aforesaid vehicle some distance ahead and started turning back the Canter in a hurry, then the police party convinced that there were definitely some illegal goods in the Canter and they apprehended the driver who told his name as Akash son of Man Singh, resident of Mohalla- Maha Talee Lane, Police Station- Shikohabad, District- Firozabad and present address Tyagi Chaupal near Chhatarpur Temple, Police Station- Mehrauli, New Delhi and he also told that his permanent address is village Jarar, Police Station- Wah, District- Agra and told that he is aged about 24 years. On his personal search, a mobile phone of OPPO company was recovered from the right pocket of his trousers. The IMEI numbers of the phone was obtained as (1) 863885033196312 (2) 863885033196304 and Rs. 3100/-and an Aadhar Card in the name of Akash Pratiman Singh resident of Mohalla- Mahteli Gali, Shikohabad, District Firozabad were also recovered from him. On being asked about the reason for turning the vehicle back, he told that the vehicle was loaded with cow skin on which the policemen removed the Tripal and found 145 bundles of cow skin from which smell of rotten meat was coming out and Dr. Mahendra Verma, Veterinary Medical Officer, Saiyan, Agra was asked to come at the spot over phone who came there in no time and after closely checking he told that the bundles of the skin loaded in the Canter is the skin of cow and took three pieces of skin from different bundles for sample which were separately kept in three jars and sealed and sample seal was prepared. The accused Akash could not produce the papers of the vehicle, therefore, the aforesaid vehicle was seized under Section 207 of Motor Vehicle Act and the accused was arrested after informing him that his act is punishable under Sections 3/5Ka/8 of Uttar Pradesh Cow Slaughter (Prevention) Act. The recovery memo was prepared on the spot by Sub-Inspector Virendra Singh and companion police constables and Dr. Mahendra Verma. On the basis of recovery memo, Case Crime No.0036 of 2021, under Sections 3/5Ka/8 was registered against the accused/Driver Akash, later on who was released by the coordinate Bench of this Court vide order dated 31.08.2021 passed in Criminal Misc. Bail Application No. 24517 of 2021 (Akash vs. State of UP).

4. The revisionist is owner of the aforesaid Vehicle No. Eicher DL 1 GC 5909 who moved an application for the release of aforesaid Canter which was rejected by learned Special Chief Judicial Magistrate, Agra vide impugned order dated 11.11.2021.

5. Feeling aggrieved by the aforesaid impugned order, the revisionist has preferred this revision and has filed the photocopy of e-Way Bill System as Annexure No.3, Registration Certificate of Canter DL1GC5905, Fitness Certificate, Permit, Insurance Certificate, Motor Insurance Certificate Cum GCCV- Public Carriers Other Than Three Wheelers Package Policy-Zone A (Annexure No.4), Bill of Supply in favour of Maaz Traders, Mohalla- Peer Khan Soldpur Road, Gulaathi (BSR) Uttar Pradesh issued by Maharashtra Leather Merchant dated 22.03.2021 (annexure no.5), Extract of Uttar Pradesh Prevention of Cow Slaughter

Act (annexure no.6), copy of NPPA document (annexure no.7), photocopy of certified copy of impugned order dated 11.11.2021 passed by Special Chief Judicial Magistrate, Agra in Case Crime No. 36 of 2021, under Sections 3/5A/8 Prevention of Cow Slaughter Act, P.S. Saiyan, District- Agra.

6. Learned counsel for the revisionist has submitted that the lower court has illegally held that in view of the law laid down by this Court in ***"Yaash Mohammad vs. State of Uttar Pradesh and Others, reported in 2021 SCC Online Allahabad 608***" that the Canter was seized under special criminal act and it has no jurisdiction to release the Canter under Sections 451, 452, 457 of Code of Criminal Procedure and has rejected his release application. It is further submitted that the facts of the aforesaid case referred by learned lower court while rejecting the application do not apply in this case. Learned counsel has submitted that this Court in Criminal Misc. Application No. 20507 of 2008 (Mohd. Haneef vs. State of UP and Others) decided on 08.01.2010 relying upon the order passed by this Court dated 06.01.2005 in Criminal Revision No. 23 of 2005, the skin to be released in favour of the accused-revisionist wherein it is also held that "A perusal of above order passed in Criminal Revision goes to show that 456 pieces of leather were recovered from possession of one Babu and a case under Section 3/5/8 of Cow Slaughter Act was registered. The applicant/revisionist who is the owner of above leather, approached the lower court for release of the above leather pieces, which was rejected by the court below. The submission was made by the learned counsel for the revisionist in that case that no offence under section 3/5/8 of Cow Slaughter Act was made out as the leather pieces were recovered and the recovery of said leather pieces was not an offence under the Act and only slaughtering and keeping the beef is an offence under the Cow Slaughter Act. Considering the facts and circumstances of the case and without going into the merits of the same, this Court allowed the said revision and directed the Magistrate to release 456 pieces of leather in favour of the revisionist."

7. In view of above analogy, this Court had allowed the application under Section 482 Cr.P.C. in ***Mohd. Haneef vs. State of UP and others (supra)***. Learned counsel for revisionist has submitted that on the above anology and the above law laid down by this Court, the impugned order dated 11.11.2021 passed by learned Special Chief Judicial Magistrate, Agra in in Case Crime No. 36 of 2021 (State vs. Manjeet Tanwar) is liable to be quashed and the lower court may be directed to release the aforesaid Eicher Canter bearing Registration No. DL 1 GC 5909 in favour of revisionist/applicant.

8. It has been further submitted by learned counsel for revisionist that Section 2 (a) which deals definition read as follows:-

Section 2 - Definitions

"In this act, unless there is anything repugnant in the subject to context- (a) "Beef' means flash of cow but does not include such flesh contained in sealed containers and imported as such in Uttar Pradesh."

9. It is further submitted that leather does not fall within the definition of "Beef',

therefore, Canter cannot be seized under Prevention of Cow Slaughter Act. It is further submitted that the aforesaid Canter was transporting the leather skins of cow which is not prohibited by the provisions of Cow Slaughter Act. In above circumstances, learned lower court has illegally held that it was contravention of cow slaughter and it has no jurisdiction to release the Canter.

10. Learned A.G.A. has opposed the release of the vehicle Eicher Canter bearing Registration No. DL 1 GC 5909 and submitted that learned lower court has rightly held that it has no jurisdiction to decide the release application of the revisionist/applicant and rejected the release application according to law vide impugned order dated 11.11.2021 which requires no interference by this Court.

11. I have given thoughtful consideration to the contentions raised by learned counsel for the applicant as well as learned A.G.A. In this case, it is admitted to the parties that the Eicher Canter DL 1 GC 5909 is seized in Crime No. 36 of 2021, under Section 3/5A/8 of Uttar Pradesh Cow Slaughter Act. It is also admitted to the parties that the revisionist is the registered owner of the aforesaid vehicle. Now, the question arose whether transportation of leather skin outside the State is contravening the provisions of Cow Slaughter Act as amended from time to time:-

*"**Section 3. Prohibition of Cow Slaughter**.- No person shall slaughter or cause to be slaughtered, or offer or cause to be offered for slaughter, a cow, bull or bullock in any place in Uttar Pradesh, anything contained in any other law for the time being in force or any usage or custom, to the contrary notwithstanding.*

***5. Prohibition on sale of beef.**- Except as herein excepted and notwithstanding anything contained in any other law for the time being in force, no person shall sell or transport or offer for sale or transport or cause to be sold or transported beef or beef-products in any form except for such medicinal purposes as may be prescribed.*

***Exception.**- A person may sell and serve or cause to be sold and served beef or beef products for consumption by a bona fide passenger in an air-craft or railway train.*

***5-A. Regulation on transport of cow etc**. - (1) No person shall transport or offer for transport or cause to be transported any cow, or bull or bullock, the slaughter whereof in any place in Uttar Pradesh is punishable under this Act, from any place within the State to any place outside the State, except under a permit issued by an officer authorised by the State Government in this behalf by notified order and except in accordance with the terms and conditions of such permit.*

(2) Such officer shall issue the permit on payment of such fee not exceeding five hundred rupees for every cow, bull or bullock as may be prescribed:

Provided that no fee shall be chargeable where the permit is for transport of the cow, bull or bullock for a limited period not exceeding six months as may be specified in the permit.

(3) Where the person transporting a cow, bull or bullock on a permit for a limited period does not bring back such cow, bull or bullock into the State within the period specified in the

permit, he shall be deemed to have contravened the provision of sub-section (1).

(4) The form of permit, the form of application therefor and the procedure for disposal of such application shall be such as may be prescribed.

(5) The State Government or any officer authorised by it in this behalf by general or special notified order, may, at any time, for the purpose of satisfying itself, or himself, as to the legality or propriety of the action taken under this section, call for and examine the record of any case and pass such orders thereon as it or he may deem fit.

(6) Where the said conveyance has been confirmed to be related to beef by the competent authority or authorised laboratory under this Act, the driver, operator and owner related to transport, shall be charged with the offence under this Act, unless it is not proved that the transport medium used in crime, despite all its precautions and without its knowledge, has been used by some other person for causing the offence.

(7) The vehicle by which the beef or cow and its progeny is transported in violation of the provisions of this Act and the relevant rules, shall be confiscated and seized by the law enforcement officers. The concerned District Magistrate/Commissioner of Police will do all proceedings of confiscation and release, as the case may be.

(8) The cow and its progeny or the beef transported by the seized vehicle shall also be confiscated and seized by the law enforcement officers. The concerned District Magistrate/ Commissioner will do all proceedings of the confiscation and release, as the case may be.

(9) The expenditure on the maintenance of the seized cows and its progeny shall be recovered from the accused for a period of one year or till the release of the cow and its progeny in favour of the owner thereof whichever is earlier.

(10) Where a person is prosecuted for committing, abetting, or attempting to an offense under Sections 3, 5 and 8 of this Act and the beef or cow-remains in the possession of accused has been proved by the prosecution and transported things are confirmed to be beef by the competent authority or authorised laboratory, then the court shall presume that such person has committed such offence or attempt or abetment of such offence, as the case may be, unless the contrary is proved.

(11) Where the provisions of this Act or the related rules in context of search, acquisition, disposal and seizure are silent, the relevant provisions of the Code of Criminal Procedure, 1973 shall be effective thereto.

***5B- Insertion of Section 5B-**. Whoever causes any physical injury to any cow or its progeny so as to endanger the life thereof such as to mutilate its body or to transport it in any situation whereby endangering the life thereof or with the intention of endangering the life thereof does not provide with food or water shall be punished with imprisonment for a term which shall not be less than one year and which may extend to seven years and with fine which shall not be less than one Lakh*

rupees and which may extend to three Lakh rupees.

8. Amendment of section 8- (1) *Whoever contravenes or attempts to contravene or abets the contravention of the provisions of Section 3, Section 5 or Section 5-A shall be guilty of an offence punishable with rigorous imprisonment for a term which shall not be less than three years and which may be extend to ten years and with fine which shall not be less than three Lakh rupees and which may extend to five Lakh rupees.*

(2) Whoever after conviction of an offence under this Act is again guilty of an offence under this Act, shall be punished with double the punishment provided for the said offence for the second conviction.

(3) The names and the photograph of the person accused of the contravention of the provision of Section 5-A shall be published at some prominent place in locality where the accused ordinarily resides or to a public place, if he conceals himself from the law enforcement officers."

12. From perusal of Section 5A Cow Slaughter Act, it is very much clear that there is no contravention of transportation of cow skin leather from outside of the State. In such a matter, the District Magistrate/Commissioner of the Police has no jurisdiction to confiscate such vehicle in the event of seizure of vehicle by law enforcement officer. This Court in Criminal Revision No. 23 of 2005 had held that transport of cow skin leather does not amount any contravention of provisions of Cow Slaughter Act which is followed by this Court in ***Criminal Misc. Application No.20507 of 2008 (Mohd. Haneef vs. State of UP and others decided on 08.01.2010).***

13. In above circumstances, the Judicial Magistrate has jurisdiction to release the Canter DL1GC5909 as being the case property. The ruling of Single Bench of this Court in Yaash Mohammad vs. State of UP (supra) on which learned lower court has relied and held that the lower court has no jurisdiction to release the Canter in question is not applicable in this case because in the aforesaid case the application for the release of vehicle was rejected on the ground that the cow or its progeny was transported in contravention of Section 5A of Uttar Pradesh Cow Slaughter Act regarding which special provisions were prescribed and only District Magistrate/Commissioner of the Police was authorised to pass order for confiscation in the event of seizure of cow or its progeny and transport medium.

14. It is further provided that in case where the provisions of this Act or the related rules in context of such, acquisition, disposal and seizure are silent, the provision of Criminal Procedure Code, 1973 shall be affected thereto.

Section 5A (11) of Cow Slaughter Act reads as follows:-

"5A(11). Where the provision of this Act or the related rules in context of such, acquisition, disposal and seizure are silent, the provision of the Code of Criminal Procedure, 1973 shall be effective thereto."

15. From above discussion, it is, prima facie, established that the skin leather of cow was not transported in

contravention of the provisions of Cow Slaughter Act or rule of Uttar Pradesh Cow Slaughter Rules. In above circumstances, the Special Magistrate, Agra has jurisdiction to decide the release of the vehicle in question by which the skin leather of cow or its progeny was transported. Learned Magistrate has jurisdiction to decide the release application of the revisionist/applicant and learned lower court has illegally held that he has no jurisdiction to hear on the release application of Canter DL1GC5909, hence, the revision is liable to be allowed and order of the lower court is liable to be set-aside.

16. Accordingly, the criminal revision is allowed. The impugned order dated 11.11.2021 passed by Special Chief Judicial Magistrate, Agra is set-aside and learned Special Chief Judicial Magistrate, Agra is directed to decide the release application of applicant within a period of one month from the date of production of the certified copy of this order.

(2022) 9 ILRA 268
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2022

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Revision No. 2610 of 2022

Naval Kishore & Ors. ...Revisionists
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionists:
Sri Bala Nath Mishra, Sri Ram Vishal Mishra, Sri Sachin Mishra

Counsel for the Opposite Parties:
G.A., Sri Indra Jit Singh, Sri Rakesh Chandra Upadhyay, Sri Sharad Tripathi, Sri O.P. Sing, (Sr. Adv.)

Criminal Law- Code of Criminal Procedure, 1973- Sections 145 & 146 - The proceeding under Section 145 Cr.P.C. and 146 Cr.P.C. are summary in nature and the power is conferred upon the executive Magistrate. The object of this part is merely to maintain law and order and to prevent to breach of peace by maintaining one or other parties of the possession, which the court finds that they had immediately before the dispute and until the actual right of one of the parties has been determined by the civil court. The Magistrate should careful enough to see that the criminal court are not being used by the parties for the settlement of civil dispute or for manoeuvring of possession for the previous and subsequent civil litigation or easy way of keeping the possession of the property in dispute without going to the civil court or for driving the other side of the civil court to prove his title. The action which may ultimately be taken is not of punitive but preventive one and for that purposes of is provisional only, until such time, a formal adjudication over the rights affected may be obtained and carried into effect by the competent court to deal with the matter in due course of law. The action to be taken is quasi executive action, and having for its object and justification. The prevention of breach of public peace, the existence of dispute is likely ot cause breach of peace is a condition laying at the root of the power conferred.

The proceedings under Section 145 and 146 of the Cr.P.C are preventive and not punitive, the same to be taken recourse to for only preventing the likelihood of breach of public peace, and do not confer any right or title to any of the parties, as the same is the domain of the civil court and hence it is incumbent for the Magistrate to prevent the misuse of the said proceedings by either of the parties who may attempt to possess the property in dispute by circumventing the course of law. (Para 25)

Criminal Revision allowed. (E-3)

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

1. Pursuant to my earlier orders of this Court dated 08.08.2022, the Court was compelled to call Sri Prabhakar Chaudhary, S.S.P.,Agra and Sri Bhupendra Singh, S.H.O., Tajganj, Agra before the Court. On the earlier occasion dated 19.07.2022, the S.H.O., Tajganj, Agra was summoned but his conspicuous absence in the defiance of this Court's earlier order has compelled the Court to summon the S.S.P, Agra. Both the police officials are present before this Court today.

2. Heard S/Shri Bala Nath Mishra, Sri Sachin Mishra, learned counsel for the revisionists, Sri O.P.Singh, Senior Advocate assisted by Rakesh Chandra Upadhyay, learned counsel for the opposite party and learned AGA for the State and perused the record.

3. This is an interesting case, whereby, the S.H.O. of P.S. Tajganj assuming the powers of civil court have decided the title and the ownership over property in dispute in the proceeding under Section 145 and 146 Cr.P.C. and have handed over the property to the person of his choice i.e. opposite party nos. 3 and 4. The concerned City Magistrate, Agra blindly toeing the lines of S.H.O., Tajganj, vide impugned order dated 31.05.2022 have dropped the proceeding under Section 145(5) Cr.P.C. and have consciously passed the ambiguous order dated 31.05.2022 giving full opportunity to the concerned S.H.O. to interpret the order in his own way and hand over the keys & possession to opposite party nos. 3 and 4.

It is pertinent to mention here that property in question is still subject matter of civil suit in which interim injunction order is in favour of the revisionists but ignoring the parallel proceedings before the civil court, concerned City Magistrate, Agra and S.H.O., Tajganj, Agra have committed a judicial blunder by keeping the injunction order at bay, just to benefit his own person (opposite party nos. 3 and 4) have committed all these illegalities & irregularities, ignoring the settled principles and norms in this regard.

4. This is the crux of the revision, which has to be adjudicated by this Court.

5. By means of the instant revision, the revisionists are jointly assailing the legality and validity of the order passed by the then S.I.-Sri Amar Malik, P.S. Tajganj, District Agra dated 26.04.2022 and present impugned order passed by IVth Additional City Magistrate Agra (respondent no.2) dated 31.05.2022, whereby the concerned City Magistrate have passed an ambiguous order, giving long rope to the S.H.O., Tajganj interpret the same in his own way, and thus has handed over the possession & keys to the opposite party nos. 3 and 4, under the teeth of injunction order about the same shop, by the learned Civil Judge(S.D.), Agra.

6. The perusal of the order impugned gives a bird's eye view of the entire controversy involved, which is spelled here-in-below:-

7. At the outset, it is submitted that the entire controversy revolves around Shop No. 15/77A, M.P. Pura, Fatehabad Road, Tajganj, Agra, where the revisionists were running Sweet Mart Shop under the name and style of "Shree Ji Mishtan Bhandar". The shop in question was initially owned by one Brijendra Kushwaha @ Brijendra Singh who was recorded as

tenure holder of concerned Khasra as per the records of Nagar Nigam, Agra. The said khasra owing as many as ten shops over the place, out of which shop no. 15/77A, M.P.Pura, Fatehabad Road, Tajganj, Agra was given to the revisionists as his tenants. The revisionists remained in the said shop from 22.06.2006 to 2016 after executing an annual rental agreements on various successive years signed by Brijendra Kushwaha and the revisionists. There was no dispute between the revisionists and Brijendra Kushwaha up to the year 2013. It seems that dispute was cropped up between collaterals of Brijendra Kushwaha and qua him, who filed a civil suit as Original Suit No. 1271 of 2013, Inre: Sri Amar Singh and others Vs. Sri Vivek Gupta and others making Shree Ji Mishtan Bhandar as well as Brijendra Kushwaha as its defendants.

8. It is also surfaced from the records of the case, that some dispute were also cropped up between the revisionists and Brijendra Kushwaha, (the owner of the property) and thus the revisionists has filed *civil suit bearing Original Suit No. 1240 of 2014 Inre: Sri Nawal Kishore and others Vs. Sri Brijendra Singh and others* with the prayer to issue a decree of permanent prohibitory injunction in favour of the plaintiffs(revisionists) against the defendants, restraining the defendants or his agents/successors/associates not to interfere in plaintiff's peaceful possession over the property (shop in dispute).

9. Initially, learned Civil Judge (S.D.), Agra vide order dated 09.09.2014 keeping in view the plaintiffs(revisionists) are in the actual physical possession and doing their business from the aforesaid property/shop in question, have directed to parties to maintain status quo over the site and after exchange of pleadings have eventually allowed the plaintiffs(revisionists) "8C' application vide order dated 13.10.2021 granting temporary injunction in favour of the plaintiffs(revisionists) during pendency of suit and as such on the strength of status quo, thereafter injunction order the revisionists/plaintiffs,who are in the actual physical possession of shop in question, were doing their business work uninterruptedly & peacefully.

10. During the pendency of the aforesaid suit the defendant no.1 Brijendra Kushwaha died on 19.03.2015 thereafter descendant of late Brijendra Kushwaha, who were impleaded as defendants in place of Brijendra Kushwaha who have executed a sale deed in 2016 of the entire property in favour of Devendra Singh Chauhan and Sanjeev Singh Chauhan (opposite party nos. 3 and 4) by executing a sale deed dated 02.09.2016.

11. Interesting part of the issue is that there opposite party nos. 3 and 4 have consciously purchased the property, which is subject matter of litigation. Still they have decided to purchase it. It means they have purchased a litigation as well as the shop. Consequently, after purchasing the property under the litigation, they ave stepped into the shoes of the descendants of late Brijendra Kushwaha through the registered sale deed dated 02.09.2016.

12. Learned counsel for the revisionists submits, that as soon as they came to know that opposite party nos. 3 and 4 have purchased the property in question of the suit, they have moved an application under Order VI Rule 17 read with Section 151 of CPC, impleading Devendra Singh Chauhan and Sanjeev Singh Chauhan as defendant nos. 13 and 14 respectively with a suitable prayer to get

them impleaded in the prayer part. This application was moved for impleading the aforesaid person as defendant nos.13 and 14 by making an application on 30.11.2021 which is remained undecided till date though pending since November 2021.

13. It is further contended that as soon as the opposite party nos. 3 and 4 have stepped into the shoes of erstwhile owner, they have tailored a fabricated story and lodged an FIR on 10.08.2021 as case crime no. 0546 of 2021 under Sections 406, 420, 384, 447, 120B, 323 and 504 IPC, P.S. Tajganj, District Agra and further in order to exert undue pressure upon the revisionists, the opposite party nos. 3 and 4 approached the S.I., Tajganj by cooking up an imaginary story regarding law & order situation and have managed to have police report under Section 145 Cr.P.C. addressed to IVth A.C.J.M., Agra on which the then, S.I. Tajganj without any proceeding on its own have given a "स्वप्रेरणा आख्या" requesting the authorities proceed under Section 145 Cr.P.C.. It is contended by the learned counsel for the revisionists, that this is a million dollar question that under how and what circumstances S.I., P.S.Tajganj, Agra has given this report to the City Magistrate with regard to the shop in question? The answer is quite obvious, which needs no elaboration, this report dated 11.09.2021 itself is a tainted and motivated one, just to oblige one of the contesting parties by the then S.I. Mr. Neeraj Kumar, P.S. Tajganj, Agra, a overzealous Sub-Inspector. It is further argued that till 11.09.2021, there was no proceedings pending for consideration by concerned City Magistrate, Agra under Section 145(1) Cr.P.C. namely, Neeraj Kumar.

14. After the aforesaid report, was submitted by Mr. Neeraj Kumar, S.I., Tajganj, Agra, thereafter, the opposite party nos. 3 and 4 moved an application under Section 145 Cr.P.C. as Computer Case No. D-202110101000832 6/2021, Inre: Devendra Singh Chauhan and another Vs. Nawal Kishore and anothers, on which learned Additional City Magistrate-IVth , Agra issued notices under Section 145(1) Cr.P.C. to the revisionists relying upon the aforesaid reports of S.I.

15. It is contended by the counsel for the revisionists, that on one hand learned Civil Judge (S.D.), Agra, after hearing both the parties i.e. plaintiffs(revisionists)and the defendants nos. 1/1 to 1/6 and defendant no. 2 while deciding the Application 8C in O.S. No. 1240 of 2014 have confirmed the earlier order of maintaining the status quo over the site and this time has granted temporary injunction in favour of the plaintiffs(revisionists) on 13.10.2021. On the other hand, the concerned City Magistrate, Agra, despite of the fact, was full in knowledge of above temporary injunction on 30.11.2021, ignoring the same on 30.11.2021 passed an earlier order under Section 146(1) Cr.P.C. directing the Incharge Inspector, P.S. Tajganj, Agra to seal the property (shop) in dispute after taking its physical possession from the revisionist. The only ground spelled out in the order impugned, is that since opposite party nos. 3 and 4 are not parties as deficiencies in O.S. No. 1240 of 2014, thus the said temporary injunction would not be operational against them.

It is urged by the counsel for the revisionist that this is the bogus reasoning by the City Magistrate while passing the impugned order of seizure dated 30.11.2021. The property in question/subject matter of both the proceedings are the same i.e. 15/77A,

M.P.Pura Fatehabad Road, Tajganj, Agra & opposite party nos. 3 and 4 came into picture in the year 2016. The temporary injunction was granted in favour of the plaintiffs(revisionists) on 13.10.2021 after hearing the rival parties at that time and if opposite party nos. 3 and 4 consciously stepped into the shoes of erstwhile defendants, then by implication of law, the said temporary injunction would also deemed to be applicable to them, the impleadment application for impleading the opposite party nos. 3 and 4 pending before concerned civil court for consideration and appropriate orders.

16. It is contended by the learned counsel for the revisionists that all these castle has been raised on an imaginary story and created a sham and frivolous threat to the peace and tranquillity to the society. It is further contended that where the police has played a partisan role in favour of the opposite party nos. 3 and 4 for the obvious reasons, who had given a report prior to the application of opposite party nos. 3 and 4 under Section 145(1) Cr.P.C.. On this application rapid action was ensured by the local police and the IVth Additional City Magistrate, Agra, while passing the order under Section 146(1) Cr.P.C..

Excercise of the powers of Section 145 & 146 Cr.P.C., is to maintain the peace, tranquillity & the order in the society. Though it is grey issue but in order to justifying its order under Sections 145/146 Cr.P.C, the concerned police as well as City Magistrate must spell out some confidence generating material on record justifying their objective satisfaction with regard to invoking its powers under Section 145/146 Cr.P.C. mere using of hyperbolic expressions would not going to justify the orders of City Magistrate or Sub-Inspector.

17. Meanwhile, the revisionists approached this Court by filing the Crl. Revision No. 1104 of 2021, in which this Court on 08.04.2022 passed the following order, the relevant extract is quoted herein below:-

"Order on Criminal Revision

By means of the present criminal revision, the revisionist is assailing the legality and validity of the two orders under section 145(1) dated 30.11.2021 and its seizure under section 146(1) dated 02.12.2021.

Submission made by learned counsel for the revisionist is that despite of the clear cut interim injunction order, while allowing 8-C application on 13.10.2021, a parallel proceeding under section 145(1) and 146(1) has been initiated by respondent nos.3 and 4. Learned City Magistrate, without taking into account the interim order, has passed the aforesaid impugned orders. Learned counsel for the revisionist also submitted that it is settled principal of law that when the court of civil proceeding is already seized with the matter, the proceeding of 145 and 146 which are summary in nature, cannot be invoked.

Under the circumstances, let notice be issued to opposite party no.3 and 4 through the Chief Judicial Magistrate, Agra to file their detailed counter affidavit within next two weeks.

Learned A.G.A. who is representing opposite party nos.1 and 2 are

also required to take suitable instructions in the matter and file relevant counter affidavit within the same period.

Learned counsel for the revisionist may also file rejoinder affidavit within three days thereafter.

Put up this matter as fresh on 28.04.2022."

18. From the order sheet of the criminal revision, it is clear that time was granted to learned AGA to file counter affidavit and the notices were issued to opposite party nos. 3 and 4 through CJM, Agra to file detailed counter affidavit but ignoring the directions of the Court to file detailed counter affidavit the opposite party nos. 3 and 4 on their own, surreptitiously on 20.04.2022, moved an application by concerned City Magistrate, Agra, in which they themselves certified that, there is no threat to the peace & tranquillity to the society & thus opposite party nos. 3 and 4 moved an application for dropping the proceedings under Sections 145(5) Cr.P.C. with additional prayer that property in question may be released in their (opposite party nos. 3 and 4) favour. This by itself is a strange prayer and perfect clever example to dupe and play jugglery with legal procedure. As observed above, the local police was dancing on the tune of opposite party nos. 3 and 4. This time Mr. Amar Malik, S.I. Tajganj, Agra came to rescue of opposite party nos. 3 and 4, who, after responding to the above application for dropping the proceedings under Section 145(5) Cr.P.C. have reported to letter to concerned City Magistrate, Agra on 26.04.2022, which reads thus:-

" महोदय,

सादर अवगत करना है कि उपरोक्त प्रा०पत्र की जाँच मुझ उ०नि० द्वारा की गयी तो वाक्यात इस प्रकार पाये कि आवेदक-श्री देवेन्द्र सिंह चौहान पुत्र श्री इन्दल सिंह चौहान निवासी-15/77एम०पी०पुरा, गुम्मट थाना-ताजगंज जनपद-आगरा द्वारा बास्ते अन्तर्गत धारा-145(5) सी०आर०पी०सी० मे विवादित सम्पत्ति सख्या-15/77ए को अवमुक्त किये जाने के सम्बन्ध मे आवेदन किया गया है। उपरोक्त विवादित सम्पत्ति के सम्बन्ध मे बाद सख्या- 8326/2021 अन्तर्गत धारा-145 सी०आर०पी०सी० के अनुपालन मे दोनो पक्षो की मौजूदगी मे कुर्की की कार्यवाही-दिनाँक-02/12/2021 को की जा चुकी है उसी दिन से विपक्षी-नवलकिशोर, सुषमा देवी, कैलादेवी द्वारा श्री०जी० मिष्ठान भण्डार की दुकान को विवादित सम्पत्ति के सामने सड़क पार सम्पत्ति सख्या-18/162/एच-1 मे दुकान खोलकर सुचारु रुप से चलायी जा रही है। उपरोक्त कार्यवाही के वाद दोनो पक्षो मे किसी प्रकार की कोई शान्ती-व्यवस्था भंग नही की गयी है और कोई विवाद नही है अतः उक्त सम्पत्ति को नियमानुसार जायज मालिक के हक मे अवमुक्त किये जाने के सम्बन्ध मे थाना-हाजा को कोई आपत्ति नही है।"

The expression "जायज मालिक" is very much significant expression used by concern Sub-Inspector here, of which the concerned police officer of Tajganj deliberately used this expression, to keep these blanks open, to be used by him in future.

19. The aforesaid application was remained pending. From the order sheet it is culled out that the aforesaid application was filed on 20.04.2022 but on 23.05.2022 behind the back of the revisionists, the matter was heard ex-parte and eventually the impugned order, whereby the proceeding of Section 145 Cr.P.C. was

dropped and all the previous orders were stand quashed in the light of the unilateral declaration by the opposite party nos. 3 and 4, that there is no dispute over the property in question, directing the S.H.O., P.S. Tajganj, Agra to release the property in question bearing no. 15/77A, M.P.Pura, Fatehabad Road,Tajganj, Agra from the alleged seizure within a week. The concerned S.H.O. readily obeyed and released the property in question in favour of opposite party nos. 3 and 4.

The order impugned dated 31.05.2022 records thus :-

"<u>आदेश</u>

सम्पत्ति संख्या 15/77ए एम०पी०पुरा के सम्बन्ध में वाद संख्या डी 202101010008326 अन्तर्गत धारा-145 द०प्र०स० की समस्त कार्यवाही को उक्त धारा की उपधारा 145(5) के अन्तर्गत रोका जाता है एवं समस्त आदेश रद्द किये जाते है। धारा 146(1) के अन्तर्गत विवादित सम्पत्ति के सम्बन्ध में पक्षकारों के मध्य कब्जे का विवाद न रह जाने के कारण परिशान्ति भंग की सम्भावना नहीं होने के आधार पर उक्त सम्पत्ति की कुर्की वापस ली जाती है। प्रभारी निरीक्षक ताजगंज आगरा को निर्देशित किया जाता है कि सम्पत्ति संख्या 15/77ए एम०पी०पुरा को कुर्की से अवमुक्त कर अनुपालन आख्या एक सप्ताह में न्यायालय को प्रस्तुत करें। पत्रावली वाद आवश्यक कार्यवाही दाखिल दफ्तर की जाए।"

Suffice to say the order of City Magistrate, Agra on his own has passed an ambiguous order without specifying to whom the property in question be handed over. It is no where specifies that, after the seizure would lifted, to whom the property would be handed over. Taking the advantage of these blanks, the concerned S.I. Tajganj, Agra dishonestly released the shops in question in favour of opposite party nos. 3 and 4, though the same were taken from the revisionists. It is aruged, that in all fairness, the concerned S.I. should have return back the property in question from whom he has taken.

20. Per contra Sri O.P.Singh, learned Senior Counsel filed a detailed counter affidavit mentioning that revisionists have never paid any rent and were illegally occupied the property in question, neither he had deposited any agreed rent to the erstwhile owner Brijendra Kushwaha nor to his legal heirs or to his representatives and occupying the property in question. All these arguments are tangent to the primary issue, But he could not dispute the fact that there is temporary injunction in favour of plaintiffs(revsionists) of Original Suit No. 1240 of 2014. It is further contended by the counsel that the said interim order would not be operative against the opposite party nos. 3 and 4 as they are not the party in the aforesaid proceeding.

21. Sri O.P.Singh, learned Senior Counsel was completely at the loss to justify the conduct of concerned police officer of Tajganj, Agra, who after playing gimmick with the procedure of the law and have assured the powers of civil court, have decided the ownership and possession of the property on his own under the teeth of temporary injunction which is still operational in favour of revisionists have delivered the keys & possession to opposite party nos. 3 and 4.

This is basic crux, long and short of the entire controversy.

22. After hearing the learned counsel of both the parties and putting the aforesaid facts in the linear way, it is abundantly

clear that property in question is 15/77A, M.P.Pura, Fatehabad Road, Tajganj, Agra which is under actual physical possession of the revsionists and prior to initiate the proceeding and pursuant to the orders of Section 146(1) Cr.P.C., the concerned S.H.O. vide order dated 02.12.2021 has taken the possession of the property in question from the revisionists itself, then in all fairness, the concerned SHO ought to have handed over the keys to the person from whom he has taken the possession and should not have decided the title or the question of possession on his own. The concerned S.H.O. has clearly transgress his limits by handing over the property in dispute i.e. shop no. 15/77A, M.P.Pura, Fatehabad Road, Tajganj, Agra to the opposite party no.3 and 4.

23. After coming to know this development behind the back, the plaintiffs(revsionists) immediately on 03.06.2022 moved an application to recall the exparte order dated 31.05.2022 before the Additional City Magistrate-IVth, Agra but it is alleged by learned counsel for the revisionist, that City Magistrate and the local police of P.S. Tajganj, Agra are hand in gloves with each other and as such the said application was rejected by the concerned Additional City Magistrate-IVth, Agra by making a mention that after passing the order under Section 145(5)Cr.P.C., the court cannot recall its own order and become "functus officio' and thus rejected the said recall application.

24. The City Magistrate has passed palpably vague and ambiguous order without making any mention or clarifying to whom the property in question should be handed over. The Magistrate ought to have clearly specified with the property in question should be handed over to the revisionists but these ambiguity was kept purposely by the Additional City Magistrate in its order to extend benefits to the opposite party nos. 3 and 4. Taking the advantage of this void the partisan S.H.O. of P.S. Tajganj had played fraud upon the procedure of the Court and has clearly played partisan role while handing over the property to his own person i.e. opposite party nos. 3 and 4, by making the entire civil proceeding to a BIG ZERO. The SHO concerned is not permitted to hold a court of decide the title or possession of the property in question under Chapter X Part "D' of the Code of Criminal Procedure.

25. It is settled principle of law that the proceeding under Section 145 Cr.P.C. and 146 Cr.P.C. are summary in nature and the power is conferred upon the executive Magistrate. The object of this part is merely to maintain law and order and to prevent to breach of peace by maintaining one or other parties of the possession, which the court finds that they had immediately before the dispute and until the actual right of one of the parties has been determined by the civil court. The Magistrate should careful enough to see that the criminal court are not being used by the parties for the settlement of civil dispute or for manoeuvring of possession for the previous and subsequent civil litigation or easy way of keeping the possession of the property in dispute without going to the civil court or for driving the other side of the civil court to prove his title. The action which may ultimately be taken is not of punitive but preventive one and for that purposes of is provisional only, until such time, a formal adjudication over the rights affected may be obtained and carried into effect by the competent court to deal with the matter in due course of law. The action to be taken is quasi executive action, and having for its

object and justification. The prevention of breach of public peace, the existence of dispute is likely ot cause breach of peace is a condition laying at the root of the power conferred.

26. Putting all these orders in the line, this Court has regrettably deprecate the conduct of the concerned Additional City Magistrate,Agra and warns to act fairly in future, and quashed his order dated 31.05.2022 and expunge the orders of S.H.O., dated 26.04.2022 and 04.06.2022 (rejecting the application to recall his order dated 31.05.2022).

27. I.G., Agra Range/ SSP, Agra is directed that

(i) to hold indepth inquiry into the matter within 15 days from the date of production of certified copy of this order before them and take a suitable disciplinary action against the present S.H.O., P.S. Tajganj, Agra, and all other concerned Sub-Inspectors who involve in this scam, who have illegally handed over the keys of the shop in question to the opposite party nos. 3 and 4 after playing partisan role.

(ii) After quashing all the three orders as mentioned above, S.S.P., Agra is directed to ensure that the shop in question no. 15/77A M.P.Pura, Fatehabad Road, Tajganj, Agra should be immediately taken a vacant actual physical possession from the opposite party nos. 3 and 4 and shall put a lock and key after sealing the property **latest by 10.09.2022 positively.**

(iii) Circle Officer, Tajganj, Agra shall give a recent report after assessing the peace and tranquillity, the justification and the exigency of imposing Section 145/146 Cr.P.C.in the nearby area on account of seizure of the property and furnish the aforesaid report to the new City Magistrate dealing with the issue.

(iv) District Magistrate, Agra is requested to confer the records of the case to some other City Magistrate to re-visit and re-decide the entire issue after taking into account the settled principles of law in this regard within next two months after hearing both the parties, in the light of settled principles of law laid down by Hon'ble Apex Court and this Court.

28. With this observation, the present criminal revision stands **ALLOWED** with the aforesaid conditions.

(2022) 9 ILRA 276
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.08.2022

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Revision No. 2660 of 2022

Gaurav @ Govind ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Raghawendra Kumar Singh, Sri Yogendra Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law- Code of Criminal Procedure, 1973 - Section 154, 174 & 154 Cr.P.C deals with information in cognizable offence for lodging F.I.R. Section 154 Cr.P.C. which stipulates that there must be an information relating to the commission of cognizable offence and the information can be termed as F.I.R., there

is particular condition in respect of F.I.R. that there must be information of cognizable offence. When the Portal/Pointsman, Mukesh Kumar, Railway Authority, informed the Police regarding lying of a dead body near railwayline, it does not disclose commission of any cognizable offence. Therefore, the said information entered in G.D. cannot termed as F.I.R. The inquest was conducted in terms of Section 174 Cr.P.C. and police had rightly chosen not to lodge any F.I.R. on such information. The scrutiny done under Section 174 Cr.P.C. cannot be equated with the information under Section 154 Cr.P.C. which is meant for cognizable offence. Inquiry under Section 174 Cr.P.C. is more distinct.The inquest proceedings are in the nature of inquiry in case of accident which is entirely distincts from investigation under Section 157 Cr.P.C.

Merely an information to the police without any complaint, accusation or information about commission of an offence, cannot be termed as F.I.R. and the consequent inquest proceedings cannot be termed as investigation within the meaning of Section 157 Cr.P.C as the purpose of the inquiry under Section 174 of the Code is only for the limited purpose of discovering the cause of death.

Code of Criminal Procedure, 1973 – Section 228- While framing the charge, the court below has to consider prima facie case even if the Court thinks that the accused might have committed the offence it would frame the charge at the stage of framing of charge and probative value of materials on record, cannot be gone into.

Settled law that at the stage of framing the Charge the Court is required to see only as to whether a prima facie case is made out from the material collected during the investigation but the probative value of said material cannot be gone into at this stage. (Para 10, 11, 13, 15, 18, 19)

Criminal Revision rejected. (E-3)

Judgements/Case law relied upon:-

1. Manohari Vs The District Suptd. of Police, 2018 (2) LW (Cri) 522 (cited)

2. Rhea Chakraborty Vs St. of Bih. & ors., 2020 (0) SC 490 (cited)

3. Radha Mohan Singh @ Lal Saheb & ors. Vs St. of U.P. ,2006 (2) SCC 450 (cited)

4. Patai alias Krishna Kumar Vs St. of U.P., (2010) 4 SCC 429

5. Manoj Kumar Sharma & ors. Vs St. of Chhattis. & anr., (2016) 9 SCC 1

6. St. of Maha. & ors. Vs Som Nath Thapa & ors., (1996) 4 SCC 659

7. Bhawna Bai Vs Ghanshyam & ors., (2020) 2 SCC 217

(Delivered by Hon'ble Brij Raj Singh, J.)

The present revision has been preferred with a prayer to allow this revision and quash/set aside the order dated 26.04.2022 passed by learned Additional Sessions Judge-14, Aligarh in Sessions Trial No.942 of 2022 (State of U.P. Vs. Gaurav @ Govind) arising out of Case Crime No.74 of 2021, under Section 302 I.P.C., Police Station Aligarh Junction, District Aligarh.

2. Portal/Pointsman, Mukesh Kumar and Deputy Superintendent of Police, Hathras Railway Station were informed on 26.10.2021 about unidentified dead body laid down near platform no.2, up line to the out post of the G.R.P. Hathras Junction. The inquest was conducted on the body of the deceased on 26.10.2021 and Panchnama was prepared and thereafter the postmortem was also conducted on 26.10.2021, which indicates that the deceased died due to shock and

haemorrhage as a result of antemortem injury.

3. The family members of the deceased reached at the place of occurrence, where inquest was prepared by the concerned police station. The report was registered under Section 174(1) of the Code of Criminal Procedure. After conducting Panchnama, postmortem report and detailed accident report were submitted on 26.10.2021. The brother of deceased, lodged a report on 28.10.2021 mentioning therein that he had come to Aligarh on 28.10.2021 to take postmortem report and while he was sitting in waiting room of Aligarh Railway Station, he heard from one Omjeet @ Chhotu, son of Kishori Lal that he was sitting in General Bogie of Unchahar Express from Fafund Railway Station on 25.10.2021, which was going to Chandigarh, one Gaurav @ Govind, a Mechanic of Bike met him in the train, after sometime, there was quarrel at Hathras Railway Station between a boy (deceased) and Gaurav and the boy was thrown from the train by accused.

4. The first information report was lodged on 28.10.2021, under Section 302 I.P.C. at G.R.P. Aligarh Junction, Aligarh. The investigation was conducted and statement of complainant as well as other witnesses was recorded under Section 161 Cr.P.C. and charge sheet was filed against the applicant on 20.12.2021 before the Additional Chief Judicial Magistrate, Aligarh, under Section 302 I.P.C. The cognizance was taken and charges were framed.

5. The applicant has challenged the charge sheet dated 26.04.2022, framed by Additional District and Sessions Judge-14, Aligarh.

6. It has been submitted by Sri Yogendra Singh, learned counsel for the revisionist that there are two F.I.Rs. in the present case and two investigations were carried out by the Police but no police report under Section 173(2) Cr.P.C. has been submitted before Chief Judicial Magistrate with respect to the information and the charges have been framed in pursuance of the second F.I.R., which is not legally sustainable. He has submitted that for the same cause of action, it is the second F.I.R., therefore, proceeding initiated for framing the charge dated 26.04.2022 by the Additional District and Sessions Judge, Aligarh, is bad in the eyes of law and according to his submission investigation of second F.I.R. is bad in the eyes of law, whereas, the first report should be taken into consideration. He has further submitted that the materials collected under Section 302 I.P.C. against the applicant, is based on hearsay witness. He has relied upon the judgment passed by High Court of Madras (Madurai Bench) in the case of **Manohari Vs. The District Superintendent of Police reported in 2018 (2) LW (Cri) 522, Rhea Chakraborty Vs. State of Bihar and others** reported in **2020 (0) SC 490 and Radha Mohan Singh @ Lal Saheb and others Vs. State of U.P.** reported in **2006 (2) SCC 450.**

7. On the other hand, Sri Rupak Chaubey, learned A.G.A. for the State-opposite party has opposed and submitted that there is only one F.I.R., which was registered on 28.10.2021, as Case Crime No.74 of 2021, under Section 302 I.P.C., Police Station G.R.P. Aligarh Junctiion, District Aligarh. The information tendered by Portal/Pointsman, Mukesh Kumar and police authority dated 26.10.2021 that an unknown dead body was lying near railway

line, cannot be termed as F.I.R. and therefore, the police authority has rightly chosen not to lodge the F.I.R. upon receiving such information. He has further submitted that the preparation of inquest report under Section 174 Cr.P.C. regarding the death of deceased, postmortem examination and detailed accident report were, in fact, in the nature of inquiry and it cannot be equated with the investigation contemplated under Section 157 Cr.P.C. which commenced after lodging of F.I.R. under Section 154 Cr.P.C. Moreover, this aspect cannot be considered when the trial has been commenced and charges have been framed and trial court bring the evidence on the basis of material on record. There is ground for presuming that the accused has committed an offence and the Court framed the charge even strong suspension based on material on record.

8. Sri Rupak Chaubey, learned A.G.A. has further submitted that there is statement under Section 161 Cr.P.C. of witness, namely, Omjeet @ Chhotu, who had stated that he himself had witnessed the incident, wherein, it is mentioned that the revisionist had pushed out the deceased from running train which resulted homicidal death of the deceased. The statement of other witnesses recorded in the investigation also support this allegation.

9. Heard Sri Yogendra Singh, learned counsel for the revisionist and Sri Rupak Chaubey, learned A.G.A. for the State-opposite party.

10. Section 154 Cr.P.C. deals with information in cognizable offence for lodging F.I.R. Section 154 Cr.P.C. which stipulates that there must be an information relating to the commission of cognizable offence and the information can be termed as F.I.R., there is particular condition in respect of F.I.R. that there must be information of cognizable offence. When the Portal/Pointsman, Mukesh Kumar, Railway Authority, informed the Police regarding lying of a dead body near railwayline, it does not disclose commission of any cognizable offence. Therefore, the said information entered in G.D. cannot termed as F.I.R. The inquest was conducted in terms of Section 174 Cr.P.C. and police had rightly chosen not to lodge any F.I.R. on such information. The said view is enunciated in the Judgment passed by Hon'ble Supreme Court in the case of **Patai alias Krishna Kumar Vs. State of Uttar Pradesh** reported in **(2010) 4 SCC 429**. Paragraph No.16 of the said judgment is relevant and is quoted below:-

"16. In order for a message or omunication to be qualified to be a first information report, there must be something in the nature of a complaint or accusation or at least some information of the crime given with the object of settting the police or criminal law into motion. It is true that a first information report need not contain the minutest details as to how the offence had taken place nor it is required to contain the names of the offenders or the witnesses. But it must at least contain some information about the crime committed as also some information about the manner in which the cognizable offence has been committed. A cryptic message recording an occurrence cannot be termed as a first information report."

11. Hon'ble Supreme Court has held that the proceeding under Section 174 Cr.P.C. is for the purpose of discovering the cause of death, and the evidence taken was very short. When the body cannot be found or has been buried, there can be no

investigation under Section 174 Cr.P.C. The scrutiny done under Section 174 Cr.P.C. cannot be equated with the information under Section 154 Cr.P.C. which is meant for cognizable offence. Inquiry under Section 174 Cr.P.C. is more distinct.

12. The case of inquiry under Section 174 and 154 is considered in case of **Manoj Kumar Sharma and others Vs. State of Chhattisgarh** and another reported in **(2016) 9 SCC 1.** Paragraph nos.19, 20, 21 and 22 of the said judgment are relevant, which are quoted below:-

"19. The proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174 of the Code. Neither in practice nor in law was it necessary for the police to mention those details in the inquest report. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. The procedure under Section 174 is for the purpose of discovering the cause of death, and the evidence taken was very short. When the body cannot be found or has been buried, there can be no investigation under Section 174. This section is intended to apply to cases in which an inquest is necessary. The proceedings under this section should be kept more distinct from the proceedings taken on the complaint. Whereas the starting point of the powers of the police was changed from the power of the officer in charge of a police station to investigate into a cognizable offence without the order of a Magistrate, to the reduction of the first information regarding commission of a cognizable offence, whether received orally or in writing, into writing. As such, the objective of such placement of provisions was clear which was to ensure that the recording of the first information should be the starting point of any investigation by the police. The purpose of registering FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report and only after registration of FIR, beginning of investigation in a case, collection of evidence during investigation and formation of the final opinion is the sequence which results in filing of a report under Section 173 of the Code. In ***George v. State of Kerala,*** *it has been held that the investigating officer is not obliged to investigate, at the stage of inquest, or to ascertain as to who were the assailants. A similar view has been taken in* ***Suresh Rai v. State of Bihar*** *.*

20. In this view of the matter, Sections 174 and 175 of the Code afford a complete Code in itself for the purpose of "inquiries" in cases of accidental or suspicious deaths and are entirely distinct from the "investigation" under Section 157 of the Code wherein if an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered to investigate, he shall proceed in person to the spot to investigate the facts and circumstances of the case. In the case on hand, an inquiry under Section 174 of the Code was convened initially in order to ascertain whether the death is natural or unnatural. The learned Senior Counsel for the appellants claims that the earlier information regarding unnatural death

amounted to FIR under Section 154 of the Code which was investigated by the police and thereafter the case was closed.

21. On a careful scrutiny of materials on record, the inquiry which was conducted for the purpose of ascertaining whether the death is natural or unnatural cannot be categorised under information relating to the commission of a cognizable offence within the meaning and import of Section 154 of the Code. On information received by Police Station Mulana, the police made an inquiry as contemplated under Section 174 of the Code. After holding an inquiry, the police submitted its report before the Sub-Divisional Magistrate, Ambala stating therein that it was a case of hanging and no cognizable offence is found to have been committed. In the report, it was also mentioned that the father of the deceased, R.P. Sharma (PW 1) does not want to take any further action in the matter. In view of the above discussion, it clearly goes to show that what was undertaken by the police was an inquiry under Section 174 of the Code which was limited to the extent of natural or unnatural death and the case was closed. Whereas, the condition precedent for recording of FIR is that there must be an information and that information must disclose a cognizable offence and in the case on hand, it leaves no matter of doubt that the intimation was an information of the nature contemplated under Section 174 of the Code and it could not be categorised as information disclosing a cognizable offence. Also, there is no material to show that the police after conducting investigation submitted a report under Section 173 of the Code as contemplated, before the competent authority, which accepted the said report and closed the case.

22. In view of the above, we are of the opinion that the investigation on an inquiry under Section 174 of the Code is distinct from the investigation as contemplated under Section 154 of the Code relating to commission of a cognizable offence and in the case on hand there was no FIR registered with Police Station Mulana neither any investigation nor any report under Section 173 of the Code was submitted. Therefore, challenge to the impugned FIR under Crime No. 194 of 2005 registered by Police Station Bhilai Nagar could not be assailed on the ground that it was the second FIR in the garb of which investigation or fresh investigation of the same incident was initiated."

13. Section 2 (H) Cr.P.C. includes all the proceedings under the Code for collection of evidence by a Police Officer or by any person other than the Magistrate, who is authorised by the Magistrate. Section 157 Cr.P.C. prescribed the procedure for investigation. Section 174 deals with the inquest proceeding upon receiving information by the police that a person has committed suicide or has been killed in an accident or has died under circumstances raising suspicion that some other person has done some offence. The body of inquest proceeding is to ascertain the apparent cause of death. The inquest proceedings are in the nature of inquiry in case of accident which is entirely distincts from investigation under Section 157 Cr.P.C. Under Section 157 Cr.P.C., the Officer in Charge of a Police Station having reason to suspect the commission of an offence for which he is empowered to investigate, proceeds on the spot. The investigation is done by the Police after receiving information of a cognizable offence and investigation can be done only under Section 157 Cr.P.C. which results in

submission of police report. However, during the inquest proceeding, the Police Officer finds commission of cognizable offence then he can lodge F.I.R. and can investigate further in terms of Section 157 Cr.P.C.

14. In the present case, the information for cognizable offence was given by the informant on 28.10.2021 and thereafter, the police started investigation because act of commission of murder was disclosed in the F.I.R.

15. Insofar as the charge is concerned, it is framed after submission of charge sheet which contains the F.I.R. and statement under Section 161 Cr.P.C., the cognizable offence is made out and charges have been framed on the basis of the material collected by the Investigating Officer. While framing the charge, the court below has to consider prima facie case even if the Court thinks that the accused might have committed the offence it would frame the charge at the stage of framing of charge and probative value of materials on record, cannot be gone into. Paragraph Nos. 26 to 32 of the judgment passed by Hon'ble the Supreme Court in the case of **State of Maharashtra and others Vs. Som Nath Thapa and others** reported in **(1996) 4 SCC 659**, are relevant which are quoted below:-

"26. Shri Ram Jethmalani has urged that despite some variation in the language of the three pairs of sections, which deal with the question of framing of charge or discharge, being relatable to either a sessions trial or trial of a warrant case or a summons case, ultimately converge to a single conclusion, namely, that a prima facie case must be made out before a charge can be framed. This is what was stated by a two-Judge Bench in R.S. Nayak v. A.R. Antulay.

27. Let us note the three pairs of sections Shri Jethmalani has in mind. These are Sections 227 and 228 insofar as sessions trial is concerned; Sections 239 and 240 relatable to trial of warrant cases; and Sections 245(1) and (2) qua trial of summons cases. They read as below:

"227. Discharge.--If, upon consideration of the record of the case and the documents submitted therein, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

228. Framing of charge.--(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which--

(a) is not exclusively triable by the Court of Session, he may frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to

the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

239. When accused shall be discharged.--If, upon considering the police report and the document sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

240. Framing of charge.--(1) If, upon such consideration, examination, if any, and hearing the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.
(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.

245. When accused shall be discharged.--If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

28. Before adverting to what was stated in Antulay case let the view expressed in State of Karnataka v. L. Muniswamy be noted. Therein, Chandrachud, J. (as he then was) speaking for a three-Judge Bench stated (at SCR p. 119 : SCC p. 704) that at the stage of framing the charge the court has to apply its mind to the question whether or not there is any ground for presuming the commission of the offence by the accused. As framing of charge affects a person's liberty substantially, need for proper consideration of material warranting such order was emphasised.

29. What was stated in this regard in Stree Atyachar Virodhi Parishad case which was quoted with approval in paragraph 78 of State of W.B. v. Mohd. Khalid is that what the court has to see, while considering the question of framing the charge, is whether the material brought on record would reasonably connect the accused with the crime. No more is required to be inquired into.

30. In Antulay case Bhagwati, C.J., opined, after noting the difference in the language of the three pairs of sections, that despite the difference there is no scope for doubt that at the stage at which the court is required to consider the question of framing of charge, the test of "prima facie" case has to be applied. According to Shri Jethmalani, a prima facie case can be said to have been made out when the evidence, unless rebutted, would make the accused liable to conviction. In our view, a better and clearer statement of law would be that if there is ground for presuming that the accused has committed the offence, a court

can justifiably say that a prima facie case against him exists, and so, frame a charge against him for committing that offence.

31. Let us note the meaning of the word "presume'. In Black's Law Dictionary it has been defined to mean "to believe or accept upon probable evidence". (emphasis ours). In Shorter Oxford English Dictionary it has been mentioned that in law "presume' means "to take as proved until evidence to the contrary is forthcoming", Stroud's Legal Dictionary has quoted in this context a certain judgment according to which "A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged." (emphasis supplied). In Law Lexicon by P. Ramanath Aiyer the same quotation finds place at p. 1007 of 1987 Edn.

32. The aforesaid shows that if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

16. The same view has been taken by Hon'ble the Supreme Court in the case of **Bhawna Bai Vs. Ghanshyam and others** reported in **(2020) 2 SCC 217**. Paragraph nos.16 and 17 of the said judgment are relevant and are quoted below:-

"16. After referring to Amit Kapoor in Dinesh Tiwari v. State of U.P., the Supreme Court held that for framing charge under Section 228 CrPC, the Judge is not required to record detailed reasons as to why such charge is framed. On perusal of record and hearing of parties, if the Judge is of the opinion that there is sufficient ground for presuming that the accused has committed the offence triable by the Court of Session, he shall frame the charge against the accused for such offence.

17. As discussed above, in the present case, upon hearing the parties and considering the allegations in the charge-sheet, the learned Second Additional Sessions Judge was of the opinion that there were sufficient grounds for presuming that the accused has committed the offence punishable under Section 302 IPC read with Section 34 IPC. The order dated 12-12-2018 framing the charges is not a detailed order. For framing the charges under Section 228 CrPC, the Judge is not required to record detailed reasons. As pointed out earlier, at the stage of framing the charge, the court is not required to hold an elaborate enquiry; only prima facie case is to be seen. As held in Kanti Bhadra Shah v. State of W.B., while exercising power under Section 228 CrPC, the Judge is not required to record his reasons for framing the charges against the accused. Upon hearing the parties and based upon the allegations and taking note of the allegations in the charge-sheet, the learned Second Additional Sessions Judge was satisfied that there is sufficient ground for proceeding against the accused and framed the charges against the accused-Respondents 1 and 2. While so, the High Court was not right in interfering with the order of the trial court framing the charges

against the accused-Respondents 1 and 2 under Section 302 IPC read with Section 34 IPC and the High Court, in our view, erred in quashing the charges framed against the accused. The impugned order cannot therefore be sustained and is liable to be set aside"

17. Sri Yogendra Singh, learned counsel for the revisionist has relied upon the judgment of **Manohari Vs. The District Superintendent of Police *(supra),*** the said judgment is not applicable in the present case. In the said case, the information under Section 174 Cr.P.C. was given and the Court has observed that on conclusion of the investigation, the police shall file a final report under Section 173(2) Cr.P.C. only before the Jurisdictional Magistrate and not before the Executive Magistrate. This will apply in both cases, where the final report is positive report or is a closure report.

18. In the present case, there is only one F.I.R. registered on 28.10.2021, as Case Crime No.74 of 2021, under Section 302 I.P.C., Police Station G.R.P. Aligarh Junction, District Aligarh. The earlier information by Portal/Pointsman, Mukesh Kumar to the Police dated 26.10.2021, was an information regarding unknown dead body lying near railway line which can be termed as F.I.R. Preparation of inquest under Section 174 Cr.P.C. regarding death of the deceased, postmortem examination and detailed accident report was in fact in the nature of inquiry and it cannot be equated with the investigation contemplates under Section 157 Cr.P.C. which commenced after lodging of F.I.R. under Section 154 Cr.P.C.

19. In view of the aforesaid discussion, it is obvious that the F.I.R. lodged on 28.10.2021 for offence which is cognizable, therefore, investigation was conducted under Section 157 Cr.P.C. The first report dated 26.10.2021 was an information tendered by Portal/Pointsman, Mukesh Kumar, the railway authority regarding an unknown dead body which was lying near railway line and the same cannot be termed as F.I.R. The preparation of inquest report under Section 174 Cr.P.C. regarding death of deceased, postmortem examination and detailed accident report, was in fact, in the nature of inquiry and it cannot be equated with investigation contemplated under Section 157 Cr.P.C.

20. The charges have been framed after collecting material on record and court below had no option but to frame the charge.

21. In view of the aforesaid discussion, the revision lacks merit and it is **dismissed.**

22. No order as to costs.

(2022) 9 ILRA 285
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Criminal Revision No. 3607 of 2021

Rajdhari Yadav ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Lal Chandra Mishra

Counsel for the Opposite Parties:

Sri Ashish Pandey,G.A.

Criminal Law- Code of Criminal Procedure, 1973- Sections 451 & 457- Narcotic Drugs and Psychotropic Substances Act, 1985- Section 36-C –Section 51- Application of the revisionist for release of vehicle rejected- A perusal of Section 36- C and 51 of the NDPS Act indicates that the provisions of Cr.PC. so far as, they are not in contradictions with the special Act NDPS Act, shall be applicable to the NDPS Act and as in the NDPS Act no procedure for interim custody of the vehicle is prescribed Sections 451 and 457 of Cr.P.C. specifically deal with the custody and disposal of property pending trial and the procedure to be followed by the police upon seizure of property. Consequently the judgment *Sunderbhai Ambalal Desai (supra)* shall be applicable to the facts of the present case and as in the judgment *Union of India Vs Mohanlal and another (supra),* only the disposal of seized narcotic drug, psychotropic and controlled substances and conveyances were discussed and there was no occasion to consider the matter of release or the interim custody of the vehicle (conveyance)- Law laid down by the Apex Court in *Sunderbhai Ambalal Desai (supra)* will apply to the vehicle seized under the NDPS Act as well. Thus, the Magistrate/ Special Judge, NDPS Act shall have power to consider the application for the interim custody of the conveyance/ vehicle under the provision of Section 451 and 457 of Cr.P.C. The finding of the trial court that the Drug Disposal Committee would dispose of the vehicles seized under NDPS Act is against the mandate of the Apex Court in Union of India Vs Mohanlal and another (supra).

As the NDPS Act does not provide for the procedure to be followed for the interim custody and disposal of the seized property, hence the provisions of Sections 451 and 457 of the Cr.P.C shall be applicable- law laid down in *Union of India Vs Mohanlal and another* held not to be applicable in facts of the case while law laid down in *Sunderbhai Ambalal Desai* held to be applicable.

Criminal Revision allowed. (E-3)

Judgements/ Case law relied upon:-

1. Crl. Revision No.1926 of 2018, Dhirendra Singh Thapa Vs St. of U.P. & anr.

2. Sunderbhai Ambalal Desai Vs St. of Guj., (2002)10 SCC 283 (relied)

3. U.O.I Vs Mohanlal & anr. (2016) 3 SCC 379 (distinguished on facts)

4. St. of M.P Vs Udai Singh Crl. Appeal No.524 of 2019

5. Bhupendra Pathak Vs St. of U.P. & anr. Crl. Revision No. 4509 of 2018 (Alld.)

6. Shajahan Vs Inspr. of Excise & ors, 2019 SCC Online Kerala 3685 (distinguished on facts)

7. Crl. Petition No.3571/2021 Rathnamma Vs State reptd. by PSI Channagiri P.S Davanagere Kar. High Court At Bengaluru on 17.05.2022. (relied)

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. The present criminal revision has been preferred by the revisionist Rajdhari Yadav against the order dated 29.10.2021 passed by the Special Judge N.D.P.S. Act/ Additional Session Judge, Court No.6, Allahabad in Misc. Case No.381 of 2021, arising out of Case Crime No.19 of 2021, under Sections 8/20/27A/ 29 N.D.P.S. Act, Police Station Lucknow NCB, District Prayagraj whereby the application of the revisionist for release of Tata Mini Truck No.GJ 16 AU 9781 was rejected.

2. It is argued by the learned counsel for the revisionist that the Tata Mini Truck No. GJ 16 AU 9781 of the revisionist was

being repaired by the mechanic near Naribari Police Chowki. The STF force detained his driver, helper and vehicle from there on 27.05.2021 at about 3:00 PM. Nothing was recovered from the truck of the revisionist. The recovery was made from the Eicher Mini Truck but the police let that vehicle go after getting huge amount and illegally implicated his truck by taking his truck to Police Station Shankargarh, at a distance of 50 km from the Naribari Police Chowki. From the spot nothing is shown to be recovered from his truck. After planting the alleged ganja the arresting officer badly damaged the mangoes loaded upon his vehicle and looted the cash of Rs. 25,000/- from the driver and challaned the driver and helper in the present case. He is not named in the complaint. He has neither committed any offence nor has any concern with the aforesaid case. He is wrongly and illegally being implicated in the present case on the basis of the fake recovery. The Special Judge N.D.P.S. Act/ Additional Session Judge, Court No.6, Allahabad has not exercised the jurisdiction vested in him according to the provisions of law. The impugned order is totally against the provisions of law, hence, the revision be allowed and the impugned order rejecting the release application of his vehicle No. GJ 16 AU 9781 be quashed.

3. Learned counsel for the revisionist has drawn the attention of the Court towards the judgment passed in ***Criminal Revision No.1926 of 2018, Dhirendra Singh Thapa Vs. State of U.P. and another*** and has argued that in that case the Court allowed the revision, impugned order was set aside, and release application was allowed, hence, on the basis of the said judgment the impugned order is prayed to be set aside.

4. Counter affidavit has been filed by the opposite party no.2- NCB wherein it is narrated that the specific information with regard to the transportation of huge quantity of 'ganja', by the nominated accused persons, by the vehicle of the revisionist was received in their office at Lucknow. A team constituted to conduct search and seizure. The team so constituted intercepted the vehicle in question and nominated accused persons and recovered 975:00 kg ganja from the vehicle of revisionist. During search and seizure the officers of NCB complied with all the mandatory provisions of NDPS Act. Memo of recovery was prepared on spot and was signed by accused persons, who were present at the time of recovery. On the national highway due to heavy traffic and security reasons it was not possible to unload mango cartons and bags of ganja. So the intercepted vehicles and the persons were taken to the Police Station Shankargarh for the proceedings of search and seizure and there is no illegality in the same. After recovery of 975:00 kg. ganja from the vehicle of the revisionist, Ganja and vehicle were seized under the N.D.P.S. Act and were deposited in malkhana of concerned police station by the order of concerned court.

5. The statement of accused persons were recorded. Several notices were sent to the revisionist as he was found the owner of the vehicle in question, but despite the service of notices, the revisionist did not appear before the investigating officer and, accordingly, the investigation with regard to the revisionist is kept open and is still pending. The court below has rightly rejected the vehicle release application of the revisionist as the vehicle was being used for the transportation of narcotic substance and was seized under Section 60 of N.D.P.S. Act. The impugned rejection

order is a detailed and reasoned order, which was passed after considering the relevant provisions of N.D.P.S. Act and the material available on record.

6. The judgment ***Sunderbhai Ambalal Desai Vs. State of Gujrat, (2002)10 SCC 283*** does not apply on the facts of the present case as the N.D.P.S. Act is a self contained Act and Section 8(C) of the Act prohibits the transportation of any narcotic drugs or psychotropic substances except for medical or scientific purposes, with the terms and condition of license permit or authorization. As the truck in question has been seized under Section 60 of NDPS Act which was being used by the accused persons for transportation of recovered ganja, without any authorization and the driver of the revisionist was present at the time of seizure, who had admitted his involvement in the trafficking of ganja. As per Section 63 of NDPS Act the seized ganja and the conveyance are liable to be confiscated. N.D.P.S. Act being a special Act has over riding effect on the provisions of Cr.P.C. Section 451 of Cr.P.C. does not apply in the case of N.D.P.S. Act. Such a huge quantity of recovered ganja cannot be planted. There is nothing on record to establish any type of enmity between the accused persons and the officers of NCB.

7. On the basis of judgments ***Union of India Vs. Mohanlal and another (2016) 3 SCC 379, State of Madhya Pradesh Vs. Udai Singh Criminal Appeal No.524 of 2019, Bhupendra Pathak Vs. State of U.P. and another*** passed by this Court in Criminal Revision No. 4509 of 2018, and ***Shajahan Vs. Inspector of Excise and others, 2019 SCC Online Kerala 3685,*** the prayer is made to dismiss the present revision.

8. Heard learned counsel for the revisionist and learned A.G.A. Perused the record.

9. Learned counsel for the opposite party no.2- N.C.B. is not present.

10. There is no dispute that the revisionist is the owner of the vehicle in question having all the documents with regard to his vehicle. The only question involved is whether the trial court had jurisdiction to release the truck in question?

11. As per the facts of the case, the NCB team had intercepted the truck and the alleged recovery of 975 kg. ganja is shown from the vehicle of the revisionist. It is true that in recovery memo at some places the word Eicher Mini Truck has been used in place of Tata Mini Truck, but the revisionist cannot take benefit of this bonafide mistake of the scribe of the recovery memo, as in the recovery memo the number of the vehicle has been clearly mentioned as GJ 16 AU 9781 with the name of owner Rajdhari Yadav and as per revisionist Rajdhari Yadav, he is the owner of the Tata Mini truck No. GJ 16 AU 9781. From the information received from the R.T.O. office also, intercepted Tata Mini Truck No. GJ 16 AU 9781 has been found registered in the name of the revisionist, Rajdhari Yadav.

12. Admittedly, the vehicle in question is seized the provisions of the NDPS Act. To ascertain the role of the vehicle owner various notices are alleged to have been sent by the NCB, but as per the version of NCB the revisionist refrained himself from attending the office of NCB. Though, the revisionist denies the fact that he had received any notice from NCB, but it is an admitted fact that the revisionist did

not attend the office of NCB and due to non appearance of the revisionist the confiscation proceedings regarding the aforesaid Tata Mini Truck could not be started and the investigation is still in progress.

13. It is claimed by the revisionist that his vehicle be released as per provisions of Cr.P.C. (Sections 451 and 457) in light of judgment ***Sunderbhai Ambalal Desai (supra).*** The revisionist has also claimed benefit of judgment ***Dhirendra Singh Thapa (supra)*** passed by this Court.

14. If we go through the general provisions in this regard, in the Cr.P.C. the seized vehicle can be released as per Sections 451 and 457 of Cr.P.C. but here in the case in hand the vehicle has been seized under the provisions of NDPS Act and NDPS Act admittedly is a special act which prescribes a procedure for dealing in specified case and NDPS Act being a special statute, the provisions of special statue has to be followed by the Court. Section 63 of the NDPS Act provides a procedure for making confiscation. Admittedly the vehicle in question has not been confiscated yet. Section 52-A of NDPS Act provides for the seizure and disposal of seized narcotic drug psychotropic substances and the conveyances. Before the amendment of Section 52-A of the Act in 1989 the word 'Conveyance' was not included as item which could be disposed of under Section 52-A of NDPS Act. As per the learned A.G.A. the very fact that word 'Conveyance' had been incorporated, the amendment itself indicates that the Government intended to provide a special procedure to deal with the disposal of such conveyances. While taking into account the fact that most of the transportation are done in conveyance which itself is defined under Section 2 (viii) as meaning "a conveyance of any description whatsoever and includes any aircraft, vehicle or vessel". Therefore, if any, vehicle is involved in transportation of narcotic drug, psychotropic substance or controlled substance, such vehicle also could be seized and disposed of in terms of Section 52 A(1) of the Act.

15. It is held by ***Kerala High Court in Shajahan Vs. Inspector of Excise and others (supra)*** that because the special statute has been amended giving the power of disposal of narcotic drugs, psychotropic substances, controlled substances or conveyance to special officer, he will have power to act in accordance with the procedure prescribed under the Act or the rules framed thereunder.

16. In judgment ***Union of India Vs. Mohanlal and another (supra***), the Apex Court hold that when any narcotic drug, psychotropic and controlled substances and conveyances are seized, the same shall be forwarded to the officer in-charge nearest to the police station, who shall approach the magistrate concerned and with his permission the sampling shall be done under the supervision of the magistrate. Further, it is directed by the Apex Court that Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized Narcotic Drugs and Psychotropic and controlled Substances and Conveyances. The Central Government and the State Governments shall also designate an officer each for their respective **storage** facility and provide for other steps, measures.

17. The question to be decided in this revision is that in view of the amended provisions of Section 52A of the NDPS Act and the notification dated 16.01.2015, whether the learned magistrate/ special

court has the authority under the provisions of Sections 451 and 457 Cr.P.C., or Drug Disposal Committee is to release the vehicle to consider the application for interim custody of the vehicle/conveyance.

18. The same questions were decided by the Division Bench of th**e Karnataka High Court At Bengaluru on 17.05.2022 in Criminal Petition No.3571/2021 Rathnamma Vs. State** represented by PSI Channagiri Police Station Davanagere, State Public Prosecutor High Court of Karnataka, Bengaluru and accompanied petitions in a reference made to that Court.

19. As per Division Bench of Karnataka, High Court at Bengaluru provisions of Section 451 of Cr.P.C. are not inconsistent with the provisions of NDPS Act, paragraph-47 of the judgment reads as follows:-

"47. In the peculiar facts and circumstances of the present case, we are of the considered opinion, that we have no hesitation in holding that there is no provision under the NDPS Act debarring release of the vehicle for interim custody. The provisions of Section 451 of Cr.P.C., as already stated supra, is found not inconsistent with the provisions of the NDPS Act and is applicable to the vehicle seized under the NDPS Act as well. Thereby, the law laid down by the Hon'ble Supreme Court in Sunderbhai Ambalal Desai's case stated supra will apply to the vehicles seized under the NDPS Act as well. Any contrary view taken by the Courts of law would be against the interest of the owner of the vehicles, the public at large and the State."

20. In paragraph-50 of the same judgment the Division Bench held that:-

"50. Since the provisions of the Code of Criminal Procedure including Section 451/457 have been expressly made applicable by virtue of Sections 36-C and 51 of the NDPS Act to the proceedings before the Special Court and there is no express bar contained in the NDPS Act for grant of interim custody as contained in Section 52C of the Indian Forest Act, 1927, therefore, merely on the ground that the vehicle is liable to confiscation under Section 60 of the NDPS Act, it cannot be held that once the vehicle is seized for commission of offence under the NDPS Act, interim custody cannot be granted, as jurisdiction of criminal court has to be construed strictly unless expressly excluded."

21. Regarding Standing Order No.1/ 1989 and notification dated 16.01.2015, the Apex Court in judgmen**t Union of India Vs. Mohanlal and another (supra)** held that the earlier Notification/ Standing Order No.1 of 1989 shall be treated to be superseded to the extent the subsequent notification dated 16.01.2015 prescribes a different procedure.

22. In order to avoid any confusion arising out of the continued presence of two notifications on the same subject it was made clear by the Division Bench of Karnataka High Court that disposal of narcotic drugs and psychotropic and controlled substances and conveyances shall be carried out in the manner prescribed, till such time the Government prescribed a different procedure for the same.

23. Admittedly, in the present case also, the respondents have not produced any procedure prescribed by the Central Government as directed by the Hon'ble

Supreme Court in **Union of India Vs. Mohanlal and another (supra).**

24. Regarding applicability of the provisions of Cr.P.C., in this regard the Division Bench of Karnataka High Court in its judgment in paragraph-55 held that:-

"55. In view of the above, there is no expression to release the interim custody of the vehicle or exclude the provisions of the Code of Criminal Procedure in view of the Section 36-C of the NDPS Act. It is also relevant to consider, at this stage, that either in the Notification dated 16.01.2015 or the amended provisions of Section 52-A of the NDPS Act, no mechanism is provided for consideration of application for grant of interim custody of the vehicle."

25. In paragraph- 56 of the judgment the Division Bench held as follows:-

"56. The entire object of the Notification is to either dispose or destroy the drugs. Clause 9(1), (2), (4), (5)(a)(c)(d) of the Notification concerns with ***Disposal****, while Clause 9(5)(b), (6), (7) concerns with* ***Destruction.*** *The only clause which has relevance to conveyances is Clause 9(5)(e) which depicts that seized conveyances shall be sold off by way of tender or auction as determined by the Drug Disposal Committee. The said Clause does not concern to interim custody and it only concerns with Disposal which is akin to Section 452 of the Cr.P.C. Needless to emphasize that this sale is post-trial. Thereby the Notification, dated 16.01.2015 or the provisions of Section 52A of the NDPS Act does not deal with the interim custody of the seized Articles or Conveyances. The Legislature has intentionally not used the word "Custody" under Section 52A of the NDPS Act, as can be seen under Sections 451 and 457 of the Code of Criminal Procedure. Therefore, the power or jurisdiction cannot be conferred to authority/officer including the Drug Disposal Committee, who is not vested with the same by the Statute. The power under the Notification issued cannot go beyond the statutory provisions of Section 52A of the NDPS Act."*

26. Lastly, the Division Bench of Karnataka High Court held that the judgments in **Shahjahan Vs. Inspector of Excise (supra) and Union of India Vs. Mohanlal and another (supra),** there was no occasion to consider the application for release of the interim custody of the vehicle (conveyances) and in that view of the matter, the said judgments relied upon by the learned counsel for the respondents to the effect that Drug Disposal Committee has power and not the Magistrate or the Special Court under the NDPS Act have no application to the facts and circumstances of the present petitions.

27. A perusal of Section 36- C and 51 of the NDPS Act indicates that the provisions of Cr.PC. so far as, they are not in contradictions with the special Act NDPS Act, shall be applicable to the NDPS Act and as in the NDPS Act no procedure for interim custody of the vehicle is prescribed Sections 451 and 457 of Cr.P.C. specifically deal with the custody and disposal of property pending trial and the procedure to be followed by the police upon seizure of property. Consequently the judgment ***Sunderbhai Ambalal Desai (supra)*** shall be applicable to the facts of the present case and as in the judgment ***Union of India Vs. Mohanlal and another (supra),*** only the disposal of seized narcotic drug, psychotropic and controlled

substances and conveyances were discussed and there was no occasion to consider the matter of release or the interim custody of the vehicle (conveyance).

28. So on the basis of above discussions, this Court is of the opinion that law laid down by the Apex Court in ***Sunderbhai Ambalal Desai (supra)*** will apply to the vehicle seized under the NDPS Act as well. Thus, the Magistrate/ Special Judge, NDPS Act shall have power to consider the application for the interim custody of the conveyance/ vehicle under the provision of Section 451 and 457 of Cr.P.C.

29. The finding of the trial court that the Drug Disposal Committee would dispose of the vehicles seized under NDPS Act is against the mandate of the Apex Court in **Union of India Vs. Mohanlal and another (supra).**

30. The revision is hereby **allowed.** The order dated 29.10.2021 passed by the Special Judge N.D.P.S. Act/ Additional Session Judge, Court No.6, Allahabad in Misc. Case No.381 of 2021, arising out of Case Crime No.19 of 2021, under Sections 8/20/27A/ 29 N.D.P.S. Act, Police Station Lucknow NCB, District Prayagraj is hereby set aside. The revisionist is directed to appear before the court concerned within a period of 15 days from today to get his application decided on the basis of law discussed above.

(2022) 9 ILRA 292
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.09.2022

BEFORE

THE HON'BLE RAJAN ROY, J.

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ C No. 10792 of 2013

Kripa Shanker Singh ...Petitioner
Versus
Lucknow Development Authority, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kripa Shankar Rai

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra, Kumar Ayush, Rahul Shukla

A. Local bodies – Ownership – Allotment of house – Hire purchase agreement – Default in payment of installment – Effect – Forceful dispossession by the Development Authority – Validity challenged – Liability of authority described – Held, the financier, the L.D.A., is the real owner of the house in a Hire purchase agreement – There can be no impediment to the financier taking possession of the vehicle when the hirer does not make payment of installments/hire charges in terms of the Hire purchase agreement – However, any forceful dispossession is illegal and any dispossession has to be as per the due process of Law. (Para 15)

B. Constitution of India – Article 226 – Writ – Alternative remedy – Rights accrued under the hire purchase agreement – Enforcement – Civil court jurisdiction – Held, allotment and the right flowing from the hire purchase agreement has to be adjudicated and proved by leading evidence in a competent court of civil jurisdiction – When there is an alternative efficacious remedy available, the special and extraordinary remedy available under Article 226 of the Constitution of India cannot be exercised. (Para 19 and 20)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. M/S Magma Fincorp Ltd. Vs Rajesh Kumar Tiwari; (2020) 10 SCC 399

2. Charanjit Singh Chadha & ors. Vs Sudhir Mehra; (2001) 7 SCC 417

3. K. L. Johar and Company Vs Deputy Commercial Tax Officer; AIR (1965) SC 1082

4. Anup Sarmah Vs Bhola Nath Sharma & ors.; (2013) 1 SCC 400

5. Laxmi Raj Shetty & anr. Vs St. of T.N.; (1988) AIR 1274

6. Sawarni Vs Inder Kaur; (1996) 6 SCC 223

7. Balwant Singh & anr. Vs Daulat Singh (Dead) by Lrs. & ors.; (1997) 7 SCC 127

8. Narasamma & ors. Vs St. of Karn. & ors.; (2009) 5 SCC 591

9. Roshina T Vs Abdul Azeez K.T.; (2018) SCC Online 2654

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

1. Heard Sri Vishwajeet Rai, Advocate holding brief of Sri Kripa Shankar Rai, learned counsel for the petitioner, learned Standing Counsel for the State authorities and Sri Kumar Ayush, learned counsel representing the Lucknow Development Authority.

2. By instituting these proceedings under Article 226 of the Constitution of India, the petitioner-Kripa Shanker Singh has prayed that the opposite party nos.1 to 4 may be directed for registry of House No.M/213/G, L.D.A. Colony, Kanpur Road Yojna, Lucknow in his favour. Further, the petitioner has also prayed that the registry of the said house may not be done in favour of opposite party no.7. Although the Senior Superintendent of Police, Lucknow and the Station House Officer, Police Station Ashiyana, District Lucknow have been arrayed as opposite party nos.5 and 6 respectively, however, no prayer has been made by the petitioner against them.

3. The case set up by the petitioner in the writ petition is that one Smt. Kavita Singh was issued a letter dated 22nd January, 1992 informing her that her application dated 03.01.1992 was accepted by the Lucknow Development Authority for allotment of Plot No.A/863/I, L.D.A. Colony, Kanpur Road Yojna, Lucknow. It seems thereafter the said Smt. Kavita Singh has applied for alternate plot to the Lucknow Development Authority, which was allowed vide an order dated 13.09.1996 and as such an alternate property being M/213/G, was allotted to said Smt. Kavita Singh for and in place of the earlier plot in the same locality. The petitioner has relied on a document dated 23.09.1996 issued by L.D.A. informing the said Kavita Singh that the petitioner's request and affidavit have been accepted by them and as such the plot allotted was allowed to be transferred to the petitioner on the same terms and conditions. It is the further case of the petitioner that subsequently a "Hire purchase agreement" was executed in his favour by L.D.A. on 25.09.1996 for the said property number M/213/G for a consideration of Rs.2,63,900/- on hire purchase basis and pursuant to which he was also issued a possession letter dated 25.09.1996 for the said property. The tenure for the said hire purchase agreement was 20 years and it was expected that L.D.A. would execute the sale deed for the said plot after the completion of the said tenure of hire purchase agreement.

4. It is the further case of the petitioner that the actual possession was given to him by the L.D.A. on 27.09.1996 by the Engineer concerned. The petitioner relied on an unverified computer sheet purported to be a report dated 15.10.2005, estimated for registry by the L.D.A.

depicting a payment of Rs. 51,700/- made against the property in question and narrating the installment information relating to the said property. The learned counsel also relied on an internal register/document purported to be of L.D.A. wherein name of the petitioner is reflected at serial no.61 and various payments to have been made, although dates of payments are mentioned in the said extract of register but no dates have been mentioned therein. The learned counsel referring to the said documents has argued that since the name of the petitioner finds mentions in the records of the L.D.A., he should be construed as the only rightful owner of the property M/213/G, L.D.A. Colony, Kanpur Road Yojna, Lucknow.

5. The learned counsel continuing with his arguments vociferously went on to submit and rely on several documents relating to the raising and payment of house tax, water tax and electricity bills raised by the concerned Department and paid by the petitioner over a passage of time to further his argument relating to the petitioner being the rightful allottee of the property in question. Further, an internal document of the L.D.A. relating to a list of plot/building numbers and the allotees name, for which it was proposed to open a duplicate application for registration purpose as on 23.12.2008 has also been relied upon by the petitioner. However, the next document brought to the notice of this Court shows that although the petitioner's name is registered in the computer sheet printed and annexed as Annexure-18 to the writ petition, but there is no explanation as to why the registration and issue date of the said registration is 17.01.1984, when actually the plot was not even in existence.

6. The petitioner has vehemently relied on the form for registration for one time settlement (O.T.S.) filled by the petitioner on 02.12.2008, wherein the date of allotment has been mentioned as 13.09.1996 to explain that there was some discrepancy in the registration and the issue date, however, again we are not able to find any document on record, which would show that any objection had been filed by the petitioner with the L.D.A. for correcting the said error. In fact, it is the other way around, wherein the petitioner vide letter dated 10.12.2009 although has represented the L.D.A. for considering the O.T.S. by mentioning the opening of the duplicate application for registration purpose, however any mention of the correction in the computer record was conspicuously absent. It is seen that the petitioner had been giving series of representations in similar manner as is apparent from the letter dated 25.04.2010, 27.01.2012 but without any results, although the petitioner was made to deposit Rs.26,000/- with the L.D.A. for processing and administrative fees on 27.02.2012, Rs.50,000/- on 14.06.2012, Rs.45,000/- on 21.10.2013. Consequently, it is the case of the petitioner that he has also got sent a complaint to the Director General of Police, Lucknow relating to some named property dealers and some unidentified persons approaching him and intimidating to vacate the property as purportedly these new persons have told him that they have purchased the plot in question from the Lucknow Development Authority. These letters dated 19.10.2013 was alleged followed by another letter dated 21.10.2013 to the L.D.A. and 31.10.2013 to the Secretary, L.D.A. It is the case of the petitioner that since the opposite parties did not heed to his request, he was left with no alternative but to file the present writ petition.

7. Learned counsel for the opposite parties no.1 to 6 appeared on advance

notice and as such notice was issued to the opposite parties no.7 on 20.11.2013, wherein all the parties were directed to file their counter affidavit and rejoinder thereto and status-quo with regard to possession of plot in question was directed to be maintained.

8. The assertions made in the writ petition have categorically been denied by the Lucknow Development Authority in the counter affidavit filed by the O.S.D., Lucknow Development Authority, wherein they specifically mention that the petitioner was not the alltotee of House No.M/213/G, Kanpur Road, L.D.A. Colony, Lucknow and he was never allotted the said house. They have denied having given any possession. It was mentioned that the computer generated receipt (Anneuxre-1) is in the name of opposite party no.7 (Vishwambhar Nath Dubey) is of dated 20.09.2004 and it does not have any bearing to the petition as the opposite party no.7 has no relation with the petitioner. They further stated on affidavit that the documents filed by the petitioner are forged and no agreement of any nature was executed by them with the petitioner. The authority has stated in its affidavit that no receipt has been filed by the petitioner under the cash sale procedure which could establish registration of the said plot in favour of the petitioner because as per their contention and as per the Rules, without registration, allotment of plot is not possible. They raised doubt on the filing of Anneuxre-4 filed in the writ petition, which according to them was an advance payment of one shop in paper mill and as such verification cannot be done by them. The L.D.A. has also stated that in the cash sale allotment scheme, the registration cost was 10% of the sale consideration and until such registration by depositing 10% of the sale consideration is not made it was not possible for any allotment under the law. The L.D.A. has also raised an issue relating to possession and mutation not being in favour of Smt. Kavita Singh and as such they submit that since Kavita Singh was not given possession or her name was not mutated, how she could have transferred the property in question to the petitioner.

9. Learned counsel for L.D.A. has also highlighted the aspect that as per the identity card annexed with the writ petition, the petitioner's birth year was depicted as 1983 and in case the execution of the document was proposed to be found correct, the same was not legally tenable and void as the petitioner was merely 13 years in the year 1996 and as such any document signed by him does not hold any legal sanctity. The counsel for the L.D.A. has also drawn the attention of the Court to the affidavit filed in support of the present writ petition, which mentions the age of the petitioner as 30 years and as such he reiterates that since the petitioner on the year of filing of the writ petition i.e. 2013 was 30 years, he ought to have been of 13 years in the year 1996 and as such he claims that all the documents filed by the petitioner are forged, even the age claimed by him is forged and as such the petitioner is not entitled for any relief from this Court.

10. Lucknow Development Authority has denied the deposit of Rs.50,000/- (Annexure-9A) and have claimed that it bears no date and they have further challenged the aspect of procurement and filing of photocopy of disposal register, as it was an internal document of the L.D.A. They have claimed that the documents are self-manufactured and forged and as such has called for serious action against the petitioner. Regarding the procurement of

electricity and water connection, L.D.A. has stated that it might have been procured on the basis of forged documents by the petitioner.

11. The petitioner filed his rejoinder almost reiterating the stand taken by him in the writ petition. The petitioner repeatedly referred to the computer costing estimate made by the L.D.A. on 05.10.2005 and a list of defaulters allegedly published by L.D.A. in newspaper on 22.02.2011, wherein the petitioner's name was mentioned, to buttress his argument about the allotment made to the petitioner. He referred to various documents filed along with the rejoinder affidavit and claimed that an agreement with a minor was not void but voidable. He contends that the documents filed are genuine and he states that there were no takers of plot under Kanpur Road Yojna at that point of time and in case any person chose and applied for allotment, then L.D.A. was obliged to allot those plots and house and possession used to be given after complying with the legal formalities.

12. The petitioner in rejoinder also stated that the L.D.A. had not disclosed to him the balance amount due as on the present time. As regarding the working of Lucknow Development Authority, the petitioner relies on newspaper clip of Amar Ujala dated 20.03.2016 and 16.07.2015 to further his point that fabrication of registry is rampant in L.D.A. In the news clip 18 plots have been found to be having a forged registry. He states that enquiry relating to 40 plots were initiated by L.D.A. on which 18 were found to be forged and his plot number does not figure in the said list and in any case action has be taken against L.D.A. officials who have been working collusively with people for allotment of plots, which actually were never allotted to this person by preparing forged documents. The petitioner has also filed certain deposit slips relating to Kavita Singh, O.T.S. fees paid by the petitioner etc. He has also filed L.D.A. portal registration details as on 10.09.2017, which shows his name in the said portal and also mentions that Rs. 78,000/- stands paid on various dates. Towards the end, the petitioner has filed electricity bill, water tax and house tax paid by him till date. As regards the variants in the birth date in voter I.D. and PAN, he claims that he belongs to a poor family and the same has been mistakenly printed and immediately after coming to his knowledge has applied for correction. The petitioner has filed his Aadhar card wherein he has declared his date of birth as 01.0.1974, however, the PAN card again shows his date of birth as 01.01.1984.

13. Having heard the learned counsel appearing for the parties and perused the record of the writ petition available before us, we have considered the rival submissions, but are unable to convince ourselves with the submissions and prayers made by learned counsel for the petitioner for various reasons as would follow hereinafter.

14. As per the petitioner, the plot house in question was allotted to him by L.D.A. vide a Hire purchase agreement dated 25.09.1996 for a total sale consideration of Rs. 2,63,900/- of which Rs.46,000/- has been mentioned to be paid as part payment of the sale consideration and the balance money was payable at the rate of Rs.2539.35 in equal monthly installments payable in advance within first week of each due English calendar month spread over a period of 20 years. Thus, as per the said analogy, the total amount to be

paid by the petitioner would be Rs.6,09,440/- having been paid as equal monthly installments plus Rs.46,000/- having paid as part payment at the time of Hire purchase agreement, which totals to about Rs.6,55,4e40/-, provided the petitioner has paid all the equal monthly installments on time, this court painstakingly undertook to understand the said mathematical calculation as the fulcrum of the writ petition is a direction to L.D.A. for getting a property registered in favour of the petitioner, a right which kicks in when the entire sale consideration stands paid to the authority. Paragraph 5 of the Hire purchase agreement in as many word says clearly:

"5. that upon payment of all the installments in respect of the demised property by the purchaser the seller will execute the sale deed of the aforesaid house the land in favour of the purchaser."

Similarly, paragraph 12 and 13, which are relevant to the context, inter alia says:

"12. That in case of default of payment for continuous three regular installments on the part of the purchaser, the seller shall have every right to terminate this agreement or to take any action against the purchaser and the purchaser shall be bound to surrender the property with the seller, as directed in a notice issued by L.D.A.

13. That the seller on re-entry consequent upon the termination of this agreement will be entitled to sell the demised property in favour of any third persons."

15. A conjoint reading of paragraphs 5, 12 and 13 of the Hire purchase agreement would mean that the L.D.A. can be called upon to execute a sale deed only after all the installments in respect of the subject property is paid, which is the last stage of relationship between purchaser and his seller. In the interregnum, paragraph 12 and 13 has to be pressed for service, in case of default of payment for continuous three regular installments on the part of the purchaser. In default, L.D.A. may terminate the agreement and after termination may reenter the property and sell it to any third party. This Court is bereft of any evidence on record, which could show that the petitioner had defaulted and on his default any action has been taken by L.D.A. or that L.D.A. has reentered the property and sold to some other third party. Neither of the sides have assisted this Court on the said aspect and the only reply which has come from L.D.A. is that they have not made any allotment to the petitioner and as such there was no question of termination or re-entry. While that question would have been pertinent to adjudicate the matter in its right perspective, especially when the matter had been pending for nearly a decade, however complacency of both the petitioner and L.D.A. in not finally getting the matter adjudicated is quite rife as the petitioner has on the one hand filed huge numbers of documents of which mostly are irrelevant to establish his allotment of the house in question, whereas on the other hand L.D.A. did not choose to file any documents to justify and substantiate its ground as mentioned in the counter affidavit. As regards the Hire purchase agreement, which forms the key to claim the allotment of the house by the petitioner is concerned, the law relating to ownership in such kind of arrangement stands settled by the Hon'ble Supreme Court. The ratio of the judgment passed by Hon'ble Supreme Court in the case of ***M/S Magma Fincorp Ltd. VS Rajesh Kumar Tiwari, (2020) 10 SCC 399*** is relevant to the context, wherein

the Hon'ble Apex Court relying on its earlier judgments passed in ***Charanjit Singh Chadha And Ors. Vs. Sudhir Mehra, (2001) 7 SCC 417, K. L. Johar and Company Vs. Deputy Commercial Tax Officer, AIR (1965) SC 1082, Anup Sarmah Vs. Bhola Nath Sharma & Others (2013) 1 SCC 400***, held that the financier, which in this case is the L.D.A., is the real owner of the house in a Hire purchase agreement. The court in that case, as it was relating to financing of the vehicle in that case, held that the financier being the owner of the vehicle which is a subject of a Hire purchase agreement, there can be no impediment to the financier taking possession of the vehicle when the hirer does not make payment of installments/hire charges in terms of the Hire purchase agreement. However, such repossession cannot be taken by recourse to physical violence, assault and/or criminal intimidation. Nor can such possession be taken by engaging gangsters, goons and muscleman or so called recovery agents. The ratio of the said judgment applies to the present case on all its four corners. Although, L.D.A. might have some right under the hire purchase agreement, but again as held by the Hon'ble Supreme Court the same is subject to due process of law and L.D.A. cannot take recourse to violence, assault or intimidation, nor the said dispossession can take place with engaging goons or muscleman. We are conscious of the fact that the petitioner has filed a complaint relating to his forceful dispossession from the house in question, but it seems there is no real threat to his dispossession and as such no relief has been claimed by the petitioner against the police authorities in the writ petition. In any case, the petitioner shall always have the benefit of the settled position of law that any forceful dispossession is illegal and any dispossession has to be as per the due process of law.

16. The next issue raised in the petition is relating to the installment amount paid or the part payments made. The petitioner has heavily relied on numerous documents filed by him in the writ petition, which shows the following payments made by the petitioner; (i) Rs.46,000/- on 10.09.1996, (ii) Rs. 3000/- paid on 22.08.2005, (iii) Rs.2500/- paid on 26.08.2005, (iv) Rs.50,000/- paid on 01.03.2007, (v) Rs.26,000/- paid on 27.02.2012, (vi) Rs.50,000/- paid on 14.06.2012, and (vii) Rs.45,000/- on 21.10.2013. Although, L.D.A. has strongly objected to the receipt and veracity of these payments made by the petitioner, however, even for the sake of argument, if these payments are construed to be correct and paid to the L.D.A. for the plot/house in question, the petitioner as per his own showing has made only payments of Rs.2,22,500/- against the total amount of Rs.6,55,440/- or Rs.15,05,465/- as on 22.02.2011 as notified in the newspaper publication relied by the petitioner. Although, the petitioner has filed an application for O.T.S. in the year 2013, however again the said O.T.S. proposal/application is cryptic and does not mentions as to what demand has been raised by the L.D.A. as in 2013 or what is the offer of the petitioner under said O.T.S. In any case, the pendency of O.T.S. does not take the petitioner anywhere as the L.D.A. has been denying any relationship with the petitioner in their counter affidavit filed to the present writ petition.

17. The petitioner has strenuously relied on the aspect that his name appears in an internal document of the L.D.A., wherein it has been mentioned and

proposed to open duplicate files of certain persons including the petitioner. First and foremost, this court was unable to elicit any answer from the parties as to how and in what perspective these duplicate files were to be opened by the L.D.A. Secondly, since it was an internal document of L.D.A., how the petitioner was able to lay his hands on the said document and finally it is no body's case as to what eventually happened to this document and as to whether it was acted upon by the L.D.A. and as to any duplicate files were actually opened by the petitioner or not as pertinently the said internal communication not only mentions the name of the petitioner, but also 31 other persons.

18. There is another aspect of the matter, as per the own showing of the petitioner a default list was published by the L.D.A. on 22.02.2011, which mentions the name of the petitioner as defaulter for Rs.15,05,465/-, which the petitioner may argue to show that he is a *bona fide* allottee, however in the same breath it also means that the petitioner had admitted to be defaulting in payment as it is for that reason only that his name might have appeared in the default list published by the L.D.A. Additionally, the petitioner has referred to news clip of Amar Ujala dated 20.03.2016, 16.07.2015 and 24.01.2018, Hindustan dated 18.01.2018 to further his point that fabrication of registry is rampant in L.D.A. and 18 plots have been found to be having a forged registry against the total enquiry of 40 plots. This Court fails to understand as to how this newspaper clipping would further the case of the petitioner. The enquiry relating to 40 plots having been initiated by the L.D.A. and actions being proposed against the delinquent officers of L.D.A. and a having F.I.R. filed against the erring officers of L.D.A., in fact dilutes the case of the petitioner and furthers the case of the opposite party-L.D.A., who has been consistently in the counter affidavit denying any relationship and terming all the documents filed by the petitioner as forged. In any case, the evidentry significance of these newspapers clippings cannot be taken into consideration in this summary proceedings. The Hon'b;e Supreme Court of India in the case of ***Laxmi Raj Shetty and anotehr Vs. State Of Tamil Nadu, [(1988) AIR 1274]***, held as follows:

"Judicial notice cannot be taken of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspaper is the only hearsay evidence. A newspaper is not one of the documents referred to in Section 78 (2) of the Evidence Act, by which an allegation of fact can be proved.

The presumption of genuineness attached under Section 81 of the Evidence Act to a newspaper report cannot be treated as proof of facts reported therein. It is now well-settled that a statement of fact contained in a newspaper is merely hearsay and, therefore, inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported."

19. The next point raised by the petitioner is relating to payment of various electricity bills, water bills and the house tax paid to the concerned authorities over a passage of time for the house in question. Although, the respondent/L.D.A. has given an innocuous reply that the same has been obtained on the basis of forged documents, but again neither of the parties have taken pain to prove this document, which could

be by way of leading evidence. No doubt the electricity bills, water bills and house tax gives an impression of the possession of the plot / house, but as held by the Hon'ble Supreme Court in several occasions that the title of the property can be proved by documents like sale deed, gift deed, will etc. The courts have been very slow even in recognizing the title of the property by virtue of the mutation in the name of revenue records. The Hon'ble Apex Court has consistently held that mutation of a land in the revenue records does not create or extinguish the title over a land nor it has any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. ***[See: Sawarni (Smt.) Vs. Inder Kaur (Smt.) (1996) 6 SCC 223, Balwant Singh And another Vs. Daulat Singh (Dead) By Lrs. And Others, (1997) 7 SCC 127 and Narasamma and Others v. State Of Karnataka and Others (2009) 5 SCC 591]***. Thus, although the payments of electricity bills, water bills and house tax have relevance relating to the possession of the house by the petitioner, but the allotment and the right flowing from the hire purchase agreement has to be adjudicated and proved by leading evidence in a competent court of civil jurisdiction.

20. It is settled law that, when there is an alternative efficacious remedy available, the special and extraordinary remedy available under Article 226 of the Constitution of India cannot be exercised. The question as to whether the petitioner is entitled to registry and retain possession of the house in question are all pure questions of facts and could be answered one way or the other only by the Civil Court in a properly instituted civil suit on the basis of evidence adduced by the parties but not in a writ petition filed under Article 226 of the Constitution of India.

21. It has been consistently held by Hon'ble Supreme Court as in the case of ***Roshina T Vs. Abdul Azeez K.T., (2018) SCC Online 2654***, that "the High Court cannot allow its constitutional jurisdiction to be used for deciding disputes, for which remedies under the general law whether civil or criminal are available." and that the writ jurisdiction of the Court "is not intended to replace the ordinary remedies by way of a civil suit or application available to an aggrieved person." The proposition is emphasized by the subsequent sentence which states that the decision of the writ court under Article 226 of the Constitution of India being special and extraordinary, should not be exercised casually or lightly or merely on the asking of the litigant. Paras 13 to 15 of the said judgment relevant to the context read thus:

"13. The question as to who is the owner of the flat in question, whether respondent No. 1 was/is in possession of the flat and, if so, from which date, how and in what circumstances, he claimed to be in its possession, whether his possession could be regarded as legal or not qua its real owner etc. were some of the material questions which arose for consideration in the writ petition.

14. These questions, in our view, were pure questions of fact and could be answered one way or the other only by the Civil Court in a properly constituted civil suit and on the basis of the evidence adduced by the parties but not in a writ petition filed under Article 226 of the Constitution by the High Court.

15. It has been consistently held by this Court that a regular suit is the

appropriate remedy for settlement of the disputes relating to property rights between the private persons. The remedy under Article 226 of the Constitution shall not be available except where violation of some statutory duty on the part of statutory authority is alleged. In such cases, the Court has jurisdiction to issue appropriate directions to the authority concerned. It is held that the High Court cannot allow its constitutional jurisdiction to be used for deciding disputes, for which remedies under the general law, civil or criminal are available. This Court has held that it is not intended to replace the ordinary remedies by way of a civil suit or application available to an aggrieved person. The jurisdiction under Article 226 of the Constitution being special and extraordinary, it should not be exercised casually or lightly on mere asking by the litigant."

22. The facts of the case as discussed above and also as culled out from the pleadings of the respective parties available on the record lead to the only indefeasible conclusion that there exist serious disputed question of facts which cannot be adjudicated in a writ petition. The petitioner claims to be the purchaser of the property in question. However, it appears that the respondents are disputing the said allotment. How, when and under what circumstances, the petitioner was allotted and came into possession of the property in question and as to whether the petitioner is entitled for registry of the said property is to be ascertained as per the subsisting rights between the parties flowing from the hire purchase agreement or any subsequent development. All these facts, according to this court, have to be established by leading evidence in accordance with law. The petitioner has to establish its right under the law to claim the substantial reliefs as claimed in the present writ petition.

23. In view of the facts and the reasoning discussed hereinabove, this court is not inclined to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India and the present writ petition is liable to be dismissed. The petitioner is however at liberty to pursue other remedies as available under the law for establishing his rights to claim substantial reliefs as claimed under this writ petition. It is clarified that this Court has examined the matter on the limited issue on its maintainability and no opinion has been expressed on the merits of the petition.

24. Resultantly, the writ petition is ***dismissed*** and all interim orders stand vacated.

25. Before parting with the case, we find it appropriate to observe that the manner in which the officers and authorities of the Lucknow Development Authority have conducted themselves in this case, cannot be appreciated. The stand of the Lucknow Development Authority is that the documents relating to the allotment of House No.M/213/G, Kanpur Road, Lucknow is not available in their records and forged, thus in the background of the above narrated fact, how the money deposited by the petitioner was adjusted as is apparent from the records remains unexplained by the Lucknow Development Authority. In absence of allotment of house No.M/213/G, Kanpur Road, Lucknow, how the L.D.A. could have published the default list and mention the name of the petitioner corresponding to the house in question the internal correspondence and the records of L.D.A. also remains a mystery. The facts of

the case compel us to observe that the officers of the Lucknow Development Authority and the administration thereof have been extremely lackadaisical in performing their duties. It is high time that these officers self-introspect and take extraordinary measures which will improve its working so that the development authority is able to discharge its statutory functions entrusted under the Uttar Pradesh Urban Planning and Development Act, 1973. We hope and expect that the top administration of Lucknow Development Authority take notice of the observation of this Court and take appropriate steps not only to put its house in order, but also improve its functioning and administration in the future, keeping in view the solemn discharge of its duty of planning, developing and providing housing solutions effecting the public at large.

26. There shall be no order as to the costs.

(2022) 9 ILRA 302
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.09.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

Special Appeal (D) No. 43 of 2022

State of U.P. & Ors. ...Appllant
Versus
Vidyottma Dwivedi & Anr. ...Respondents

Counsel for the Appellant:
C.S.C.

Counsel for the Respondents:
Abhishek Dwivedi, Anurag Kumar Singh

A. Civil Law - Service Law - Leave encashment - Leave encashment to an employee of an Associated College of Lucknow University - Uttar Pradesh State Universities Act, 1973, S. 21 (4) - Fundamental Rules 58 to 104 of the Financial Handbook - Section 21 (4) of 1973 Act provides that the pay and other allowances of the employees of the University & of associated college shall be such as may be approved by the State Government - Furthermore, Statute 37.01 of First Statutes of Lucknow University, provides that the leave rules applicable to the Government servants shall mutatis mutandis apply to the employees of an Associated College of Lucknow University of like status - Leave in respect of the State Government employees is governed by Fundamental Rules 58 to 104 of the Financial Handbook - Fundamental Rules 81-B (1)(xii) of the Financial Handbook (Volume II, Part II to IV) provides that a Government servant may be permitted to surrender a portion of earned leave at his credit and allowed cash payment in lieu thereof - all the leave rules applicable to the State Government employees as are contained in the Fundamental Rules will have application in case of an employees of an Associated College of Lucknow University & such employee are legally entitled for grant of benefit of leave encashment as per Fundamental Rule 81-B(1)(xii) of the Financial Handbook (Para 27, 32)

B. Civil Law - Service Law - The Uttar Pradesh State Universities Act, 1973- Section 21 (3) - Leave Encashment - no approval of the State Government required for meeting the expenditure in making payment of leave encashment either under the 1973 Act or in the first Statutes or in the Ordinances of Lucknow University - Merely because the State Government has not issued any Government Order prescribing the manner and quantum and point of time etc. for leave encashment, will not, disentitle an employee of an Associated College of Lucknow University to seek the benefit of leave encashment (Para 27, 32)

Dismissed. (E-5)

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

Order on C.M. Application No. 02 of 2022 (Application for Condonation of Delay)

1. Heard learned State counsel representing the appellant- State authorities, Sri Pradeep Chandola and Sri Abhishek Dwivedi, learned counsel representing the respondent no.1- petitioner and Sri Anurag Kumar Singh, learned counsel representing the Vice-Chancellor, Lucknow University, Lucknow.

2. Having heard the learned counsel for the parties and perused the averments made in the application seeking condonation of delay, we are satisfied that the delay has sufficiently been explained.

3. Accordingly the application is ***allowed*** and the delay in preferring the special appeal is hereby condoned.

Order on Special Appeal

1. Heard the learned counsel representing the respective parties and perused the record available before us on this special appeal.

2. By means of this intra-court appeal instituted under the provisions of Chapter VIII Rule V of the Rules of the Court, the State authorities have laid a challenge to the judgement and order dated 14.12.2020 passed by the learned Single Judge in Writ Petition No. 24316 (SS) of 2020, whereby the writ petition filed by the respondent no.1- petitioner was allowed with a direction to the appellant - State authorities to provide her benefit of leave encashment. Learned Single Judge while allowing the said writ petition and ordering to extend the benefit of leave encashment to the respondent no.1-petitioner has relied upon a judgement passed by another learned Single Judge, dated 27.05.2019 rendered in the case of ***Ram Kumar and others versus State of UP and others; Writ-A No.62389 of 2014.***

3. Impeaching the judgement and order passed by learned Single Judge, learned State counsel has vehmentaly argued that the judgement and order under appeal herein is erroneous and as a matter of fact the judgement rendered by the Court in the case of Ram Kumar (supra) requires a re-look for the reason that the relevant provisions contained in the Financial Handbook which govern leave rules and matter related thereto, including leave encashment, have not been taken into consideration by learned Single Judge while deciding the case of Ram Kumar (supra). It has been argued by learned State counsel that in terms of provisions contained in Fundamental Rules 81-B (1)(xii) of the Financial Handbook (Volume II, Part II to IV), in absence of any Government Orders having been issued by the State Government allowing leave encashment to an employee of an Associated College of Lucknow University, the respondent no.1- petitioner is not entitled to the said benefit. It has, thus, been argued that this aspect of the matter does not appear to have been considered by the learned Single Judge in the case of Ram Kumar (supra) and accordingly it is not only that the judgement in the case of Ram Kumar (supra) is erroneous but also that reliance placed by learned Single Judge while passing the judgement and order

under appeal herein also suffers from the said error.

4. On the other hand learned counsel for the respondent No.1-petitioner has submitted that the judgement in the case of Ram Kumar (supra) is based on elaborate discussion of the provisions contained in the U.P. State Universities Act 1973 (hereinafter referred to as "the 1973 Act), the first Statutes of the University concerned and the provision of Fundamental Rules 58 to 104 including sub-Rule 1 and 2 of Rule 81-B, and hence neither the said judgement in the case of Ram Kumar need any re-look, nor the judgement and order under appeal herein warrants any interference by this Court in this Special Appeal.

5. Sri Anurag Kumar Singh representing the University has stated that there is no irregularity in the judgement and order under appeal in this case and the special appeal is thus liable to be dismissed.

6. We have given our anxious consideration to the rival submissions made by learned counsel representing the respective parties.

7. Respondent No.1- petitioner was employed with Nari Siksha Niketan Post Graduate College, Lucknow against a Class III post, who after serving the said institution retired on 31.03.2018 on attaining the age of superannuation. Nari Siksha Niketan Post Graduate College is an Associated College listed at serial number 14 of the list of Colleges mentioned in the Statute 13.01 of the First Statutes of Lucknow University. "Associated College' under the 1973 Act has been defined to mean, in section 2 (4), any institution recognised by the University as such. Similarly "Affiliated College' has been defined in Section 2 (2) of the 1973 Act to mean any institution affiliated to the University in accordance with the provisions of the Act and the Statutes of that University. Section 37 which falls under Chapter VII of the 1973 Act provides for affiliation and recognition of the affiliated colleges and as per Section 37 (1), the said provision does not apply so far as the University of Lucknow is concerned. In other words, in Lucknow University there are no affiliated colleges rather Associated Colleges and other category of educational institutions such as Constituent Colleges and Institute etc. The provision relating to Associated Colleges is found in Section 38 of the 1973 Act which clearly provides that the said provision shall apply to the University of Lucknow.

8. Thus as per the scheme of 1973 Act, there is no concept of affiliated colleges so far as Lucknow University is concerned and similarly there is no concept as Associated Colleges so far as other State universities are concerned. This distinction became necessary for us to discuss for the reason that the judgement under appeal is based on the judgement in the case of Ram Kumar (supra), who was an employee of an affiliated college of Chaudhary Charan Singh Meerut University, Meerut and the relevant Statute available in the first Statutes of the Meerut University applicable in the case of employees working in an affiliated college has been quoted and relied upon in Ram Kumar's case. The said distinction also became necessary for us to discuss for the reason that the learned Single Judge in the judgement and order under appeal in this case has relied upon in the case of Ram Kumar (supra), which is based on the first

Statutes applicable to the employees of affiliated colleges of Meerut University, whereas the claim in the instant case of the respondent No.1- petitioner is based on the relevant Statute of the First Statutes of the Lucknow University applicable to the non-teaching staff of Associated Colleges.

9. However, the relevant Statute governing the conditions of service of the non-teaching staff of Meerut University is couched in identical language as the relevant Statute which governs the condition of service of a class III employee working in the Associated Colleges of Lucknow University.

10. Statute 36.01 of the First Statutes of Meerut University is quoted here under:-

"36.01: The leave rules applicable to the Government servants from time to time shall mutatis mutandis apply to the employees of like satute."

11. The Statute which is relevant for resolving the issue involved in this matter is Statute 37.01 of First Statutes of Lucknow University, which is also extracted herein below:-

"37.01 Leave- The leave rules applicable to the Government servants from time to time shall mutatis mutandis apply to the employees of like status."

12. Thus there is no doubt that Statute 37.01 of the First Statutes of the Lucknow University and the Statute 36.01 of the First Statutes of Meerut University are akin to each other and accordingly any decision in this matter will necessarily require the discussion in relation to and consideration of judgement in the case of **Ram Kumar (supra)** rendered by learned Single Judge.

13. We may, at this juncture, notice that Statute 37.01 of the Lucknow University falls in Chapter XXIII of the First Statutes which is in relation to, *"Qualification and Conditions of Service of non-Teaching Staff of the Associated Colleges*". Statute 37.01 clearly and categorically states that leave rules applicable to the government servants from time to time shall apply to the employees of the Associated Colleges of like status mutatis mutandis. Employees of like status mentioned in Statute 37.01 refers to the non-teaching staff of the Associated Colleges. Admittedly, the respondent No.1 - petitioner was employed against a class III post in an Associated College of Lucknow University, as such she will be governed in the matters of leave by Statute 37.01 of the First Statutes of the Lucknow University. There is no ambiguity in our mind regarding applicability of leave rules which govern the State Government employees, to the employees of an Associated College of Lucknow University.

14. We, thus, now need to examine as to what are the leave rules applicable to the State Government employees. There is no dispute at the bar that leave rules applicable to the State Government employees can be found under Chapter X, Section I of the Financial Handbook (Volume II, Part II to IV). The leave in respect of the State Government employees is thus governed by Fundamental Rules 58 to 104 of the Financial Handbook.

15. Fundamental Rules 81-B (1) of the Financial Handbook provides for certain leave rules applicable to the State Government employees. Rule 81-B (1) states that the procedure given therein shall be deemed to have come into force with effect from 01.01.1978 in regard to the

calculation of earned leave in respect of the State Government employees. Clause 1 of Rule 81-B of the Fundamental Rules contains various other sub-clause from (i) to (xii). Sub-Clause xii of Clause 1 of Rule 81-B runs as under:-

"(xii) A Government servant may be permitted to surrender a portion of earned leave at his credit and allowed cash payment in lieu thereof in accordance with the orders issued by Government, in this regard, from time to time."

16. There cannot be any dispute that in terms of the provisions contained in Statute 37.01 as quoted above sub-clause (xii) of Clause 1 of Rule 81-B will have its application to the employees working in the Associated Colleges of Lucknow University by virtue of express provision that leave rules as applicable to the State Government employees shall apply to the employees of Associated Colleges as well. We do not have any doubt that provisions contained in sub-clause (xii) of Clause I of Rule 81-B will have application in case of respondent No.1 - petitioner as well.

17. We are also of the considered opinion that the kind of language in which sub-clause (xii) of Clause I of Fundamental Rules 81-B is framed gives a substantive right to an employee to surrender a portion of earned leave available in his credit and to ask for cash payment in lieu thereof. In other words, the said provision confers a substantive right upon a Government servant to surrender a portion of earned leave and seek encashment instead of the leave.

18. By virtue of Statute 37.01, the petitioner as well, is thus conferred with the substantive right of surrendering a portion of her earned leave which might be available in her credit and to seek cash payment in lieu of such surrender of the earned leave.

19. The only issue/ question which has been raised by learned counsel for the State-Appellant is that so far as the State Government employees are concerned, the State Government has issued orders from time to time and payment of leave encashment in terms of the provisions contained in Rule 81-B(1)(xii) is permissible only in accordance with the Government Orders, however in case of employees of Associated Colleges, till date no Government Order has been issued. In this view, the submission is that in absence of any Government Order having been issued as per the requirement of sub-clause (xii) of Clause I of Fundamental Rule 81-B, the respondent No.1 - petitioner is not entitled to leave encashment.

20. Learned State Counsel has drawn our attention to a Government Order dated 26.04.1978 which provides that benefit of leave encashment will be available to the State Government employees equivalent to maximum of 180 days leave. The said Government Order also provides that benefit of leave encashment will be available after the Government employee attains the age of superannuation and retires and accordingly in terms of the formula for payment given in the said Government Order, a government employee shall be paid the amount of leave encashment at the time of his retirement.

21. Learned State Counsel while arguing further has also drawn our attention to yet another Government Order dated 01.07.1999, according to which the benefit of leave encashment was enhanced from

180 days to 300 days' earned leave. His submission, thus, is that so far as the State Government employees are concerned, the Government Order from time to time have been issued and accordingly they are entitled to the benefit of leave encashment, however in the case of employees working in the Associated College of Lucknow University, since the State Government has not issued any Government Order as such they are not entitled for payment of leave encashment.

22. Emphasis of the learned State Counsel is on the occurrence of the words, "in accordance with the orders issued by the Government in this regard, from time to time" as can be found in Clause 81-B (1)(xii) of the Fundamental Rules. When we examine and consider the aforesaid arguments advanced by the learned State counsel, we do not find ourselves in agreement with the same for the reasons which follows.

23. If we scrutinize the two Government Orders as pointed out by learned State Counsel, namely, Government Order dated 26.04.1978 and 01.07.1999, what we find is that the said Government Orders do not in any manner accord or vest any substantive right of leave encashment. The Government Orders only provide the point of time at which an employee shall be entitled to encash his/ her earned leave and the extent of the amount to be paid in lieu of the earned leave. As already pointed out, the first Government Order dated 26.04.1978 provides that the Government Employee shall be entitled to benefit of leave encashment at the time when he retires on his attaining the age of superannuation. This Government Order further provides that a Government employee shall be entitled to leave encashment up to 180 days of earned leave. Similarly the Government Order dated 01.07.1999 provides that leave encashment will be permitted upto 300 days earned leave. Thus, the Government Orders determine two things, firstly, the point of time when the employee shall be entitled to encash her earned leave and secondly, the extent or quantum of leave encashment admissible. Thus, Government Orders do not, clearly, create or vest any right in the employees so far as payment of leave encashment is concerned. The substantive right available to the employees is referable to the provisions Rule 81-B (1) (XII) of the Fundamental Rules.

24. In our considered opinion, the substantive right of leave encashment to an employee flows from the provisions contained in Fundamental Rule 81-B (1)(xii) of the Financial Handbook. The said provision of the Fundamental Rules confers right rather, substantive right upon an employee to surrender a portion of his/her earned leave and claim encashment in lieu thereof. The occurrence of the phrase "in accordance with the orders issued by the State Government, in this regard from time to time", in our considered opinion only permits the State Government to prescribe the manner in which leave encashment is to be made avaialble. Thus the Government Orders issued from time to time do not confer the substantive right of claiming leave encashment which rather flows from the earlier part of provision contained in Fundamental Rule 81-B (1)(xii) of the Financial Handbook.

25. In other words, sub-clause (xii) of Fundamental Rule 81-B (1) after conferring the right in a State Government to encash a portion of his earned leave only permits the

State Government to issue Government Orders for the purposes of prescribing the procedure etc. "In accordance with the orders" clearly refers to the nature of Government Orders which may be issued by the State Government which may be referable to the provision contained in Rule 81-B(1)(xii).

26. In view of the aforesaid discussion, insistence of the learned State Counsel that for entitling any Government servant to leave encashment, it is necessary that Government Order should be issued and unless and until the Government Order is issued, a Government employee will not be entitled to leave encashment, in our considered opinion, is fallacious and such an argument is clearly based upon a complete misreading of the provisions of Fundamental Rule 81-B (1)(xii) of the Financial Handbook.

27. So far as the respondent no.1- pettioner is concerned, as already observed above, she retired from a Class III post working in an Associated College of Lucknow University and Statute 37.01 of the First Statute of the Lucknow University clearly provides that leave rules applicable to the employees of Associated Colleges will be the same as are applicable to the Government servant. Accordingly, we are of the considered opinion that Fundamental Rule 81-B (1)(xii) of the Financial Handbook will be applicable to the respondent no.1- petitioner as well and further that the said provision confers a right upon the respondent no.1- petitioner to surrender a portion of her earned leave and encash the same. Merely because the State Government has not issued any Government Order prescribing the manner and quantum and point of time etc. for leave encashment, will not, in our opinion, dis-entitle the respondent no.1-petitioner to seek the benefit of leave encashment. We may also emphasise that while framing Statute 37.01, the Statute making authority was conscious and accordingly it has used latin phrase "mutatis mutandis" in the said provision. The purpose of using such a phrase in the First Statute is not difficult to gather. In our opinion the intention of the Statute making authority/ body was clear and infact it intended to provide all the leave benefits to the employees of Associated College, which are applicable on and available to a Government employee.

28. There is yet another aspect of the matter which cannot be lost sight of. The respondent no.1- petitioner has been legitimately expecting throughout her service career that she shall be entitled to the leave encashment in terms of the provisions contained in Statute 37.01 and accordingly instead of availing the leaves, which she could have, she rather allowed certain number of leaves to be credited in her leave account. In such a view of the matter, the stand being now taken by the State Government is not only contrary to the statutory prescription available in the Statute 37.01 read with Fundamental Rules 81-B (1)(xii) of the Financial Handbook but is also against the principle of legitimate expectation.

29. So far as the reliance placed by learned Single Judge in the judgment under Appeal before us on the judgement by another learned Single Judge in the case of **Ram Kumar (supra)** is concerned, the only difference in the facts of these two cases is that the employee in the case of **Ram Kumar (supra)** was employed with an Affiliated College of Meerut University, whereas in the present case the respondent

no.1-petitioner was employed with the Associated College of Lucknow University. The Statute 36.01 of the First Statute of Meerut University, as already noticed above, is identically worded as Statute 37.01 of the First Satutes of Lucknow University. Learned Single Judge in the case of **Ram Kumar (supra)** has elaborately discussed the provisions of relevant Statute and those of the Financial Handbook including the Fundamental Rules 81-B (1)(xii) of the Financial Handbook and has concluded that in view of the said provisions, the benefit of leave encashment is available to an employee of a Affiliated College of Meerut University.

30. It has also been argued by learned counsel for the appellant- State authorities that in view of the provisions contained in Section 21(3), no expenditure where approval of State Government is required by the 1973 Act or the Statute or the Ordinances, shall be incurred except with such approval previously obtained from the State Government and since there is no approval accorded by the State Government for payment of leave encashment, which will of course be an expenditure, the respondent no.1-petitioner is not entitled to the benefit of the leave encashment.

31. On behalf of the appellant it has further been urged that in terms of the provisions contained in sub-section (4) of Section 21 of the 1973 Act, pay and other allowances to various categories of employees of the University or any Institute or a Constituent or Affiliated or Associated College shall be such as may be approved by the State Government. The submission is that leave encashment forms part of pay and unless and until this is approved by the State Government the respondent no.1- petitioner will not be entitled to leave encashment.

32. When we examine sub-clause (3) of Section 21, what we find is that approval of the State Government is required only in a situation where expenditure can be incurred by the University for which approval of the State Government is required either under the 1973 Act or under the first Statute or Ordinance. Learned counsel representing the appellant has utterly failed to show that there is any requirement of approval for expenditure for meeting the expenditure in making payment of leave encashment either under the 1973 Act or in the first Statutes or in the Ordinances of Lucknow University. On the contrary, so far as the leave related matters are concerned, Statute 37.01 is clear, according to which the said matters shall be governed by the Rules applicable to the State Government employees. There being specific provision in Statute 37.01 regarding applicability of leave rules applicable to the government employees, we are of the opinion that all the leave rules applicable to the State Government employees as are contained in the Fundamental Rules will have application in case of the respondent no.1- petitioner as well and thus she is legally entitled for grant of benefit of leave encashment as per the conferment of rights in terms of Fundamental Rule 81-B(1)(xii) of the Financial Handbook.

33. So far as the arguments based on sub-Section (4) of Section 21 of the 1973 Act is concerned, we find that the said issue has been considered by the learned Single Judge in the case of **Ram Kumar (supra)**, wherein it has been observed that such

argument would have been justified in case a provision such as Statute 36.01 (in case of Meerut University which is akin to Statute 37.01 applicable to the Lucknow University) was not in existence in the first Statutes and no approval was granted by the Sate Government in that regard. The reasoning given by learned Single Judge in the case of the **Ram Kumar (supra)** appears to be correct. The argument based on Section 21(4) could be said to be available to the learned State Counsel only in absence of the provisions which are contained in Statute 37.01 of the First Statutes.

34. For the reasons aforesaid, we are unable to find ourselves in agreement with the submission made by the learned counsel for the appellant- State authorities. The judgment and order passed by learned Single Judge which is under Appeal herein does not warrant any interference by us in this Special Appeal.

35. The Special Appeal is thus ***dismissed.***

36. However, there will be no order as to Costs.

(2022) 9 ILRA 310
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ C No. 20596 of 2022

C/M Maulana Abdul Kalaam Azad Education Society, Aadelih, Dist Mau & Anr. ...Petitioners

Versus

Assistant Registrar Firms Societies and Chits, Azamgarh Region Azamgarh & Anr. ...Respondents

Counsel for the Petitioners:
Sri Adarsh Singh, Sri Indra Raj Singh

Counsel for the Respondents:
C.S.C., Sri Anshu Chaudhary, Sri G.K. Singh

A. Constitution of India – Article 226 – Writ – Maintainability – Committee of management dispute – Bye-Laws authorized the Manager to initiate proceeding in a Court of Law, however, the proceeding was initiated by the President – Proceeding by the President in individual capacity – Permissibility – Word 'pairvi' in the Bye-Laws of the society – Scope defined – Held, word "pairvi" in common parlance implies that all proceedings including institution of legal proceedings in a Court of Law is to be done by the Manager and as such, there appears to be some force in the preliminary objection – However, the Court finds that even if the writ petition is held to be not maintainable by the Committee of Management through its President, it is certainly maintainable by the President in his/her individual capacity. (Para 10)

B. Societies Registration Act, 1860 – Sections 4(1) & 25(1) – Election – Dispute or doubt – Duty of Assistant Registrar to refer the dispute, when can be discharged – Assistant Registrar found the rival claim not bonafide – Validity challenged – Held, only genuine rival claim / disputes or doubts about the office bearers of the Society are required to be referred for adjudication by Prescribed Authority under Section 25 (1) of the Societies Registration Act, 1860 and the Assistant Registrar, Firms, Societies and Chits while referring the dispute is not to function as a post office/rubber stamp – High Court found no error in the order of the Assistant Registrar to proceed u/s 4(1) . (Para 12, 13 and 14)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Gram Shiksha Sudhar Samiti Junior High School Sikandra District Manpur Dehat & anr. Vs Registrar Firms, Societies and Chits, U.P. Lucknow & ors.; 2010 (3) UPLBEC 2522

2. Ramadhar Shashtri & Anr. Vs Deputy Director of Education, IV Region, Allahabad & ors.; 1987 UPLBEC 14

3. Committee of Management, Rashtriya Junior High School (Society) Vs The Assistant Registrar, Firms, Societies and Chits & ors.; 2005 (61) ALR 74

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

1. Heard Shri Indra Raj Singh, learned counsel for the petitioners and Shri G. K. Singh, learned Senior Advocate assisted by Shri Anshu Chaudhary, leaned counsel appearing for the caveator-respondent No. 3. The learned Standing Counsel has appeared on behalf of respondent No. 1 & 2.

2. The challenge laid in the writ petition is to an order dated 2.6.2022 passed by the Assistant Registrar, Firms Societies and Chits, Azamgarh Region, Azamgarh / respondent No. 1 whereby and whereunder, the claim of the petitioner No. 2 to hold the post of President of the Committee of Management has been negated while the claim of the respondent No. 3 has been approved.

3. The facts shorn of unnecessary details, necessary for the purposes of adjudicating the controversy involved in the instant writ petition, briefly, stated are that there is a Society in the name and style of "Maulana Abdul Kalaam Azad Education Society, Gram Aadedhi, Post Umapur, Tehsil Sadar, Janpad Mau" duly registered under the provisions of the Societies Registration Act, 1860. The Society has its approved bye laws and the Certificate of Registration is renewed from time to time. The Society has established and runs an educational institution in the name of Maulana Abdul Kalaam Azad Alpsankhayak Shikshak Prasikshan Sansthan, Pardaha, Mau which is duly recognized under the U.P. State Universities Act, 1973 and is managed by recognized Committee of Management whose term is five years. The Certificate of Registration of the Society was lastly renewed vide order dated 16.10.2019 by the Assistant Registrar/ respondent No. 1 for a period of five years on the proceedings submitted by Shri Mohd. Javed as Manager and Shri Amit Kumar Singh, as President of the Committee of Management of the Society.

4. The General Body of the Society in its meeting held on 7.2.2021 presided over by the President Amit Kumar Singh resolved to induct at least two new members and in furtherance thereof an Advertisement dated 9.2.2021 was published in the News Daily "Devbrat", Azamgarh. The petitioner No. 2 Smt. Mridula Mishra and one Nisha Khan are stated to have been inducted as Life Members of the General Body of the Society. Meanwhile, Shri Amit Kumar Singh, the recognized President is stated to have died on 16.4.2021. The Vice President, Shri Wahadullah is stated to be residing in a foreign country. A meeting of the General Body is stated to have been held on 3.10.2021 and the petitioner No. 2 is stated to have been elected as President against the casual vacancy occurred on the death of the President Shri Amit Kumar Singh, for the remaining term of the

Committee of Management of the Society. The petitioner No.2 is stated to have submitted the proceedings along with an application dated 12.11.2021. Another set of proceedings were submitted by one Gulam Nabhi alleging himself to be Manager and Ajit Kumar Singh, as President with the Assistant Registrar / respondent No. 1.

5. The Assistant Registrar, Firms Societies and Chits, Azamgarh Region, Azamgarh/respondent No. 1 issued notices to both the rival claimants and after hearing them reserved the judgment on 12.5.2022. By the impugned judgment dated 2.6.2022, the respondent No. 1 has proceeded to reject the claim of the petitioner No. 2 and has approved the proceedings submitted by Gulam Nabhi. The said order is under challenge in the present writ petition.

6. Learned counsel for the petitioners has assailed the order dated 2.6.2022 principally on the ground that:-

the respondent No. 1 even after reserving the judgment after hearing the parties on 12.5.2022 has relied upon documents submitted by the rival claimant Gulam Nabhi on 20.5.2022 even without serving a copy of the same upon the petitioners.

the petitioners had submitted written arguments with certain documents and application on 19.5.2022, but the respondent No. 1 failed to consider the same in a prospective manner.

the impugned order has been passed in violation of the principles of natural justice.

the impugned order is without jurisdiction inasmuch as the Assistant Registrar is not vested with powers under the Societies Registration Act, 1860 to adjudicate any doubt or dispute with regard to the office bearers of the Society and the dispute was liable to be referred under Section 25 (I) of the Societies Registration Act, 1860.

7. Learned counsel for the petitioners Shri Indra Raj Singh in order to buttress his arguments has placed reliance upon the decisions in case of ***Gram Shiksha Sudhar Samiti Junior High School Sikandra District Manpur Dehat and another Vs. Registrar Firms, Societies and Chits, U.P. Lucknow and others reported in 2010 (3) UPLBEC 2522*** (Paras 7, 8 & 9) and in case of ***Ramadhar Shashtri & Anr. Vs. Deputy Director of Education, IV Region, Allahabad & Ors., reported in 1987 UPLBEC 14*** (Paras 2, 3 & 4).

8. A preliminary objection as to the maintainability of the writ petition at the instance of the petitioner No. 2 describing herself as the President of the Committee of Management has been raised by Shri G. K. Singh, learned Senior Counsel assisted by Shri Anshu Chaudhary, learned counsel representing the respondent No. 3. The objection proceeds on the premise that under the approved bye laws of the Society proceedings in a Court of Law on behalf of the Society can be maintained on behalf of the Manager of the Society and the President is not authorized to maintain the proceedings.

9. Considering the aspect of the preliminary objection regarding the maintainability of the writ petition, the Court finds that Clause 14 of the approved bye laws of the Society which have been brought on record as Annexure-1 to the writ petition provides that the *pairvi* of the legal proceedings for and against the Society is to be done by the Manager.

10. In the opinion of the Court, the word "*pairvi*" in common parlance implies that all proceedings including institution of legal proceedings in a Court of Law is to be done by the Manager and as such, there appears to be some force in the preliminary objection raised by the learned counsel for the respondent. However, the Court finds that the President of the Society has arrayed herself as petitioner No. 2 and even if the writ petition is held to be not maintainable by the Committee of Management through its President, it is certainly maintainable by the President in his/her individual capacity. In such view of the matter, the preliminary objection raised about the non maintainability of the writ petition is overruled. The writ petition is held to be maintainable.

11. Now coming to the arguments advanced by learned counsel for the petitioner No. 2, on the merits, the Court finds that the Assistant Registrar in the impugned order has clearly recorded the factum that arguments of the parties were heard on 12.5.2022 and the judgment was reserved. It was agreed between the parties that they would submit written submissions and original documents by 20.5.2022. In pursuance to the order dated 12.5.2022, Shri Gulam Nabhi submitted the original documents pertaining to the proceedings while Smt. Mridula Mishra failed to produce any original documents and only submitted her written arguments. The Court is not impressed with the argument advanced by the learned counsel for the petitioners that the respondent No. 1 even after reserving the judgment, after hearing the parties on 12.5.2022 relied upon documents submitted by Gulam Nabhi on 20.5.2022 inasmuch as it had been agreed between the parties to do so. The respondent No. 1 had permitted the original records to be filed. Shri Gulam Nabhi filed the original records, but Smt. Mridula Mishra, petitioner No. 2 failed to filed any original documents and pleaded that the documents had been stolen as an after thought. The case law relied upon by the learned counsel reported in ***Ramadhar Shashtri's case*** *(supra)* is clearly distinguishable on facts as in that case the Deputy Director permitted both parties to file documents after hearing the case on his own, but in the case at hand, the parties had themselves agreed to submit the original records by a particular date. The impugned order cannot be said to have been passed in violation of principal of natural justice as ample equal opportunity had been given to the petitioner No. 2 to establish her case.

12. It has also been argued that the impugned order dated 2.6.2022 passed by the Assistant Registrar/respondent No. 1 is without jurisdiction inasmuch as instead of referring the rival claims set up before him under Section 25 (I) of the Societies Registration Act, 1860, the Assistant Registrar proceeded to adjudicate the doubt or dispute with regard to the office bearers of the Society. Learned counsel for the petitioners has placed reliance upon the decision of Division Bench of this Court reported in ***Gram Shiksha Sudhar Samiti's case*** *(supra)*. There can be no quarrel about the law laid down by Their Lordships in the decision reported in ***Gram Shiksha Sudhar Samiti's case*** *(supra)*. However, the Court is of the opinion that only genuine rival claim / disputes or doubts about the office bearers of the Society are required to be referred for adjudication by Prescribed Authority under Section 25 (i) of the Societies Registration Act, 1860 and the Assistant Registrar, Firms, Societies and Chits while referring the dispute is not to function as a post office/rubber stamp.

Sufficient, prima facie, material must be produced before the Registrar before he can validly exercise his jurisdiction of referring the dispute.

13. In the case at hand, the Assistant Registrar while, prima facie, considering the existence of a bona fide dispute regarding the office bearers of the Society has recorded in his order that in the typed copy of the proceedings submitted along with her application / objection dated 12.11.2021, the petitioner No. 2 Smt. Mridula Mishra, the details of the number of members of present are not mentioned. It has also not been mentioned as to who convened the meeting of the General Body and who informed the members. The said aspect has neither been clarified nor any evidence has been filed in support thereof. In the absence of proof of convening the meeting as per the registered bye laws of the Society, the proceedings submitted by Smt. Mridula Mishra appears to be doubtful. Besides the above, the Assistant Registrar has in its order recorded the factum that in respect of the meeting of the General Body on 3.10.2021 in which the vacant post of the President Shri Amit Kumar Singh has been filled up by Smt. Mridula Mishra. Much prior to the said date on 15.4.2021, the President Shri Amit Kumar Singh is stated to have expired and in terms of Rule 10, the then Manager Mohd. Javed was authorized to convene the meeting of the General Body on 3.10.2021 and send information to the members. No statement has been made by Smt. Mridula Mishra that the meeting had been convened by Mohd. Javed nor any document to that effect has been presented. In contrast to the above, much before the submission of the proceedings on 12.11.2021 i.e. 28.5.2021, the proceedings of filling the casual vacancy of the post of President has been submitted by Mr. Mohd. Javed on 29.4.2021. The Assistant Registrar has on this basis returned a finding that the meeting of the General Body convened on 3.10.2021 was convened unauthorizedly and is void since the beginning. In contract to the above, the proceedings presented by Shri Gulam Nabhi and available in the office file have been found to confirm to the original records and as per the approved bye laws, the Assistant Registrar thus concluded that the application/objection dated 12.11.2021 submitted by the petitioner No. 2 Smt. Mridula Mishra as President and the proceedings attached with the objections are not found in accordance with the registered bye laws of the Society. In substance the Assistant Registrar has found that the rival claim set up by the petitioner No. 2 Smt. Mridula Mishra is not bona fide and accordingly has declined to refer the dispute to the prescribed authority under Section 25 (I) of the Societies Registration Act, 1860 and has ordered for proceeding under Section 4 (1) of the Act in respect of the proceedings submitted by Gulam Nabhi.

14. The Court finds no error in the view taken by the Assistant Registrar, Firms, Societies and Chits in refusing to refer the rival disputes for adjudication to the Prescribed Authority under Section 25 (I) of the Societies Registration Act, 1860 so as to warrant any interference in exercise of writ jurisdiction under Article 226 of the Constitution of India. The view of the Assistant Registrar is in consonance with the ratio of the decision of a Division Bench of this Court reported in ***Committee of Management, Rashtriya Junior High School (Society), Babhaniyaon, District Jaunpur versus The Assistant Registrar, Firms, Societies and Chits, Varanasi Region, Varanasi and others, 2005 (61)***

ALR 74 decided on 11.8.2005. The relevant paragraph 4 of the aforesaid decision is being reproduced hereunder:-

"4. It is the standard law that if any bona fide dispute as to two rival Committees of Managements is shown to be in existence to the Registrar or Assistant Registrar, a reference by him of the dispute to the Prescribed Authority follows as a matter of course. But a bona fide dispute does come into existence merely because one member, even if he is a founder member, chooses simply to he has say or assert that he has a rival Committee and therefore, a bona fide dispute as to Management exists. Sufficient prima facie material must be produced before the Registrar before he can validly exercise his jurisdiction of referring the dispute. He must, simply put, be satisfied that there is something to refer and he is not merely sending litigations before the Prescribed Authority, without there being even a shadow of real cause for litigation."

15. In view of the above, the writ petition lacks merit. It is accordingly ***dismissed.*** No order as to costs.

(2022) 9 ILRA 315
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2022

BEFORE

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

Writ C No. 21038 of 2022

Smt. Kamla Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vivek Saran

Counsel for the Respondents:
Sri Rajeev Singh (Standing Counsel), Sri J.N. Maurya

A. Acquisition Law – Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Sections 17(2) & 24(2) – Lapse of acquisition – Possession u/s 17 (2) was taken place and name of the Development Authority was entered in revenue record – Effect – Held, if some of the individual, who was the owner of the land in possession at the time of acquisition, continues in possession, may be by building a house, or raising some other construction, the act of the person continuing in possession, would be trespass – Shyoraj Singh's case relied upon – High Court denied to accept the claim of the petitioner to lapse the acquisition u/s 24(2). (Para 16 and 18)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Shyoraj Singh & anr. Vs St. of U.P. & ors.; 2021 SCC OnLine All 873

2. Indore Development Authority Vs Manoharlal & ors.; (2020) 8 SCC 129

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

1. This writ petition has been filed challenging an order dated 26th May, 2022 passed by the State Government declining to declare proceedings for acquisition of the petitioner's land comprised of *Gata* No. 340/1, measuring 0-10-3 (0.12836 hectares), situate in Village Kunda, District Meerut lapsed under Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short, "the Act of 2013').

2. Heard Mr. Vivek Saran, learned Counsel for the petitioner, Mr. Rajeev Singh, learned Standing Counsel for appearing on behalf of respondent Nos. 1 to 4 and Mr. J.N. Maurya, learned Counsel appearing for respondent No. 5.

3. The facts leading to this petition are that large tracts of land, part of Revenue Villages of Achraunda, Kanchanpur Ghopla, Kansa, Nagla Sherkho, Kunda and Rithani in District Meerut were proposed to be acquired for the purpose of development of Shatabdi Nagar Awasiya Yojna, Meerut. A notification under Section 4(1) read with Section 17(1) of the Land Acquisition Act, 1894 (for short, "the Act of 1894) dated 14.08.1987 was issued. The aforesaid notification was followed by a declaration under Section 6(1) read with Section 17(4) of the Act of 1894 dated 04.09.1987. Award for the land acquired was announced on 22.02.1990, which was amended on 15.03.1990 and 25.06.1990. A part of this acquisition was a plot bearing No. 340/1, measuring 0-10-3 (0.12836 hectares) in Village Kunda, District Meerut. The aforesaid land belongs to the petitioner, Smt. Kamla Devi. The dispute in this writ petition relates to the aforesaid plot, which shall be hereinafter referred to as "the land in dispute'.

4. It is the petitioner's case that physical possession of the land in dispute was never taken by the State or transferred to the Meerut Development Authority (for short, "the Development Authority') and no compensation has been paid to her till date. In the circumstances, upon coming into force of the Act of 2013 w.e.f. 1st January, 2014, a period of five years have elapsed since the making of the award, and physical possession of the land has not been taken by the State Government. It is the petitioner's case that in similar circumstances, one Harbhajan Singh, whose land was acquired for the same purpose and through the same notification, had the subject land returned to him by a decision of the State Government dated 23rd January, 2015, holding the acquisition to have lapsed under Section 24(2) of the Act of 2013.

5. The petitioner has made a grievance that his case has been treated differentially than Harbhajan Singh, though identical on all premises. The petitioner approached this Court, seeking a declaration that proceedings relating to the land in dispute for acquisition be declared as lapsed under Section 24(2) of the Act of 2013 through Writ-C No. 34122 of 2015. The said writ petition was disposed of by this Court vide order dated 02.03.2017, granting liberty to the petitioner to raise her claim before the Collector, Meerut, who was directed to process the petitioner's claim within four months from the date of receipt of a copy of this Court's order. The Collector was further directed to convey his recommendations to the State Government after processing the petitioner's claim, whereas the State Government was directed, upon receiving the Collector's recommendation, to decide the petitioner's claim about lapsing of acquisition.

6. The petitioner submitted her claim to the District Magistrate, Meerut in terms of this Court's order dated 02.03.2017. The District Magistrate called for reports from the Tehsildar, who in turn sought the Lekhpal's report. The Lekhpal and the Tehsildar submitted a report on 16.11.2017 to the District Magistrate saying that the petitioner is in actual physical possession of the land in dispute. The Tehsildar/ Lekhpal's report dated 16.11.2017 is on

record as Annexure No.5 to the writ petition. It was, however, reported by the Lekhpal that *Gata* No. 340 of Village Kunda was a much subdivided plot and its subdivisions were located in different Khata numbers of the village. It was reported that so far as the land in dispute is concerned (*Gata* No. 340/1, measuring 0.1260 hectares), it was recorded in the *khatauni* in the name of the *Meerut Development Authority Shatabdi Nagar Yojna*. However on the spot, on the land in dispute, there was a Kasana Guest House, a permanent construction in existence, besides A *Dharm Kanta* and an office (private), where a property dealership was established. The remainder of the plot was surrounded by a boundary-wall. It is the petitioner's further case that upon information being sought from the office of the Land Acquisition Officer (Joint Organization), Meerut under the Right to Information Act about the status of payment of compensation to the landowner relating to the land in dispute, the answer was that the awarded compensation had not been deposited in Court. This information was given on 17.12.2016 and is on record as Annexure No. 6 to the writ petition.

7. The petitioner further asserts that though the land in dispute was acquired by the State for the development of the scheme, known as Shatabdi Nagar Awasiya Yojna, by the Development Authority, they never took steps to take possession thereof. No compensation was also paid to the petitioner. There is a pointed reference to certain resolutions of the Development Authority's Board dated 21.10.1999 and 19.12.2011, where it was resolved that such land that has house/ constructions be released from acquisition as it was not required any more. It is pointed out that regarding the land in dispute, the resolution dated 21.10.1999 shows that the Board resolved that the said land be freed from acquisition as it was not required for the Shatabdi Nagar Awasiya Yojna. Copies of the resolutions dated 21.10.1999 and 19.12.2011 are attached as Annexure Nos. 9 and 10, respectively.

8. It must be noticed here that the resolution of the Board dated 21.10.1999 does not show any decision specifically with regard to the land in dispute (*Gata* No. 340/1, measuring 0.3612 hectares). Rather, there is a supplementary Item No. 13, where there is an omnibus resolution proposing to exempt from acquisition 2.56 acres of land in Village Kunda, that was acquired for the Shatabdi Nagar Awasiya Yojna. The resolution does not indicate that it particularly refers to the land in dispute, or that it proposes to exempt from acquisition all lands in Village Kunda, acquired for the scheme aforesaid.

9. It is urged by the petitioner that after the last of these resolutions was passed by the Development Authority, the Act of 2013 came into force and since possession of the land in dispute was never taken from the petitioner or the compensation paid in terms of the award dated 22.02.1990, as last amended on 25.06.1990, the acquisition stood lapsed under Section 24(2) of the Act of 2013. Attention of this Court has also been drawn to a report of the Additional District Magistrate (Land Acquisition) dated 13.10.2018, that was drawn up for the purpose of the State to take a decision in the matter of lapse claimed by the petitioner under Section 24(2) of the Act of 2013. The said report is said to have been made by the Additional District Magistrate (Land Acquisition), Meerut after hearing the petitioner and the Development

Authority. A copy of this report dated 13.10.2018 is on record as Annexure No. 12 to the writ petition. The said report is asserted to have been forwarded to the State Government. It appears that the directions of this Court carried in the order dated 02.03.2017 passed in Writ-C No.34122 of 2015, were not carried to their logical conclusion promptly by the State and no decision was taken. This led the petitioner to file a contempt application, wherein notice was issued to the respondents. It is the petitioner's case that the contempt rule did not avail and the petitioner was driven to bring another writ petition being Writ-C No.28526 of 2021, where a prayer was made that a mandamus be issued to the State Government to take appropriate decision for exemption of the land in dispute on the basis of the report made by the A.D.M. (L.A.), Meerut dated 13.10.2018. The said petition was entertained and the respondents were required to file a counter affidavit. However, before Writ-C No.28526 of 2021 could proceed further, the State Government rejected the petitioner's claim, seeking a declaration about lapse, relating to the land in dispute under Section 24(2) of the Act of 2013 vide order dated 26.05.2022.

10. This petition has been preferred challenging the aforesaid order, which shall be called hereinafter as 'the impugned order'.

11. Before us, Mr. Vivek Saran, learned Counsel for the petitioner has emphasized the fact that in writing the impugned order, the State Government has ignored from consideration the fact that physical possession of the land in dispute was not taken from the petitioner, pursuant to the proceedings initiated under the Act of 1894 until enforcement of the Act of 2013, and further that a period of five years and much more had elapsed from the date of the award, under the Act of 1894, when the Act of 2013 came into force, without the petitioner being paid compensation, due under the award. It is emphasized by the learned Counsel for the petitioner that the impugned order has been passed ignoring from consideration the resolutions dated 21.10.1999 and 19.12.2011, proposing to exempt from acquisition the acquired land, including the land in dispute, whereon the residents of the village concerned had constructed houses, or as said in the resolution of the year 1999, exempt 2.56 acres of land in Village Kunda. It is also argued that the impugned order is based on a unilateral report made by the Collector, where the petitioner has not been given any opportunity of hearing.

12. Mr. Rajeev Singh, learned Standing Counsel appearing on behalf of respondent Nos. 1 to 4 and Mr. J.N. Maurya, learned Advocate appearing on behalf of the Development Authority, on the other hand, submitted that the land in dispute is an acquired land of the State, that has vested in the State, free from all encumbrances long ago. It has been transferred to the Development Authority and it is up to them when, how and in what manner they would utilize different parts of the large tracts of the acquired land, spread across five villages. They have urged that case of lapse under Section 24(2) of the Act of 2013 is not even remotely established.

13. We have carefully considered the submissions made at the Bar and perused the record.

14. It is not in dispute that the land in dispute was acquired by the State for the

purpose of a residential scheme to be developed by the Development Authority. The acquisition was proposed through a notification dated 14.08.1987 under Section 4 read with Section 17(1) of the Act of 1894 followed by a declaration under Section 6(1) read with Section 17(4) of the Act of 1894. The invocation of Section 17(1) followed by Section 17(4) shows that considering the urgency involved, inquiry under Section 5-A was dispensed with. Possession was immediately taken under Section 17(2) and the land in dispute vested in the State, free from all encumbrances. Award in this case was passed on 22.02.1990, which was amended on 15.03.1990 and further on 25.06.1990. The Collector has recorded it as a fact that the State transferred possession of the land in dispute (*Gata* No. 340/1, measuring 0-10-3) to the Development Authority. The title in the name of the Development Authority has been entered in the revenue records.

15. In this regard, we must remark that in aid of the decision taken by the State Government upon the petitioner's claim of lapse of acquisition under Section 24(2) of the Act of 2013, there is a report dated 16.11.2017 submitted by the Lekhpal to the Additional District Magistrate (Land Acquisition), Joint Organization, Meerut. The said report bears out with the finding recorded in the order impugned that the land in dispute was recorded in the revenue records in the name of the 'Meerut Development Authority Shatabdi Nagar Awasiya Yojna'. For a fact, therefore, it is very difficult to accept the petitioner's contention that possession of the land in dispute was not taken from her. The petitioner does not dispute the fact that the land in dispute was acquired as part of an acquisition for the Shatabdi Nagar Awasiya Yojna, that involved acquisition of large tracts of land, spread across five villages. The acquisition was completed by invoking urgency clause under Section 17(1), dispensing with inquiry under Section 5-A of the Act of 1894. In the circumstances, possession of the land in dispute, along with all the land acquired, would have to be done by the State by drawing the memorandum of possession or the *panchnama*. This kind of a *panchnama* is not to be signed by each individual landholder. It is signed by the relevant Authorities of the State and possession of the land is taken under it. It leads to vesting of the acquired land, free from all encumbrances under Section 17(2) of the Act of 1894.

16. If some of the individual, who was the owner of the land in possession at the time of acquisition, continues in possession, may be by building a house, or raising some other construction, the act of the person continuing in possession, would be trespass; it would not be evidence of possession, not being taken in the context of proceedings under Sections 4(1) and 6(1) of the Act of 1894, invoking Section 17(1). The aforesaid issue fell for consideration consideration of a Division Bench of this Court in **Shyoraj Singh and another v. State of U.P. and others, 2021 SCC OnLine All 873,** where their Lordships following the decision of the Supreme Court in **Indore Development Authority v. Manoharlal and others, (2020) 8 SCC 129**, held:

"20. The issue as to what is meant by "possession of the land by the State after its acquisition" has also been considered by Constitution Bench of Hon'ble Supreme Court in **Indore Development Authority** Vs. Manoharlal and others AIR 2020 SC 1496. It is opined therein that after the

acquisition of land and passing of award, the land vests in the State free from all encumbrances. The vesting of land with the State is with possession. Any person retaining the possession thereafter has to be treated trespasser. When large chunk of land is acquired, the State is not supposed to put some person or police force to retain the possession and start cultivating on the land till it is utilized. The Government is also not supposed to start residing or physically occupying the same once process of the acquisition is complete. If after the process of acquisition is complete and land vest in the State free from all encumbrances with possession, any person retaining the land or any re-entry made by any person is nothing else but trespass on the State land. Relevant paragraphs 244, 245 and 256 are extracted below:

"244. Section 16 of the Act of 1894 provided that possession of land may be taken by the State Government after passing of an award and thereupon land vest free from all encumbrances in the State Government. Similar are the provisions made in the case of urgency in Section 17(1). The word "possession" has been used in the Act of 1894, whereas in Section 24(2) of Act of 2013, the expression "physical possession" is used. It is submitted that drawing of *panchnama* for taking over the possession is not enough when the actual physical possession remained with the landowner and Section 24(2) requires actual physical possession to be taken, not the possession in any other form. When the State has acquired the land and award has been passed, land vests in the State Government free from all encumbrances. The act of vesting of the land in the State is with possession, any person retaining the possession, thereafter, has to be treated as trespasser and has no right to possess the land which vests in the State free from all encumbrances.

245. The question which arises whether there is any difference between taking possession under the Act of 1894 and the expression "physical possession" used in Section 24(2). As a matter of fact, what was contemplated under the Act of 1894, by taking the possession meant only physical possession of the land. Taking over the possession under the Act of 2013 always amounted to taking over physical possession of the land. When the State Government acquires land and drawns up a memorandum of taking possession, that amounts to taking the physical possession of the land. On the large chunk of property or otherwise which is acquired, the Government is not supposed to put some other person or the police force in possession to retain it and start cultivating it till the land is used by it for the purpose for which it has been acquired. The Government is not supposed to start residing or to physically occupy it once possession has been taken by drawing the inquest proceedings for obtaining possession thereof. Thereafter, if any further retaining of land or any re-entry is made on the land or someone starts cultivation on the open land or starts residing in the outhouse, etc., is deemed to be the trespasser on land which in possession of the State. The possession of trespasser always inures for the benefit of the real owner that is the State Government in the case.

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256. Thus, it is apparent that vesting is with possession and the statute has provided under Sections 16 and 17 of the Act of 1894 that once possession is taken, absolute vesting occurred. It is an indefeasible right and vesting is with possession thereafter. The vesting specified

under Section 16, takes place after various steps, such as, notification under Section 4, declaration under Section 6, notice under Section 9, award under Section 11 and then possession. The statutory provision of vesting of property absolutely free from all encumbrances has to be accorded full effect. Not only the possession vests in the State but all other encumbrances are also removed forthwith. The title of the landholder ceases and the state becomes the absolute owner and in possession of the property. Thereafter there is no control of the landowner over the property. He cannot have any animus to take the property and to control it. Even if he has retained the possession or otherwise trespassed upon it after possession has been taken by the State, he is a trespasser and such possession of trespasser enures for his benefit and on behalf of the owner." (emphasis supplied)

17. In the background of the aforesaid well established legal proposition in cases of acquisition concluded under the Act of 1894, invoking the provisions of Sections 17(1) and 17(4), it is difficult to accept the petitioner's contention that possession was never taken. Moreover in this case, there is documentary evidence to show that possession was taken and the revenue records were corrected. The Lekhpal's report shows that the land in dispute is recorded in the name of the 'Meerut Development Authority Shatabdi Nagar Awasiya Yojna', which is evidence enough of possession being taken by the State and transferred to the Development Authority.

18. We are, therefore, not inclined to accept the petitioner's case that possession of the land in dispute was never physically taken so as to bring into existence one of the conditions (not taking physical possession) entitling the petitioner to claim lapse under Section 24(2) of the Act of 2013 upon its enforcement. The other condition about the compensation not being paid to the petitioner, though no longer in itself enough to entitle the petitioner to claim lapse under Section 24(2) of the Act of 2013 is also not established on facts.

19. It has been recorded in the impugned order that due compensation in respect of the land in dispute has been deposited in the Meerut Treasury in the account of revenue deposit. The contention of the petitioner that there is no deposit made in Court is no longer the requirement of the law to prevent lapse under Section 24(2) of the Act of 2013 in view of the decision of the Supreme Court in **Indore Development Authority's** case *(supra)*.

20. A reading of the impugned order shows that in terms of the award that was made for the large tracts of land acquired, a total sum of ₹37.73 crores was payable by the Development Authority. In satisfaction of the said award, the requisite sum of money was deposited by the Development Authority in parts up to 19.07.2010, out of which 98%, that is to say, ₹36.49 crores was paid to the land oustees. It is, thus, evident that the sum of money due under the award was deposited by the Development Authority with the Meerut Treasury in the account of revenue deposit. The finding, therefore, recorded in the order impugned that compensation relating to the land in dispute was deposited in the Meerut Treasury in the account of revenue deposit is well founded. This deposit has clearly been made on or before 19.07.2010 and much before the enforcement of the Act of 2013.

21. It is, thus, evident that the compensation due under the award was

deposited in the Government Treasury prior to enforcement of the Act of 2013 and physical possession of the land in dispute was also taken under the Act of 1894, which was handed over to the Development Authority on 06.01.1998.

22. It must be remarked that it is not necessary that the compensation in terms of the award passed under the Act of 1894 be deposited in Court prior to enforcement of the Act of 2013. It would suffice if the requisite compensation is deposited in the Government Treasury prior to the enforcement of the Act aforesaid. This position of the law would be clear from the holding in **Indore Development Authority** *(supra)*, which reads:

366. In view of the aforesaid discussion, we answer the questions as under:

366.1. Under the provisions of Section 24(1)(a) in case the award is not made as on 1-1-2014, the date of commencement of the 2013 Act, there is no lapse of proceedings. Compensation has to be determined under the provisions of the 2013 Act.

366.2. In case the award has been passed within the window period of five years excluding the period covered by an interim order of the court, then proceedings shall continue as provided under Section 24(1)(b) of the 2013 Act under the 1894 Act as if it has not been repealed.

366.3. The word "or" used in Section 24(2) between possession and compensation has to be read as "nor" or as "and". The deemed lapse of land acquisition proceedings under Section 24(2) of the 2013 Act takes place where due to inaction of authorities for five years or more prior to commencement of the said Act, the possession of land has not been taken nor compensation has been paid. In other words, in case possession has been taken, compensation has not been paid then there is no lapse. Similarly, if compensation has been paid, possession has not been taken then there is no lapse.

366.4. The expression "paid" in the main part of Section 24(2) of the 2013 Act does not include a deposit of compensation in court. The consequence of non-deposit is provided in the proviso to Section 24(2) in case it has not been deposited with respect to majority of landholdings then all beneficiaries (landowners) as on the date of notification for land acquisition under Section 4 of the 1894 Act shall be entitled to compensation in accordance with the provisions of the 2013 Act. In case the obligation under Section 31 of the Land Acquisition Act, 1894 has not been fulfilled, interest under Section 34 of the said Act can be granted. Non-deposit of compensation (in court) does not result in the lapse of land acquisition proceedings. In case of non-deposit with respect to the majority of holdings for five years or more, compensation under the 2013 Act has to be paid to the "landowners" as on the date of notification for land acquisition under Section 4 of the 1894 Act.

366.5. In case a person has been tendered the compensation as provided under Section 31(1) of the 1894 Act, it is not open to him to claim that acquisition has lapsed under Section 24(2) due to non-payment or non-deposit of compensation in court. The obligation to pay is complete by tendering the amount under Section 31(1). The landowners who had refused to accept compensation or who sought reference for higher

compensation, cannot claim that the acquisition proceedings had lapsed under Section 24(2) of the 2013 Act.

366.6. The proviso to Section 24(2) of the 2013 Act is to be treated as part of Section 24(2), not part of Section 24(1)(b).

366.7. The mode of taking possession under the 1894 Act and as contemplated under Section 24(2) is by drawing of inquest report/memorandum. Once award has been passed on taking possession under Section 16 of the 1894 Act, the land vests in State there is no divesting provided under Section 24(2) of the 2013 Act, as once possession has been taken there is no lapse under Section 24(2).

366.8. The provisions of Section 24(2) providing for a deemed lapse of proceedings are applicable in case authorities have failed due to their inaction to take possession and pay compensation for five years or more before the 2013 Act came into force, in a proceeding for land acquisition pending with the authority concerned as on 1-1-2014. The period of subsistence of interim orders passed by court has to be excluded in the computation of five years.

366.9. Section 24(2) of the 2013 Act does not give rise to new cause of action to question the legality of concluded proceedings of land acquisition. Section 24 applies to a proceeding pending on the date of enforcement of the 2013 Act i.e. 1-1-2014. It does not revive stale and time-barred claims and does not reopen concluded proceedings nor allow landowners to question the legality of mode of taking possession to reopen proceedings or mode of deposit of compensation in the treasury instead of court to invalidate acquisition.

(emphasis by Court)

23. In view of what has been said above, no good ground made out to interfere with the order impugned.

24. This petition **fails** and is **dismissed.**

(2022) 9 ILRA 323
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ C No. 23497 of 2022

C/M S.N. Sen Balika Vidyalaya Post Graduate College, The Mall, Kanpur Nagar & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Prabhakar Awasthi, Sri G.K. Singh (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Sarvesh Kumar

A. UP St.Universities Act, 1973 – Sections 57 & 58 – UP Higher Education Services Commission Act, 1980 – Section15(2) – Committee of Management dispute – Appointment of authorized controller by the St.Government – Allegation of failure in appointing the respondent as principal even after recommendation of Commission – Power to assess the qualification, how far lie in the committee – Held, it is not in the domain of the Committee of Management to assess the eligibility and qualification of the selected candidate and such power vests only with the Commission – The St. Government, while exercising the powers u/s 58 of the Act of 1973 to appoint authorized controller, has complied with the requirements of the provisions –

Impugned order appointing authorized controller does not suffers from the vice of procedural impropriety and has not been passed in violation of the principles of natural justice. (Para 11)

B. Interpretation of statute – Principle of '*Delegatus non potest delegare*' – Meaning – One to whom a power is delegated cannot himself further delegate that power. (Para 12)

Writ petition allowed. (E-1)

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

1. Heard Sri G.K. Singh, learned Senior Advocate assisted by Sri Prabhakar Awasthi, learned counsel for the petitioners, Sri Sarvesh Kumar, learned counsel for the caveator/respondent No.5 and the learned Standing Counsel representing the State-respondents.

2. The instant writ petition has been filed assailing the order dated 29.7.2022 (Annexure-17 to the writ petition) passed by the State Government, Higher Education Department, whereby exercising powers under Section 58 of the U.P. State Universities Act, 1973 the petitioners' - Committee of Management has been superceded and the District Magistrate, Kanpur Nagar has been appointed as the Authorised Controller for a period of next one year or till further orders whichever occurs earlier. A challenge to the consequential order dated 30.7.2022 passed by the District Magistrate, Kanpur Nagar / Authorised Controller/respondent No.3 whereby he has proceeded to delegate his authority to discharge his duties as Authorised Controller in favour of the Sub-Divisional Magistrate, Sadar Kanpur Nagar has also been laid.

3. The facts shorn of unnecessary details giving rise to the present proceedings are that the petitioner - Committee of Management through its Manager, petitioner No.2, has been managing the affairs of a Degree College, established in the year 1953 in the name and style of "S.N. Sen Balika Vidyalaya Post Graduate College at District Kanpur Nagar" affiliated with Chhatrapati Shahu Ji Maharaj University. The respondent No.5, Dr. Suman, was recommended vide order dated 22.10.2021 of the Director of Education (Higher) for appointment as Principal which was lying vacant in the institution and was required to be filled up by way of regular appointment. On the strength of the recommendation dated 22.10.2021 the Regional Higher Education Officer wrote to the petitioner Committee of Management on 2.11.2021 to ensure the joining of the respondent No.5. A formal request was also made by the respondent No.5 by way of communication dated 8.11.2021. The petitioner Committee of Management began processing the appointment of the respondent No.5 and prior to issuance of the appointment letter sought to verify the testimonials of the respondent No.5 for Chaudhary Charan Singh University, Meerut and other universities from where the respondent No.5 had obtained her qualifications. During the course of such verification by the petitioners, the Regional Higher Education Officer as also the Director of Higher Education wrote to the petitioner Committee of Management vide letters dated 27.11.2021 and 1.12.2021, respectively, to ensure the joining of the respondent No.5. During the course of the verification of the testimonials of the respondent No.5, it was revealed that not a single student had done his PhD under the guidance of the respondent No.5. As per the qualification prescribed under the UGC Regulations an incumbent who seeks

appointment on the post of Principal in a Post Graduate College has to have essential qualification of research guidance experience. The petitioners required the respondent No.5 to clarify her position in that regard. When no clarification was received from the respondent No.5, the petitioners vide letter dated 12.3.2022 requested the respondent Authorities to clarify whether the respondent No.5 stood qualified to be appointed as Principal of the Institution. Instead of clarifying the position, the State Government exercising powers under Section 57 of the U.P. State Universities Act, 1973, issued notices dated 20.5.2022 to it purporting to be under Section 57(ii) of the Act, 1973. The notice was duly replied by the petitioner by submitting its reply dated 6.6.2022. The State Government without considering the reply of the petitioner proceeded to pass the impugned order dated 29.7.2022 and consequent thereto the Authorised Controller proceeded to pass the order dated 30.7.2022.

4. Sri G.K. Singh, learned Senior Counsel appearing on behalf of the petitioners submits that the impugned order dated 29.7.2022, passed by the State Government appointing the Authorised Controller, superceding the petitioner Committee of Management, is patently illegal and is liable to be quashed on the grounds that:-

(i) the order dated 29.7.2022 suffers from the vice of procedural impropriety;

(ii) the order has been passed in utter violation of the principles of natural justice;

(iii) the very basis of passing the order dated 29.7.2022 having been extinguished on the joining of the respondent No.5 on 2.8.2022 the continuance of the order is unwarranted.

5. As regards the consequential order dated 30.7.2022 passed by the District magistrate Kanpur Nagar / Authorised Controller appointing the Sub-Divisional Officer, Sadar Kanpur Nagar to discharge duties as Authorised Controller, learned counsel submits that the said order also cannot be sustained on the principle of that delegated power cannot be further deligated.

6. Elaborating his arguments further, learned Senior Counsel for the petitioners contends that the Institution in question is a Degree College and as such the appointment of the respondent No.5 as Principal of the Institution is to be governed by the provisions of the U.P. Higher Education Services Commission Act, 1980. He has drawn the attention of the Court to Section 15 of the Act which reads as under:-

*"**15. Inquiry by Director.** - (1) Where any person is entitled to be appointed as a teacher in any college in accordance with Sections 12 to 14, but he is not so appointed by the management within the time provided therefor, he may apply to the Director for a direction under sub-section (2).*

(2) On receipt of an application under sub-section (1), the Director may hold an inquiry, and if he is satisfied that the management has failed to appoint the applicant as a teacher in contravention of the provisions of this Act, he may by order, require -

(a) the management to appoint the applicant as a teacher, and to pay him salary from the date specified in the order; and

(b) the Principal of the College concerned to take work from him as a teacher.

(3) The amount of salary, if any, due to such teacher shall, on a certificate issued by the Director, be recoverable by the Collector as arrears of land revenue."

7. Learned Senior Counsel has also invited the attention of the Court to Sections 57 and 58 of the U.P. State Universities Act, 1973 which are being quoted hereunder:-

"57. Power of the State Government to issue notice.- *If the State Government receives information in respect of any affiliated or associated college (other than a college maintained exclusively by the State Government or a local authority) -*

(i) that its management has persistently committed wilful default in paying the salary of the teachers or other employees of the college by the twentieth day of the month next following the month in respect of which or any part of which it is payable; or

(ii) that its management has failed to appoint teaching staff possessing such qualifications as are necessary for the purpose of ensuring the maintenance of academic standards in relation to the college or has appointed or retained in service any teacher in contravention of the Statute or Ordinances [or has failed to comply with the orders of the Director of Education (Higher Education) made on the basis of the recommendation of the Uttar Pradesh Higher Education Service Commission under the Uttar Pradesh Higher Education Services Commission Act, 1980,] or

(iii) that any dispute with respect to the right claimed by different person to be lawful office-bearers of its Management has affected the smooth and orderly administration of the college; or

(iv) that its management has persistently failed to provide the college with such adequate and proper accommodation, library, furniture, stationery, laboratory, equipment and other facilities, as are necessary for efficient administration of the college; or

(v) that its Management has substantially diverted, misapplied or misappropriated the property of the college to the detriment of the college;

it may call upon the Management to show cause why an order under Section 58 should not be made :

Provided that where it is in dispute as to who are the office-bearers of the Management, such notice shall be issued to all persons claiming to be so.

58. Authorised Controller.- *(1) If the State Government after considering the explanation, if any, submitted by the Management under Section 57 is satisfied that any ground mentioned in that section exists, it may, by order, authorise any person (hereinafter referred to as the Authorised Controller) to take over, for such period not exceeding two years as may be specified, the Management of the college and its property to the exclusion of the Management and whenever the Authorised Controller so takes over the Management, he shall, subject only to such restrictions as State Government may impose, have in relation to the Management of the college and its property all such powers and authority as the Management would have if the college and its property were not taken over under this sub-section :*

Provided that if the State Government is of opinion that it is expedient so to do in order to continue to secure the proper Management of the

colleges and its property, it may, from time to time, extend the operation of the order for such period, not exceeding one year at a time, as it may specify, so however, that the total period of operation of the order, including the period specified in the initial order under this sub-section does not exceed[five years]:

[Provided further that if at the expiration of the said period of five years, there is no lawfully constituted Management of the college the Authorised Controller shall continue to function as such, until the State Government is satisfied that the Management has been lawfully constituted :

Provided also that the State Government may, at any time, revoke an order made under this sub-section.]

(2) Where the State Government while issuing a notice under Section 57 is of opinion, for reasons to be recorded, that immediate action is necessary in the interest of the college, it may suspend the Management, which shall thereupon cease to function, and make such arrangement as it thinks proper for managing the affairs of the college and its property till further proceeding are completed :

Provided that no such order shall remain in force for more than six months from the date of actual taking over the Management in pursuance of such order :

Provided further that in computation of the said period of six months, the time during which the operation of the order was suspended by any order of the High Court passed in exercise of jurisdiction under Article 226 of the Constitution or any period during which the Management failed to show cause in pursuance of the notice under Section 57, shall be excluded.

(3) Nothing in sub-section (1), shall be construed to confer on the Authorised Controller the power to transfer any immovable property belonging to college (except by way of letting from moth to month in the ordinary course of Management or to create any charge thereon) except as a condition of receipt of any grant-in-aid of the college from the State Government or the Government of India.

(4) Any order made under this section shall have effect notwithstanding anything inconsistent therewith contained in any other enactment or in any instrument relating to the Management and control of the college or its property :

Provided that the property of the college and any income therefrom shall continue to be applied for the purposes of the college as provided in any such instrument.

(5) The Director of Education (Higher Education) may give to the Authorised Controller such directions as he may deem necessary for the proper management of the college or its property, and the Authorised Controller shall carry out those direction."

8. Placing reliance upon the above mentioned sections, learned Senior Counsel submits that there is no dispute that if the Committee of Management of an institution does not give appointment to the selected candidate action can be taken against the Management under Section 15(2) of the U.P. Higher Education Services Commission Act, 1980 as well as Sections 57 and 58 of the U.P. State Universities Act, 1973 but such action can be taken only after following the procedure prescribed. Section 15(2) of the Act, 1973 contemplates that the Director is required to hold an enquiry and record a satisfaction that the Management has failed to appoint the teacher in contravention of the

provisions of the Act. In the case at hand no such enquiry has been undertaken by the Director of Higher Education nor any satisfaction has been recorded that the petitioner Committee of Management has failed to appoint the respondent No.5.

9. Learned Senior Counsel further submits that the State Government has also been given the powers under Section 58 of the U.P. State Universities Act, 1973 to supercede the Committee of Management and appoint an Authorised Controller but such power also can be exercised only after considering the reply/explanation submitted by the Committee of Management pursuant to issue of notice under Section 57 of the Act. In the case at hand the State Government issued notice under Section 57 of the Act and pursuant thereto the petitioners submitted their reply dated 6.6.2022. However, the State Government without adverting to the reply of the petitioner and recording its satisfaction as to whether the same was satisfactory or not, proceeded to pass the order dated 29.7.2022 under Section 58 of the Act.

10. Learned Standing Counsel and Sri Sarvesh Kumar, learned counsel for the caveator/respondent No.5 have been unable to refute the legal submission made by Sri G.K. Singh, learned Senior Counsel. Sri Sarvesh Kumar, learned counsel for respondent No.5 does not dispute the fact that Dr. Suman/respondent No.5 has since joined the institution as Principal on 2.8.2022 and is functioning as such.

11. Having heard the learned counsel for the parties and having perused the record, the Court finds that the exercise of powers by Director under Section 15 of the U.P. Higher Education Services Commission Act, 1980 and the power of the State Government under Section 58 of the U.P. State Universities Act, 1973 operate in different fields. While Section 15(2) of the 1980 Act empowers the Director to order the Management of the Institution to appoint the selected applicant as Teacher and pay him his salary, order the Principal of the College concerned to take work from him as a teacher, the Director lack power to order for appointment of Authorised Controller. The said power vests only with the State Government under Section 58 of the U.P. State Universities Act, 1973. The Court finds that the impugned order takes note of the reply/explanation of the petitioners dated 6.6.2022 and has considered the same in the light of the report dated 7.7.2022 submitted by the Director of Higher Education and concluded that it is not in the domain of the Committee of Management to assess the eligibility and qualification of the selected candidate and such power vests only with the Commission. Thus the Court finds that the State Government while exercising the powers under Section 58 of the U.P. State Universities Act, 1973 has complied with the requirements of the provisions. The Court is not impressed with the submissions of the learned Senior Counsel for the petitioners that the order dated 29.7.2022 suffers from the vice of procedural impropriety and has been passed in violation of the principles of natural justice.

12. However the Court finds substance in the submission of the learned Senior Counsel that the respondent No.5 having joined the Institution as Principal on 2.8.2022 and is also working as such which fact is not disputed by the parties, the very basis of passing the order dated 29.7.2022 stands extinguished and there is no need for

the Authorised Controller to continue, particularly when no other grounds for ousting the Committee of Management and for continuance of the Authorised Controller have been shown to exist. So far as the order dated 30.7.2022 passed by the District Magistrate/Authorised Controller appointing the Sub Divisional Officer, Sadar to discharge the duties as Authorised Controller is concerned the Court is of the opinion that such an order cannot be sustained on the principle "Delegatus non potest delegare", i.e. one to whom a power is delegated cannot himself further delegate that power.

13. In view of the above, considering the totality of the circumstances the order dated 29.7.2022 passed by the State Government exercising powers under Section 58 of the U.P. State Universities Act, 1973 (Annexure-17 to the writ petition) as also the order dated 30.7.2022 passed by the District Magistrate / Authorised Controller (Annexure-18 to the writ petition) are set aside.

14. The writ petition is **allowed.** No order as to costs.

(2022) 9 ILRA 329
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE VIKRAM D. CHAUHAN, J.

Writ C No. 28249 of 2021
with other connected cases

Kusum Lata Yadav & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Siddharth Khare, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Tarun Agarwal

A. Disaster Management Act, 2005 – Sections 12 & 38 – Ex-gratia assistance – COVID Pandemic – Entitlement of family members of person, who died during election duty – Cause of death, how far material – Held, once the admission of deceased persons was on account of Covid-19, the resulting cause being heart failure or dysfunction of any other organ leading to death is immaterial and would nevertheless be treated as Covid-19 death – High Court directed the opposite parties to release ex-gratia payment within one month. (Para 29 and 30)

B. Constitution of India – Article 226 – Writ – Jurisdiction of High Court u/s 12 of Disaster Management Act, 2005 – Suit proceeding, where lie – Held, for any claim that has trammelled in Law through a government order within the scope of Section 12 r/w Section 38 of the Act of 2005, the jurisdiction has been vested in the Supreme Court of India and the High Courts to entertain a proceeding of suit or other proceeding, hence all the writ petitions filed for payment of ex-gratia amount are maintainable. (Para 25)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Writ Petition (Civil) No. 539 of 2021; Gaurav Kumar Bansal Vs U.O.I. & ors. decided by Supreme Court on 04.10. 2021

2. Delhi Development Authority & anr. Vs Joint Action Committee, Allottee of SFS Flats & ors.; (2008) 2 SCC 672

3. In Re, Distribution of Essential Supplies & Services During Pandemic; (2021) 7 SCC 772

4. Dhulabhai etc. Vs St. of M.P. & anr.; AIR 1969 SC 78

5. N. Nagendra & Co. Vs St. of A.P.; (1994) 6 SCC 205

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. This batch of writ petitions involving common question of facts and law were heard together and are being decided by a common judgment.

2. The petitioners have questioned the legality of Clause 12 of the Government Order dated 1st June, 2021, which was issued in modification of the earlier Government Orders dated 6th April, 2021 and 4th May, 2021. By means of the impugned government order, the State of Uttar Pradesh raised the amount of ex-gratia payment to the dependants of a deceased employee dying on election duty due to COVID-19 from Rs.15 lacs to Rs.30 lacs subject to the fulfilment of conditions in Clause-12.

3. In usual course, the National Authority by virtue of Section 12 of the Disaster Management Act, 2005 is empowered to recommend guidelines for the minimum standards of relief which is to be provided to persons affected by disaster. Section 12 of the Act of 2005 for ready reference is extracted hereunder:-

*"**12. Guidelines for minimum standards of relief.** --The National Authority shall recommend guidelines for the minimum standards of relief to be provided to persons affected by disaster, which shall include,--*

(i) the minimum requirements to be provided in the relief camps in relation to shelter, food, drinking water, medical cover and sanitation;

(ii) the special provisions to be made for widows and orphans;

(iii) ex gratia assistance on account of loss of life as also assistance on account of damage to houses and for restoration of means of livelihood;

(iv) such other relief as may be necessary."

4. It is evident from the above quoted provision that ex-gratia assistance on account of loss of life is one of the measures for restoration of the means of livelihood to the members of aggrieved family. The State Government is also empowered under Section 38 of the Act of 2005 to take measures defined under Section 38(2) which include the financial help in the nature of ex-gratia payment under Section 38(2)(l) and this is how the aforesaid government orders have come to be issued for compensating the loss of lives to the dependants of those who on being deputed to perform election duties in the U.P. Panchayat Elections - 2021 contracted COVID-19 and died. Section 38(2)(l) for ready reference is reproduced hereunder:-

"Section 38(2)(l):- such other matter as it deems necessary or expedient for the purpose of securing effective implementation of provisions of this Act."

5. A person having contracted pandemic i.e. COVID-19 while on election duty became a matter of consideration in the light of recommendations made by the Election Commission of India as well as the National Authority. Therefore, to avoid litigation as against the claims which may have arisen on account of the death of a person discharging election duty by his dependants, the ex-gratia payment to the tune of Rs.30 lacs was a measure evolved by the State Government to compensate the dependants of any such loss of life, whose death occurred on account of COVID-19

having been contracted while on election duty. The Election Commission of India for the purpose of ex-gratia payment is said to have defined the election duty to mean the performance of such duty by leaving one's house on a scheduled day till a person returned back home. The election duty included training, polling duty, counting duty or any other duty relating to election. It implies that contracting COVID-19 while on election duty after leaving one's place of residence till reaching back home was the range of movement to which every case has to be corroborated.

6. In the present case, the U.P. Panchayat Election was notified in the month of March, 2021 whereafter the schedule of election duty in various capacities came to be issued on 6th April, 2021. The chart below indicates the relevant details as regards the petitioners being sent on election duty, date of diagnosis of COVID-19 followed by their hospitalization and date of death in the hospitals or otherwise.

Case No.	Petitioner	Name of deceased/ date of death	Date of Election duty	Tested Positive on	Time Gap between date of duty and testing in days	Time gap between date of testing and date of death in	Time gap between date of duty and death in days
Writ-C No.1594 of 2022	Smt. Priyanka Singh	Late Sheshram Chaudhary/ 28.5.2021	9.4.2021 (training single day)	07.05.21	28	21	50
Writ-C No.28249 of 2021	Smt. Kusum Lata Yadav	Late Ashok Kumar/ 15.5.2021	12.4.2021 (training single day	23.4.2021	11	23	34
Writ-C No.1600 of 2022	Pushma Devi Pathak	Late Surendra Nath Pathak/ 23.5.2021	10.4.2021 (training) & 14.4.2021 (both single days)	27.4.2021	13	26	44 &40
Writ-C No.9460 of 2022	Smt. Geeta Devi	Late Ravi Shankar Vishwakarma/ 25.4.2021	13.4.2021 (training single day)	N/A	N/A	NA	13
Writ-C No.1485 of 2022	Shantanu Singh	Late Kaptan Singh/ 21.6.2021	12.4.2021 (training) & 2.5.2021 (both single days)	22.5.2021	20	29	71 & 51
Writ-C No.30130 of 2021	Subhash Chandra	Late Poonam Rani/ 02.06.2021	29.4.2021 (election duty single day)	10205.2021	13	21	33
Writ-C No.3276 of 2022	Smt. Khushboo	Late Shakuntala Devi/ 07.07.2021	29.4.2021 (election duty single day &	22.6.2021	55	15	70

			13.4.2021 (training single day)				

7. Taking into account the fatal impact of COVID-19, it was for this reason that the State Government by a Government Order dated 6th April, 2021 decided to compensate for the loss of life of any employee sent on election duty to the dependants with the payment of Rs.15 lacs which was enhanced to Rs.30 lacs. The definition of election duty specified by the Election Commission of India adopted in paragraph 2 of the Government Order dated 1st June, 2021 of which Clause 12 has been impugned herein remained para materia. The hardship in the matter of implementation of the ex-gratia payment to the dependents of pandemic victims was experienced on account of relating the COVID-19 deaths during election duty which fell for consideration before the State Government and the matter was considered in the background of published opinions in Lancet journal which were relied upon by the State Advisory Board of COVID-19/Director, SGPGI, Lucknow.

8. The Government Order issued by the State of U.P. on 1st June, 2021 dispelled many confusions as regards contracting COVID-19 and broader principles were adopted to ameliorate the implementation of the compensatory scheme evolved by the State. In the first place, the definition of the election duty was liberally adopted to include all the activities in relation to election duties where the probability of contracting COVID-19 prior to its diagnosis was prominent. The definition clause however made it dependant upon a person going to election duty on a scheduled date till he returned back home. The most difficult aspect of the scheme is to relate a COVID-19 death to the date of election duty. For any death on account of COVID-19, it is essential for a claimant to establish that the deceased had attended the election duty prior to his death which he contracted while on election duty. The difficulty certainly arises in the determination of the fact of contracting Covid infection but where it is definite that a person prior to diagnosis or death had performed election duty, it is to be assumed that COVID-19 was contracted while on election duty unless proved otherwise. The State Government in order to mitigate the technical hardship considered the entire issue with the assistance of experts and it was found that a COVID-19 patient from the date of disease onset had mortality expectancy within 28 days. There is however, no scientifically proven assessment of time, after the disease onset, within which a person may be diagnosed as COVID positive during the range of mortality expectancy period as derived from experimentation or data.

9. In these circumstances, the State Government in order to have a broader application of the policy decision proceeded to lay down the parameters for entitlement of ex-gratia payment. Paragraph 12 of the impugned Government Order lays down three parameters. Firstly, COVID-19 deaths which occur within 30 days of the election duty would entitle a claim. Secondly, the test reports Antigen/RT PCR positive, blood report or CT Scan would be a sufficient proof to prove the death having occurred on account of COVID-19 and thirdly, an asymptomatic case meeting with the death on account of COVID-19 within 30 days of election duty was also covered under the scheme.

10. **In this background, three type of cases have emerged before this Court. In first category, the asymptomatic deaths having occurred within 30 days from the date of election duty on account of COVID-19 and in the second category, where symptoms were detected within a gap of 30 days from the date of election duty but the actual death occurred beyond 30 days from the date of election duty and, thirdly, where symptoms were detected beyond 30 days of election duty and death occurred within 30 days of detection of symptoms or later.**

11. The case put-forth by the State in response to the above situations in two fold. It is urged that the first category cases are not entitled to the ex-gratia payment as there is no proof of a deceased having contracting COVID-19 while on election duty and to deny the claim of second and third category, it is submitted that any death that has occurred beyond a period of 30 days from the date of election duty is not relatable to the election duty, hence the claim is liable to rejection.

12. Sri Ashok Khare, learned Senior Advocate appearing for the petitioners has argued in the light of order passed by the Apex Court on 4th October, 2021 passed in **Writ Petition (Civil) No. 539 of 2021 (Gaurav Kumar Bansal Vs. Union of India and others)** but the guidelines embodied therein being of a later point of time do not provide us a complete answer. The ICMR guidelines pointed out also do not doubtlessly support or counter the stand of the State Government put-forth.

13. Learned counsel for the State has also laid emphasis on the point that the controversy involves a policy decision of the State based on the opinion of experts, therefore, the Court has no option of reading down the scope of Government Order otherwise than the manner in which it is supported by its scientific understanding. The submission put-forth is to the effect that any irrational or layman's understanding of the Government Order would bring in a heterogeneous classification or class within the class which shall offend the mandate of Article 14 of the Constitution of India. In support of the argument put-forth, learned Additional Advocate General for the State has relied upon certain decisions.

14. It is a well known fact that COVID-19 was witnessed no less than a largest precedented catastrophe leading to mortality of human lives on a very high scale. The scientific advancement was almost bent on its knees to acknowledge helplessness, yet, some how the preventive measures sensitised by the State coupled with medical aid overcame upon the threat to human life for restoration of normalcy. It is not to forget that the behavioural obedience i.e. use of mask and following guidelines on free movement was as significant as the medicinal values and much was attributed to the superstitions as well. In the general perception of the people, the asymptomatic and symptomatic cases of COVID-19 were marginally distinct and in both the type of cases, the common cause was Covid infection. It is not the case before us that the deaths have not occurred because of COVID-19 but what is disputed is that the deaths having taken place beyond 30 days from the date of election duty would not entitle the dependants for the ex-gratia payment. This defence is based on Clause-12 of the Government Order dated 1st June, 2021 impugned herein this bunch of writ petitions.

15. **In the background stated above, the question that crops up for consideration is as to whether a COVID-19 death for the purposes of ex-gratia payment is rightly regulated and understood by the executive as per Clause-12 of the Government Order, if not, whether the defence put forth is violative of the object of equality read with the purpose of Section 12(iii) of the Act of 2005.**

16. This Court may note that the life and its dignified protection is the first and foremost duty of the welfare state. During the course of disaster management, certain duties on the part of the State assume more significance. We have experienced that during COVID-19, broader guidelines striking note of caution were issued from time to time to restrict free movement, yet for the purposes of governance within our democratic organization, the guidelines prohibiting assembly had to be compromised by the State of U.P. itself so as to carry out the U.P. Panchayat Elections in furtherance of the mandate of law. The sovereign function thus necessitated the engagement of human resource in bulk which necessarily visited the state with a more onerous duty to protect the lives of those who were engaged in election duty. It is needless to reiterate that the protection of life of all such individuals engaged in election duty even on a single day during COVID-19 became an absolute duty of the State. The State at the time of outbreak of pandemic remained under an obligation to free the environment from the probabilities of outbreak or spread of infection and the hospital services were equally liable to be maintained conducive to the survival of human life. In the case at hand, all these claims where the persons sent on election duty died of COVID-19, it necessarily must be understood that all such persons for the purpose of care, treatment and protection of life remained at the mercy of the State. The wisdom of the policy devised by the State lies in meeting the emerging situation for the dependants of a COVID-19 victim, therefore, equal treatment of all is bound to be achieved by adopting a pragmatic approach.

17. Having regard to the three parameters provided in para-12, this Court would note that any case detected beyond the period of 30 days from election duty as covid positive is certainly a category not covered under the scheme. The death of asymptomatic cases within 30 days of election duty as per the mandate of government order is covered under the G.O. Provided the death certificate on account of COVID-19 is produced by the claimants. This principle broadens the scope of G.O. for symptomatic cases where the infection after election duty was detected within 30 days, however, death in such a case occurred beyond the period of 30 days. The two situations that deserve to be treated at par are; firstly, where the death occurred due to covid-19 within a period of 30 days of participation in election duty in an asymptomatic case and; secondly, where the infection of COVID-19 was detected within 30 days of election duty but the death occurred thereafter during treatment or otherwise.

18. The bar of 30 days period in the cases where infection was detected within 30 days of election duty but death occurred beyond the same is not attributable to any negligence on the part of victim that would defeat the claim rather it is owing to the lack of extra ordinary care or treatment of which the duty would lay on the State. Therefore, all the detected cases within 30

days of election duty cannot be segregated from those where the infection despite remaining undetected resulted into the death of a victim due to COVID-19 within the period prescribed i.e. 30 days. Any other principle derived by the State on the basis of scientific understanding is bound to defeat the very object of the Government Order and the purpose will frustrate. It is not necessary for the State Government to ahdere to the strict scientific principles in the matter of situations which went beyond the control of scientific means, therefore, the State Government in its caveat cannot impose an embargo upon the Courts of law to construe the scope of policy strictly within the scientific principles.

19. The scientific understanding alone is not decisive to implement the policy of the State which by its very nature is a mix of multiple variables. The State is not to be guided by the laboratory results or publication in journals alone but what is relevant is the impact of a disaster as it may be understood in common parlance not opposed to scientific principles altogether. Scientific temper is itself a matter of concern and debatable. For example the elephant's head on the holy mankind body of 'deity' of Lord Ganesha may or may not be opposed to scientific beliefs but it accompanies our mystical belief from ages and likewise many more. The scientific discoveries and inventions promote scientific temper but failure of science is bound to leave a grey area for our personal faith, traditional usages, beliefs and superstitions until modern science or spiritual attainments unfold the absolute truth. By quoting one instance, it is not meant to hurt anyone's sentiments rather is illustrative of our understanding. Embracing personal faith, usages, belief and superstitions besides scientific temperament is the beauty of Article 21 of the Constitution of India within which the horizons of our freedom grow for an inclusive dignified existence. This, however, does not suggest that the State has a religion as opposed to democracy that guarantees the rule of law to achieve the object of equality amongst the citizens.

20. This Court would thus reject the argument of the State to approach the issue at hand purely on the basis of scientific principles as portrayed on the strength of some publication in the Lancet Journal and expect the State to implement the impugned clause of Government Order dated 1st June, 2021 without discriminating between the deaths of asymptomatic and symptomatic cases on the yardstick of 30 days from the date of election duty. It must be read beneficially for those cases too which were detected within 30 days and in that event, the date of death would become immaterial once it is on account of COVID-19.

21. The constitutional morality under the directive principles of the State is well reflected from Article 38 of the Constitution of India which postulates eradication of inequality. This Article is the driving force of the public policy and offers ample guidance to the executive as well as all other organs of the State to streamline the beneficent decisions serve the purpose and object of social and economic justice equally. The apex court as far back as in the decision reported in ***(2008) 2 SCC 672*** **(Delhi Development Authority, & another vs. Joint Action Committee, Allottee of SFS Flats & Ors)** in para-65 observed as under:

"65. Broadly, a policy decision is subject to judicial review on the following grounds :

(a) if it is unconstitutional;

(b) if it is dehors the provisions of the Act and the Regulations;

(c) if the delegatee has acted beyond its power of delegation;

(d) if the executive policy is contrary to the statutory or a larger policy."

In a recent decision of the apex court reported in *(2021) 7 SCC 772 (Distribution of Essential Supplies and Services During Pandemic, In Re.)*, the apex court has succinctly dealt with the permissible extent of judicial review in policy decisions of the State and for our purpose paras 15 to 19 of the judgement being relevant are extracted as under:

"15. It is trite to state that separation of powers is a part of the basic structure of the Constitution. Policy-making continues to be in the sole domain of the executive. The judiciary does not possess the authority or competence to assume the role of the executive, which is democratically accountable for its actions and has access to the resources which are instrumental to policy formulation. However, this separation of powers does not result in courts lacking jurisdiction in conducting a judicial review of these policies. Our Constitution does not envisage courts to be silent spectators when constitutional rights of citizens are infringed by executive policies. Judicial review and soliciting constitutional justification for policies formulated by the executive is an essential function, which the courts are entrusted to perform.

16. We had clarified in our order dated 30 April 2021, that in the context of the public health emergency with which the country is currently grappling, this Court appreciates the dynamic nature of the measures. Across the globe, the executive has been given a wider margin in enacting measures which ordinarily may have violated the liberty of individuals, but are now incumbent to curb the pandemic. Historically, the judiciary has also recognized that constitutional scrutiny is transformed during such public health emergencies, where the executive functions in rapid consultation with scientists and other experts. In 1905, the Supreme Court of the United States in Jacobson vs Massachusetts` considered a constitutional liberty challenge to a compulsory vaccination law that was enacted to combat the smallpox epidemic. Harlan, J had noted the complex role of the Government in battling public health emergencies in the following terms (Jacobson case SCC OnLine US SC paras 6 and 18):

"6.....the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety...

18.....While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect.....So far as they can be reached by any government, they depend, primarily, upon such action as the State in its wisdom may take, and we do not perceive that this legislation has invaded any right secured by the Federal Constitution."

17. The Supreme Court of United States, speaking in the wake of the present COVID-19 pandemic in various instances, has overruled policies by observing, inter alia, that *"Members of this Court are not*

public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten" and "a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights".

18. Similarly, courts across the globe have responded to constitutional challenges to executive policies that have directly or indirectly violated rights and liberties of citizens. Courts have often reiterated the expertise of the executive in managing a public health crisis, but have also warned against arbitrary and irrational policies being excused in the garb of the "wide latitude" to the executive that is necessitated to battle a pandemic. This Court in *Gujarat Mazdoor Sabha vs State of Gujarat*, albeit while speaking in the context of labour rights, had noted that policies to counteract a pandemic must continue to be evaluated from a threshold of proportionality to determine if they, inter alia, have a rational connection with the object that is sought to be achieved and are necessary to achieve them.

19. In grappling with the second wave of the pandemic, this Court does not intend to second-guess the wisdom of the executive when it chooses between two competing and efficacious policy measures. However, it continues to exercise jurisdiction to determine if the chosen policy measure conforms to the standards of reasonableness, militates against manifest arbitrariness and protects the right to life of all persons. This Court is presently assuming a dialogic jurisdiction where various stakeholders are provided a forum to raise constitutional grievances with respect to the management of the pandemic. Hence, this Court would, under the auspices of an open court judicial process, conduct deliberations with the executive where justifications for existing policies would be elicited and evaluated to assess whether they survive constitutional scrutiny."

22. The ex-gratia payment payable by the State was notified in terms of Section 38 of the Act of 2005 referred to above and this was a promise held to the dependants of any such person who died due to COVID-19 having contracted the infection while on election duty. The compensation for loss of life certainly is an actionable claim and it is for this reason that Section 71 of the Act of 2005 provides as under:-

*"**71. Bar of jurisdiction of court.** --No court (except the Supreme Court or a High Court) shall have jurisdiction to entertain any suit or proceeding in respect of anything done, action taken, orders made, direction, instruction or guidelines issued by the Central Government, National Authority, State Government, State Authority or District Authority in pursuance of any power conferred by, or in relation to its functions, by this Act.*

23. We must remember that the State is not to be driven by the scientific understanding of situation alone but what is relevant is the general perception of people which settles for acceptance. If judiciary cannot form an opinion contrary to law, it equally applies on the executive not to loose sight of the purpose for which laws are made. Scientific reasons are not always

sacrosanct but what remains is the purpose and objects of legislation.

24. The Supreme Court as well as the High Courts have been empowered to entertain any suit or proceeding in respect of anything done, action taken, orders made etc. by the respective authorities/ governments.

25. Therefore, for any claim that has trammelled in law through a government order within the scope of Section 12 read with Section 38 of the Act of 2005, the jurisdiction has been vested in the Supreme Court of India and the High Courts to entertain a proceeding of suit or other proceeding, hence this Court is convinced that all the writ petitions filed for payment of ex-gratia amount are maintainable. This is, however, not to suggest that Article 21 of the Constitution of India in the matter of pandemic or disasters imposes a blanket pecuniary liability upon the State as regards the loss of life of citizens or their property to which any negligence of the State authorities or agents or misconstruction of a policy decision arrived at for a larger purpose is an exception. It can, therefore, be inferred that a suit for recovering damages as a measure of compensation can be filed against the State for negligence of its agents within the scope of Section-9 CPC unless specifically barred by law or necessary intendment. Section-71 reproduced above supports the position of law and is well supported by a decision of the apex court reported in **AIR 1969 SC 78 (Dhulabhai etc. v. State of M.P. and another).**

26. This Court may further note that Section 73 and 74 of the Disaster Management Act protect the State and its agents or officers from any legal action for anything done in good faith. The statutory protection, however, does not render a suit or proceeding non-maintainable for it may be possible for the claimant to establish by leading evidence that action or omission was deliberate and not in good faith. This Court may take note of the definition of "good faith' as provided under Section-52 of Indian Penal Code as under:

"52. "Good faith".--Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention."

The negligence co-exists with bad faith. The burden of proof shall lay heavily on the claimants but it does not render the suit or claim as non-maintainable.

27. The position of law is further supported under an apex court judgement reported in ***(1994) 6 SCC 205 (N. Nagendra & Co. v. State of A.P.)*** wherein it is held that the State cannot claim sovereign immunity from compensation due to negligence of its agents in cases directly resulting in breach of Article 21 of the Constitution of India. The decision holds good until now.

28. Thus, we are of the considered opinion that the field of compensation beyond the scope of section 12 (iii) of the Disaster Management Act, 2003 is well protected as against negligence or things not done in good faith irrespect of any measure such as ex-gratia but in the present case it is the claim of ex-gratia payment which we are concerned with.

29. Now coming to the aspect as to whether the victims named in the chart set out hereinabove have died of Covid-19 or otherwise. Sri Ashok Khare has taken us through the apex court judgement passed in

the case of ***Gaurav Kumar Bansal v. Union of India and others.*** We find that deaths having taken place in the hospitals on account of Covid-19 fully stand the test of certification. The argument that the medical reports mentioning cardiac failure or otherwise may not be attributed to Covid-19 does not impress the Court for the reason that Covid-19 is an infection that may result to the mortality of a person affecting any organ be it lungs or heart etc. Once the admission of deceased persons was on account of Covid-19, the resulting cause being heart failure or dysfunction of any other organ leading to death is immaterial and would nevertheless be treated as Covid-19 death. No other argument was advanced for our consideration, therefore, having given our anxious consideration, we allow the claims in terms of our observations made hereinabove.

27. As a result, all the writ petitions except Writ-C No. 3276 of 2022 *(Smt. Khushboo v. State of U.P. and others)* are allowed and the opposite parties are directed to release the ex-gratia payment to the dependents entitled thereto within a period of one month failing which the claims so allowed shall be made good inclusive of simple interest @ 9% p.m. from the date of judgement upto the date of actual payment.

The Writ-C No. 3276 of 2022 (Smt. Khushboo v. State of U.P. and others) is accordingly dismissed.

28. Each of the petitioners, whose claims are allowed shall be entitled to a cost of Rs. 25000/- in each case.

(2022) 9 ILRA 339
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 11.08.2022

BEFORE

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

Writ C No. 43422 of 2018

Ajay Kumar & Anr. ...Petitioners
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Subhash Chandra Yadav

Counsel for the Respondents:
C.S.C., Ms. Akansha Sharma, Sri Pranjal Mehrotra, Sri Rajnish Kumar Rai, Sri Manish Goyal (A.A.G.)

A. Land Law – UP Revenue Code, 2006 – Section 67-A – UP Revenue Code Rules, 2016 – Ss. 64 and 68 – Settlement of Abadi site land – Maximum area required to be settled is 200 Square meter – Violation – Effect – Held, an area upto 200 square meters of land with structure thereon could be settled with the petitioners under Section 67-A of the Revenue Code, 2006 and not the entire area of 0.0580 hectares (580 square metes) – No right can be said to have accrued to the petitioners in respect of Plot No. 139M and 140M in excess of 200 square meters. (Para 19)

B. Doctrine of President – Exception – Per incuriam – Earlier Writ order was passed in ignorance of the provisions – Order falls under the spectrum of per incuriam was not followed. (Para 19)

C. Acquisition Law – Railways Act, 1989 – Sections 20-A, 20-E & 20-F (2) – Lapse of proceeding – Acquisition for special railway project – Plot, in question was included in the Notification u/s Section 20-A, not u/s 20-E of the Act – Effect – Held, it can safely be concluded that the

Plot, in question has not been acquired for the Special Railway Project. If the plot has not been acquired, there is no question of the acquisition proceedings to have lapsed. (Para 23)

Writ petition dismissed. (E-1)

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

1. The writ petitioners who claim to have right, title and interest in Arazi / Plot No. 139M having area 0.0140 hectare, situate in Village Pirallipur, Pargana Haveli, Post Chunar, District Mirzapur, have approached this Court seeking issuance of a writ of mandamus commanding the respondents not to create any interference in their peaceful possession over the said arazi/plot on the ground that the entire proceedings of the acquisition of the plot for special railway project stands lapsed under Section 20-F (2) of the Railways Act, 1989. The petitioners have further prayed that no coercive action be taken against the petitioners during the pendency of the writ petition.

2. The facts giving rise to the controversy involved in the writ petition, briefly stated, as borne out from the record, are that one Chhavinath, father of petitioner No. 1 and husband of petitioner No. 2, was residing in a double storied house constructed over arazi/plot No. 139 and 140 since the time of his ancestors. The Plot No. 139 and 140 were recorded as "Banjar" under category 5-3 (^{3}) in the revenue records with area 0.1390 hectares and 0.3790 hectares, respectively. It may be stated here that an area of 0.0560 hectares of plot No. 140 was settled in favour of residents of village under Section 123 (1) UPZA&LR Act vide order dated 6.10.1993. Proceedings under Section 122-B of the U.P.Z.A.&.L.R. Act for eviction of Chhavinath were drawn by the Land Management Committee/Gaon Sabha of the village concerned which resulted in an exparte order dated 22.5.2008, being passed against Chhavinath. A restoration application was filed by Chhavinath stating his inability to appear in the proceedings whereafter the proceedings were restored after recalling the order dated 22.5.2008. On the restoration of the proceedings and after hearing Chhavinath, the report under Section 122-B U.P.Z.A.&.L.R. Act was rejected and the Notice 49-A was withdrawn by order dated 6.10.2008 passed by the Tehsildar, Chunar with further direction requiring the Revenue Inspector to proceed under Section 123 (1) of U.P.Z.A.&.L.R. Act. It appears that necessary order under Section 123 (1) of U.P.Z.A.&.L.R. Act were not passed and meanwhile, the said Chhavinath expired. An area of 0.1250 hectares of plot No. 139 was resumed by Commissioner, Vidhyachal Division, Mirzapur for the Dedicated Freight Corridor vide order dated 20.5.2012. After resumption of an area of 0.1250 hectares an area of 0.0140 hectares remained. Thereafter, the petitioners who are the heirs of the deceased Chhavinath moved the Assistant Collector under Section 67-A of the U.P. Revenue Code, 2006 praying that the house site be settled in their favour. The Assistant Collector vide order dated 16.6.2016 required the Tehsildar, Chunar to do the needful in accordance with law and submit report. Thereafter the abadi site in respect of arazi/Plot No. 139M, area 0.0140 hectare and arazi/plot No. 140 M, area 0.125 hectare were settled in favour of the petitioners under Section 67-A of the

Revenue Code, 2006 vide order dated 30.8.2016. The names of the petitioners stand recorded over the Plot No. 139 M area 0.0140 hectares in the relevant revenue records. It is relevant to mention here that Chhavinath was survived by his wife Kamla Devi (petitioner No. 2) and sons Ajay Kumar (petitioner No. 1) Vijay Shanker, Subhash Chandra, Sanjay Kumar, Ishwar Chand.

3. On 24.6.2016, a Notification under Section 20-A of the Railways Act, 1989 was issued by the Central Government wherein it was provided that certain lands in the district Mirzapur of the State of U.P. are required for the purpose of Special Railway Project i.e. Eastern Dedicated Freight Corridor and declared intention to acquire the plots including the Plot No. 139-M area 0.0140 hectare settled in favour of the petitioners. Thereafter a declaration under Section 20-E of the Railways Act, 1989 was published on 12.1.2017. The plot No. 139M area 0.0140, however, did not find place in the declaration of acquisition under Section 20-E of the Railways Act, 1989. An award in respect of the acquisition was also made on 18.4.2017 and the Plot No. 139 M area 0.0140 did not find mention in the award.

4. It is also relevant to record here that three members of the family of Chhavinath i.e. the petitioners herein and one Ishwar Chand have been granted benefit of Section 67-A of the U.P. Revenue Code, 2006 and a total area of 0.0580 hectares comprised in plot No. 139-M to the extent of 0.0140 hectares and plot No. 140M to the extent of 0.0440 hectares have been settled in their favour under Section 67-A of the Revenue Code, 2006.

5. On the basis of the above admitted facts, the petitioners submit that although initially vide Notification dated 24.6.2016 under Section 20-A of the Railways Act, 1989 the Central Government had declared its intention to acquire the arazi/plot No. 139M, area 0.0140 hectare, but subsequently vide Notification dated 12.1.2017, under Section 20-E, the Central Government declared that the land excluding Arazi/Plot No. 139M, area 0.0140 hectare be acquired. Further, since no award has been made in respect of the Arazi/Plot No. 139M, area, 0.0140 hectare within one year from the date of publication of the declaration under Section 20-E, the entire proceedings for the acquisition in respect of the Arazi/Plot No. 139M, area 0.0140 hectare shall be deemed to have lapsed and the respondent authorities have no authority to interfere in the peaceful possession and beneficial enjoyment of the petitioners over their house constructed over Plot No. 139M, area 0.0140 hectares.

6. The petitioners by way of a supplementary affidavit have brought on record the fact that by order dated 23.2.2021, the Assistant Collector had expunged the name of the petitioners from the revenue records and restored that of the Gaon Sabha, however, the petitioners assailed the order dated 23.2.2021 before this Court in Writ-C No. 17755 of 2021 (Ajay Kumar versus State of U.P. and 4 others) and Writ-C No. 10279 of 2021 (Kamla Devi versus State of U.P. and 4 others) and this Court by orders dated 4.8.2021 and 16.8.2021, respectively, have allowed the writ petitions.

7. This Court vide order dated 3.1.2019 while entertaining the writ petition invited counter affidavit from the respondents and at the same time directed parties to maintain status quo as on that day

in respect of possession over the disputed land until further orders.

8. A counter affidavit has been filed on behalf of the respondent Nos. 1 and 7 wherein it has been stated that plot No. 139 area 0.1390 hectares has been recorded as Banzar and notified under category 5-3 (³) and as such, vested in the gram sabha/state. In such view of the matter, no proceedings for its acquisition were required to be initiated and the plot was resumed by the Commissioner, Vindhyachal Division, Mirzapur vide order dated 26.4.2017 to the extent of an area of 0.0140 hectares out of an area of 0.1390 hectares and to the extent of an area of 0.3230 of plot No. 140 for the purposes of Dedicated Freight Corridor of the Railways. After the resumption of the Plot No. 139M to the extent of an area of 0.0140 hectare and acquisition of an area of 0.0440 hectares of plot No. 140M, the compensation in respect of the dwelling house of the petitioners has been determined under the National Rehabilitation and Settlement Policy, 2007 for the affected families by the competent authority and a sum of Rs.33,42,507/- has been determined in respect of arazi/plot No. 139 and 140. However, the petitioners have not collected their share.

9. A counter affidavit on behalf of respondent Nos. 3, 4, 5 and 6 has been filed by learned Additional Chief Standing Counsel wherein identical grounds as taken by the respondent Nos. 1 & 7 has been taken to resist the writ petition.

10. In the rejoinder affidavit the petitioners in response to the counter affidavit of respondent nos. 1 and 7 have reiterated their stand that the acquisition proceedings in respect of Arazi/Plot No. 139M stands lapsed as admittedly no award has been made in respect of the said plot within the time provided under Section 20-F (2) of the Railways Act, 1989. The petitioners have right and title over the land in question. Once the land was notified under Section 20-A of the Railways Act it became mandatory to decide the objections under Section 20-D and make notification under Section 20-E for declaration. In response to the counter affidavit filed on behalf of respondent Nos. 3, 4, 5 & 6, the petitioners submit that the resumption order dated 26.4.2017 is void as also barred by Rule 68 (2) (f) of the U.P. Revenue Code Rules, 2016.

11. It has been argued by the learned counsel for the respondent Nos. 1 & 7 that the Government of India, Ministry of Railways issued Notification under Section 2 (37-A) of the Railways Act, 1989 inter alia declaring Eastern Dedicated Freight Corridor and Western Dedicated Freight Corridor as a Special Project for railways covering 9 States including the State of U.P. The Eastern Dedicated Freight Corridor with a route length of 1873 Km., links Ludhiana in Punjab and Darkauni in West Bengal. The Western Dedicated Frieght Corridor covers a distance of 1504 Km., double line electric (2 X 25 Kv) track from Mumbai to Dadri and thus, the Freight Corridor is a project of National Importance and would be the lifeline to the economy of the country and would provide infrastructure to reduce the time period substantially in transporting goods as well as consumption of fuel involved in transportation of the goods in comparison of road transport. The total estimated cost of DFCC Project from Pt. Deen Dayal Upadhyaya Junction (Mughalsarai) to Prayagraj Junction is more than 3000 crores which has increased by a significant amount owing to delays in land acquisition

and cost overruns. The date of commissioning the project is being shifting from time to time. The house of the petitioners is built upon plot No. 139M and 140 jointly. Compensation for the same has already been determined under National Rehabilitation Policy, but petitioners have not collected the same. The house of the petitioners situate at Km. 155+30 in village Pirallipur, Tehsil Chunar, District Mirzapur is an obstruction in completion of the project and account of this only partial width of formation was available and mechanized track linking work along with electrical and signal works is not possible beyond the above location at Km. 155+30. Entire work in 181 Kms., section have almost been completed except this 50 meters patch of land which is pending due to the interim order in operation. It is, thus submitted that higher public purpose must give way to individual rights.

12. In the above backdrop, this Court is required to adjudicate the controversy and determine as to whether the claim of the writ petitioners is justified. From the pleadings of the parties, the following issues arise for consideration in the writ petition:-

i. Whether the writ petitioners have right, title and interest in plot Nos. 139 M, area 0.0140 hectare as claimed by them and if so, what is the nature of such right?

ii. Whether the proceedings in respect of the acquisition of Plot No. 139M, area 0.0140 hectare included in the Notification dated 24.6.2016, under Section 20-A of the Railways Act, 1989, but not included in Notification/Declaration dated 12.1.2017 under Section 20-E and non declaration of award in respect thereof will result in proceedings having lapsed under Section 20-F (2) of the Railways Act, 1989 as claimed by the petitioners?

iii. Whether the resumption proceedings of the Plot No. 139M area 0.0140 hectare under Section 59 of the U.P. Revenue Code, 2006, by the Commissioner, Vindhyachal Division, Mirzapur by order dated 26.4.2017 is in accordance with law in the wake of the plot/land having settled in favour of the petitioners under Section 67-A of the U.P. Revenue Code, 2006?

iv. Whether higher public purpose will have preference over individual rights as argued by learned counsel for respondents?

13. Before we proceed to decide the aforesaid issues which arise for consideration in this writ petition, it would be apt to consider certain provisions of the U.P. Revenue Code, 2006. The petitioners claim their right over the Plot No. 139M, area 0.0140 hectare by virtue of Section 67-A of the U.P. Revenue Code, 2006. Section 67-A is being reproduced hereunder:

"Section 67-A. Certain house sites to be settled with existing owners thereof -

(1) If any person referred to in sub-section (1) of Section 64 has built a house on any land referred to in Section 63 of this Code, not being land reserved for any public purpose, and such house exists on the November 29, 2012, the site of such house shall be held by the owner of the house on such terms and conditions as may be prescribed.

(2) Where any person referred to in sub-section (1) of Section 64, has built a house on any land held by a tenure holder (not being a government lessee) and such house exists on November 29, 2000, the site of such house, notwithstanding anything

contained in this Code, be deemed to be settled with the owner of such house by the tenure holder on such terms and conditions as may be prescribed.

Explanation.- *For the purpose of sub-section (2), a house existing on November 29, 2000, on any land held by a tenure holder, shall, unless the contrary is proved, be presumed to have been built by the occupant thereof and where the occupants are members of one family by the head of that family.]"*

14. Section 67-A (1) provides that if any agricultural labourer or village artisan belonging to scheduled caste, scheduled tribes or other backward class or a person of general category living below poverty line, has built a house on any land which may be allotted for abadi sites under Section 63, not being a land reserved for any public purpose and such house exists on 29th November, 2012, the site of such house shall be held by the owner of the house. That is to say it shall be settled with the owner of such house on such terms and conditions as may be prescribed.

15. Section 67-A (2) on the other hand provides that where any person belonging to the category given as above has built a house on any land held by a tenure holder and such house exists on 29th November, 2000, it be deemed to be settled with the owner of such house by the tenure holder.

16. In the case at hand, we are concerned with Section 67-A (1) only and Section 67-A (2) is not attracted as the petitioners have not built their house on any land held by a tenure holder. Now, the terms and conditions prescribed for regularization of certain house sites with their existing owners is referable to Rule 68 of the U.P. Revenue Code Rules, 2016 which is reproduced hereunder:

"68. Settlement of house sites with existing owners thereof (Section 67 A) -

(1) Where any person referred to in sub-section (1) of section 64 has built a house on any land referred to in section 63 of the Code, not being land reserved for any public purpose and such house exists on twenty-ninth day of November 2012, the site of such house shall be held by the owner of the house on terms and conditions prescribed in rule 64.

Note:- For the removal of doubt it is hereby declared that the maximum area of the site settled under section 67-A (1) of the Code or the rules framed there under shall not exceed two hundred square meters.

(2) Where any person referred to in sub-section (1) of section 64 has built a house on any land held by a tenure holder (not being a government lessee) and such house exists on twenty-ninth day of November 2000, the site of such house shall be deemed to be held by the owner of the house on the following terms and conditions -

(a) the maximum area of the site settled under section 67-A (2) of the Code or the rules framed thereunder shall not exceed two hundred square meters.

(b) the owner of the house as well as his heirs shall have a heritable interest in the site and shall also have unrestricted right to use the trees and wells existing on the site subject to existing rights of easements.

(c) he shall have a right to use the site for construction of a residential house, subject to existing rights of easement.

(d) the owner of the house shall not be liable to pay to the tenure holder or the State Government any future rent in respect of the site.

(e) the succession over the site shall be governed by personal law which the house owner was subject to.

(f) the owner of the house and his heirs shall not be liable to ejectment on any ground whatsoever.

(g) if the building is abandoned or if the owner thereof dies without any heir entitled to succeed, the land or site shall escheat to the State.

(h) the tenure holder shall be allowed remission of the proportionate land revenue for the portion of his holding settled under this rule with house owners. The land shall also be classified as abadi in the Khatauni maintained under the Code."

17. A perusal of the Rule 68 shows that the terms and conditions for settlement have been provided in Rule 64 of the 2016 Rules. The Rule 64 of the 2016 Rules is being quoted hereunder:

"64. Maximum area and other conditions of allotment (Sections 63 and 64) -

(1) The maximum area of allotment under rule 61 or 62 shall not exceed 200 square meters.

(2) The allottee of an abadi site shall not be liable to pay any premium or ground rent, but he shall hold such abadi site on the following terms and conditions:-

(a) The allottee shall build a house and shall begin to reside in it or use it for the purpose for which the site was allotted within a period of three years from the date of delivery of possession of the site allotted.

(b) If the allottee fails to comply with the terms and conditions incorporated in clause (a) of sub-rule (2) of this rule, the Collector may cancel the allotment in accordance with section 66:

Provided that in the case of the persons belonging to Scheduled Caste or Scheduled Tribe the aforesaid time limit for building of the house shall not apply.

(c) The allottee or his heirs shall not be entitled to transfer the site or the house built thereon by sale within a period of five years from the date of allotment. If the site or house is transferred after the expiry of five years from the date of allotment, the allottee shall not be eligible for re-allotment.

(d) The allottee shall have heritable interest in the land so allotted.

(e) The succession to the land shall be governed by the personal law of the allottee.

(f) Subject to the provisions of section 66, the allottee or his heirs shall not be liable to be ejected from the land allotted or from the house built thereon.

(g) If the land or the house built thereon is abandoned or if the allottee or his heirs die without any heir, the property shall re-vest in the Gram Panchayat."

18. The settlement of the abadi site is subject to the provisions of Section 66 of the U.P. Revenue Code whereunder the Collector has been empowered to hold an inquiry suo moto or on the application of any person aggrieved by allotment of land and cancel the allotment after recording satisfaction that the allotment is irregular and in that event the right, title and interest of the allottee and every other person claiming through him in the land allotted shall cease. However, no application in this regard shall be entertained after the expiration of a period of three years from the date of allotment.

19. In the case at hand, we find that plot No. 139M area 0.0140 hectares (140

square meters) along with an area of 0.0440 hectares (440 square meters) of Plot No. 140M, i.e. a total area of 0.0580 (580 square meters) of land contained in Plot No. 139M and 140M have been settled with the petitioners and other heirs of Chavvinath. The Rule 68 of the U.P. Revenue Code Rules, 2016 governing the settlement of the house sites under Section 67-A of the Revenue Code, 2006 clearly provides that the maximum land that could have settled with an owner of house is 200 square meters. Here the heirs of Chhavinath have to be taken as one unit and thus could not be entitled to settlement of an area in excess of 200 square meters under Section 67-A of the Revenue Code vide order dated 30.8.2016. The said order was recalled by the Assistant Collector vide order dated 23.2.2021 and the name of the petitioners were expunged from the revenue records and the entry of Gaon Sabha was restored. However, this Court in Writ-C No. 17755 of 2021 (Ajay Kumar versus State of U.P. and 4 others) and Writ-C No. 10279 of 2021 (Kamla Devi versus State of U.P. and 4 others) set aside the order dated 23.2.2021 and allowed the writ petitions vide orders dated 4.8.2021 and 16.8.2021. The orders dated 4.8.2021 and 16.8.2021 have been passed in complete ignorance of the fact that under law land in excess of 200 square meters could not be settled in favour of an allottee or otherwise under the provisions of Section 67-A of the Revenue Code, 2006. The house of the petitioners is admittedly built over Plot No. 140M and 139M, with major portion lying on Plot No. 140M. In the opinion of the Court, an area upto 200 square meters of land with structure thereon could be settled with the petitioners under Section 67-A of the Revenue Code, 2006 and not the entire area of 0.0580 hectares (580 square metes) comprised in Plot No. 140M and 139M. No right can be said to have accrued to the petitioners in respect of Plot No. 139M and 140M in excess of 200 square meters. Thus, in our view, the plot No. 139M area 0.0140 hectares (140 square meters) does not stand settled with the petitioners along with the house constructed over it under Section 67-A of the U.P. Revenue Code. The petitioners are not the owners of the house as also the site under Section 67-A of the U.P. Revenue Code, 2006. The first issue thus stands answered against the petitioners.

20. Now, coming to the second issue as to whether the proceedings of acquisition of Plot No. 139M area 0.0140 hectares included in the Notification dated 24.6.2016, under Section 20-A of the Railways Act, 1989 but not included in the Notification/Declaration under Section 20-E and non declaration of award in respect thereof will result in the proceeding having lapsed under Section 20-F (2) of the Act, it would be apt to refer to the respective provisions under the Railways Act, 1989. Chapter IV-A of the Railways Act, 1989 deals with the land acquisition for Special Railway Project. Section 20-A relates to the power to acquire land etc., and reads as under:

"20A. Power to acquire land, etc.-- (1) *Where the Central Government is satisfied that for a public purpose any land is required for execution of a special railway project, it may, by notification, declare its intention to acquire such land.*

(2) Every notification under sub-section (1), shall give a brief description of the land and of the special railway project for which the land is intended to be acquired.

(3) The State Government or the Union territory, as the case may be, shall for the purposes of this section, provide the

details of the land records to the competent authority, whenever required.

(4) The competent authority shall cause the substance of the notification to be published in two local newspapers, one of which shall be in a vernacular language."

21. Section 20-E of the Act deals with declaration of acquisition and reads as under:-

20E. Declaration of acquisition.-- ***(1)*** *Where no objection under sub-section (1) of section 20D has been made to the competent authority within the period specified therein or where the competent authority has disallowed the objections under sub-section (2) of that section, the competent authority shall, as soon as may be, submit a report accordingly to the Central Government and on receipt of such report, the Central Government shall declare, by notification, that the land should be acquired for the purpose mentioned in sub-section (1) of section 20A.*

(2) On the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.

(3) Where in respect of any land, a notification has been published under sub-section (1) of section 20A for its acquisition, but no declaration under sub-section (1) of this section has been published within a period of one year from the date of publication of that notification, the said notification shall cease to have any effect:

Provided that in computing the said period of one year, the period during which any action or proceedings to be taken in pursuance of the notification issued under sub-section (1) of section 20A is stayed by an order of a court shall be excluded.

(4) A declaration made by the Central Government under sub-section (1) shall not be called in question in any court or by any other authority.

22. Perusal of the recitals contained in Section 20-A of the Railways Act, 1989 reveals that the Central Government under the section merely declares its intention to acquire land under the Notification for special railways project. It is merely a proposal. However, the recitals of Section 20-E reveals that on publication of the Notification under Section 20-E, the land shall vest absolutely in the Central Government free from all encumbrances. Sub section (3) of Section 20-E provides that where in respect of any land, a Notification under Section 20-A (1) of the Act has been published, but no declaration under Section 20-E (1) of the Act is published within one year from the date of Notification issued under sub-section (1) of Section 20-E the said Notification shall cease to have effect. Section 20-F deals with determination of amount payable as compensation. Section 20-F (2) provides that an award is to be made within a period of one year from the date of publication of Notification under Section 20-E (1) and if no award is made within that period, the entire proceedings for acquisition of the land shall lapse.

23. Applying the provisions discussed above to the case at hand, we find that, admittedly, the plot No. 139M area 0.0140 hectare was included in the Notification dated 24.6.2016 under Section 20-A of the Act, but the said plot was not included in the Notification/Declaration dated 12.1.2017 under Section 20-E and as such, it can safely be concluded that the Plot No. 139M area 0.0140 hectare has not been acquired for the Special Railway Project. If the plot has not been acquired, there is no question of the acquisition proceedings to

have lapsed. The submissions of the learned counsel for the petitioners in this regard is misconceived and is hereby rejected. The second issue is answered, accordingly, against the petitioners.

24. Now, coming to the third and most important issue as to whether the resumption proceedings in respect of Plot No. 139M area 0.0140 hectare under Section 59 of the U.P. Revenue Code, 2006, under the order dated 26.4.2017 of the Commissioner, Vindhyachal Division, Mirzapur is in accordance with law. We have already held that the Plot No. 139M area 0.0140 hectare along with the structure (house) constructed thereon could not be settled with the petitioners under Section 67-A of the U.P. Revenue Code, 2006 as an area in excess of 200 square meters cannot be settled in favour of the petitioners under Section 67-A of the Revenue Code, 2006. The settlement has attained finality so far as the petitioners are concerned only to the extent of 200 square meters of Plot No. 140M. Area in excess of 200 square meters of Plot No. 140M and 139M combined i.e. 380 square meters is liable to be treated to continue as Gaon Sabha land. The Land Management Committee/Gaon Sabha as also the State Government cannot be said to be divested of any right, title or interest in the said plot No. 139M area 0.0140 hectares and 380 square meters of Plot No. 140M and we are of the considered view that the plot No. 139M area 0.0140 hectares could be resumed treating it to be Gaon Sabha Land. The third issue is thus answered against the petitioners.

25. Learned counsel for the respondent Nos. 1 & 7 has argued that land in question i.e. Plot No. 139M area 0.0140 hectare is involved in a project of national importance i.e. for construction of a dedicated freight corridor that is the eastern dedicated freight corridor with a route length of 1873 Km., linking Ludhiana in Punjab and Darkauni in West Bengal. The project should be the lifeline to the economy of the county and would provide the infrastructure to reduce the time period substantially in transporting goods as well as the consumption of fuel involved in transportation of the goods in comparison of road transportation. The dedicated freight corridor is the need of the day. The dedicated freight corridor will decongest already saturated road network and promote shifting of freight transport to more efficient rail transport. The total estimated cost of DFCC project from Pt. Deen Dayal Upadhyaya Junction to Prayagraj Junction is more than Rs.3,000/- crores which has increased by a significant amount owing to delays in land acquisition and other cost overruns. The target date for commissioning of the project earlier fixed as June, 2022 has since passed. For commissioning, both the tracks Up and Down need to be completed along with signal, telecom and electrical supply. On account of the interim order dated 3.1.2019 operating in the case, hindrance is being caused by the private house of the petitioners at Km. 155+030 and the contractors are demanding hefty amount owing to stoppage of work, idling of man and machine. The house of the petitioners which is existing over the plot No. 139M area 0.0140 hectares is an obstruction in the completion of the project. It is, thus, prayed that the interim order passed by the Court is liable to be vacated on the principle that the higher public purpose shall have preference over individual rights.

26. We have given our anxious consideration to the submissions advanced by the learned counsel for the respondent

Nos. 1 & 7 and find substance in the same. The Dedicated Freight Corridor project of the railways is certainly a project of national importance. The project has certainly suffered on account of the present litigation and on account of the status quo order operating since 3.1.2019.

27. We find that the petitioners have no right, title or interest in plot No. 139M area 0.0140 hectares (140 square meters) situate in village Pirallipur, Pargana Haveli, Post Chunar, District Mirzapur as pleaded and the same does not stand settled with them under Section 67-A of the U.P. Revenue Code, 2006. The house of the petitioners is built over plot No. 140M and 139M with major portion lying over plot No. 140M. An area upto 200 square meters with structure thereon could alone be settled with the petitioners under Section 67-A of the U.P. Revenue Code and not the entire area of 0.0580 hectares (580 square meters) comprised in plot No. 140M and 139M. No right can be said to have accrued to the petitioners in respect of plot No. 139M and 140M in excess of 200 square meters. The respondent Nos. 1 and 7 have already determined the compensation in respect of the dwelling house constructed over plot No. 139M and 140M to the tune of Rs.33,42,507/- which the petitioners are entitled to collect from the respondents.

28. For the forgoing reasons, the writ petition lacks merit and is, accordingly, ***dismissed.*** The interim order dated 3.1.2019 is discharged

29. In the connected Writ-C No. 17435 of 2018 separate order would be passed.

(2022) 9 ILRA 349
ORIGINAL JURISDICTION

CRIMINAL SIDE
DATED: LUCKNOW 25.08.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Misc. Application U/S 482 No. 929 of 2017

Om Prakash & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Rajendra Prasad Mishra, Raghvendra Singh

Counsel for the Opposite Parties:
G.A., Anurag Singh, K.K. Singh Rathore, Syed Aftab Ahmad

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860 - Sections 147, 30 & 201-Quashing of summoning order-murder-complainant's son was killed by hanging from a tree-Investigating agency filed closure report-Complainant filed protest petition, upon which learned Magistrate took cognizance and summoned the accused-However, mandatory provision of proviso 2 to sub section 2 of Section 200 Cr.P.C. had not complied with-In the instant case, learned Magistrate opined that prima facie offence is made out which is triable by Session Court-Therefore, learned Magistrate called upon the complainant to furnish list of witnesses to be examined on oath to hold an enquiry as the offence was exclusively triable by the Sessions Court, thus, learned Magistrate has not committed any error of law in passing the order and directing the complainant to file a list of witnesses to be examined on oath before committing the case to the learned Session Court.(Para 1 to 35)

B. The complainant is not bound to examine all the witnesses named in the complaint, only those witnesses are

required to be examined whom the complainant considers material to make out a prima facie case for issuance of process-At the stage of taking cognizance the Magistrate has only to see whether there exists sufficient ground or not. the list of witnesses can be called at later stage from the complainant, if the learned Magistrate is of the opinion that the offence is exclusively triable by the Sessions Court in order to examine the complainant witnesses on oath to hold an enquiry u/s 202 Cr.P.C. At the initial stage, even if the list of witnesses are not filed with the complaint/protest petition, but on examination of the complainant and the witnesses produced, learned Magistrate is of the opinion that there is a prima facie case against the accused, the order passed by the learned Magistrate would not get vitiated.(Para 33)

The application is rejected. (E-6)

List of Cases cited:

1. Rosy & anr. Vs St. of Ker. (2000) 2 SCC 230
2. Shivjee Singh Vs Nagendra Tiwary & ors. (2010) 7 SCC 578

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

(Application No.14 of 2022)

1. The application seeks recall of the order dated 12.04.2022.

2. Heard learned counsel for the applicants-petitioners.

3. **Allowed**.

4. Order dated 12.04.2022 is hereby recalled.

5. The petition is restored to its original number.

(Order on Memo)

6. Present petition under Section 482 Cr.P.C. has been filed seeking quashing of the proceedings of Criminal Case No.3682 of 2010: Smt. Madhuri vs Anoop Kumar & Ors, arising out of Case Crime No. 879 of 2008 under Sections 147, 302, 201 IPC, Police Station Mishrikh, District Sitapur as well as summoning order dated 23.12.2015 whereby the petitioners have been summoned to face trial under Sections 147, 302, 201 IPC.

Further challenge has been made to the order passed by the learned Additional Sessions Judge, Court No.11, Sitapur in Criminal Revision No.50 of 2016 dismissing the revision of the petitioners instituted against the summoning order dated 23.12.2015.

7. The complainant/respondent No.2 filed an application on 14.12.2007 under Section 156(3) Cr.P.C. alleging that her son was killed on 12.11.2007 at around 9 A.M. by the accused-petitioners and his dead body was hanged from a tree. On the basis of order passed by learned Magistrate the FIR at Case Crime No.879 of 2008 came to be registered on 11.07.2008 under Sections 147, 302, 201 IPC against the accused-petitioners.

8. The investigating agency, however, filed closure report in favour of the petitioners on 24.07.2008. Against the closure report, the complainant filed a protest petition, and the learned Magistrate considering the evidence and material, took cognizance under Section 190 Cr.P.C. and summoned the accused-petitioners for offences under Sections 147, 302, 201 IPC vide order dated 29.07.2010.

9. The petitioners thereafter filed a petition under Section 482 Cr.P.C. being Criminal Miscellaneous Case No.48 of 2011.

10. This Court on 31.01.2011 passed the following order in the said petition:-

"Supplementary affidavit filed by the petitioners is taken on record.

The petitioners have challenged the order dated 29th of July, 2010, passed by the learned Chief Judicial Magistrate, Sitapur on the ground that the learned Magistrate has taken cognizance of offence on the protest application under Section 190(1)(b)Cr.P.C., which provides that the Magistrate may take cognizance of any offence in exercise of power provided under the aforesaid section, but the Magistrate may take cognizance of offence only upon the police report of such facts. He further submits that the complaint case can never be treated as a police case, whereas the learned Magistrate has directed to proceed as State Case.

Upon perusal of the order impugned the submission of learned counsel for the petitioners cannot be disputed. I am of the view that the learned Magistrate on the basis of complaint can may take cognizance of offence only under Section 190 (1)(a) Cr.P.C. and that is not the State case in any manner, therefore, I hereby modify the order impugned to the extent that the cognizance taken by the learned Magistrate shall be considered as cognizance taken under Section 190(1)(a) Cr.P.C. and the learned Magistrate shall proceed with the case accordingly.

In the aforesaid terms the petition is disposed of finally. "

11. From perusal of the aforesaid order, it is evident that learned Single Judge was of the opinion that this petition was not a state case and, therefore, the order dated 29.07.2010 passed by the Magistrate was modified to the extent that cognizance taken by the learned Magistrate should be considered as cognizance taken under Section 190(1)(a) Cr.P.C. and the Magistrate should proceed with the case accordingly.

12. Thus, this Court directed the learned Magistrate to treat the protest petition as a complaint case. After passing of the aforesaid order by the this Court, the case was registered as a complaint case vide Case No.3692 of 2010.

13. Statement of the complainant was recorded under Section 200 Cr.P.C. on 09.06.2019. In her statement recorded under Section 200 Cr.P.C., the complainant said that on 22.11.2007 at around 9 A.M. accused-Anup Kumar took her paralyzed son, Sohit in respect of some theft allegedly committed by Sohit in the shop of Anup's uncle. Accused-Anup was an occultist. On the same day, the body of the son of the complainant was found in a field hanging from a tree which is near to the worship place of Anup Kumar. In the evening, the accused-Gulshan, Ashutosh, Om Prakash, Krishna Prakash and many other persons brought the dead body of her son to the house of the complainant. At that time, no male member of the family was present. When the husband of the complainant came home, he found the dead body of his son lying in the house, he became unconscious and the dead body was buried by accused-Gulshan, Ashutosh, Om Prakash, Krisha Prakash and others. Later on, elder brother of the husband of the complainant got the full information about the incident from Munni Devi an eye witness and other persons that accused-Gulshan, Ashutosh,

Om Prakash and Krishna Prakash had strangulated the deceased and after killing him hanged his body from the tree. He gave information to the higher authorities and then dead body was exhumed and post mortem on the body gotconducted.

14. Mr.Uttam Kumar Mishra, Smt. Munni, Mr. Bhagauti Prasad and Dr.Arun Kumar were examined under Section 202 Cr.P.C.

15. Mr. Uttam Kumar Mishra was the elder brother of the husband of the complainant. He said that Sohit's one hand was amputated and, therefore, he could not have hanged himself from a tree. When he enquired about the incident from people, he was informed that Anup took the deceased on 22.11.2007 at 9:00 A.M. from the house and he was of the confirmed view that it was accused-Anup, who had killed the deceased on which he gave a complaint on 23.11.2007 at the police station and, thereafter, dead body was taken out from the grave and post mortem was conducted. It was further said that from interration with Munni Devi, he could come to know Anup, Gulshan, Ashutosh, Om Prakash had killed his nephew.

16. Smt. Munni Devi in her statement recorded under Section 202 Cr.P.C. stated that she witnessed accused-Anup, Gulshan, Ashutosh, Om Prakash, Krishna Prakash strangulating the deceased by a rope. Sohit was crying and she tried to stop the accused but they threatened her and chased her away from the place of the incident. She came home and after sometime, she could come to know that Sohit was killed.

17. Mr.Bhagwati Prasad, grandfather of the deceased-Sohit in his statement stated that deceased-Sohit's left hand was amputated in a flour mill, and his both legs were also broken. He used to have difficulty even in answering the natural call. Some theft was committed in the shop of Anup's uncle, Sohit's name came in relation to said theft. On 22.11.2007 Anup took Sohit from his house and on the same day at around 12:30 Hours, his dead body was found hanging from a tree near his worship place. He could come to know from Munni Devi and others that Anup, Gulshan, Ashutosh, Om Prakash, Krishna Prakash had killed the deceased by strangulating him by a rope.

18. Dr.Arun Kumar Gautam, who conducted the post mortem examination on the body of the deceased was also examined.

19. Learned Magistrate after considering the statements of the complainant and the witnesses under Sections 200 and 202 Cr.P.C. respectively summoned the petitioners vide impugned order dated 23.12.2015 and was of the opinion that prima facie offence under Sections 147, 302, 201 IPC was made out against the accused-petitioners. They were summoned vide impugned order dated 23.12.2015. The complainant was directed to file a list of witnesses.

20. Mr. Rajendra Prasad Mishra, learned counsel for the petitioners has submitted that the learned Magistrate has failed to appreciate that there is no evidence to take cognizance or for summoning the petitioners for offences under Sections 147, 302, 201 IPC. Police had already filed closure report earlier after considering the statements of the complainant and witnesses. Their evidence is neither credible nor cogent and, therefore, summoning the petitioners on the

basis of statements of the complainant and the witnesses is wholly illegal and impugned order is liable to be set aside.

21. Learned counsel for the petitioner has further submitted that the cause of death in the post mortem report is not strangulation but it is asphyxia as a result of hanging. He, therefore, has submitted that the allegation that the deceased was strangulated by the petitioners, and other accused, and he was hanged from the tree cannot be believed. Learned counsel for the petitioners has also submitted that the complainant has not filed any list of witnesses along with protest petition and, therefore, in absence of this mandatory requirement under proviso 2 of Section 202(2) Cr.P.C. the complaint was required to be rejected.

22. On the other hand, Mr.Anurag Singh, learned counsel appearing for opposite party No.2 and Mr.Rao Narendra Singh, learned A.G.A have opposed the petition and have submitted that the learned Magistrate had taken cognizance on the closure report submitted by the police but his Court vide order dated 31.01.2011 had directed that the protest petition to be treated as complaint. They have submitted that evidence of eye witnesses, Munni and others would prima facie disclose commission of the offence by the petitioners. At the stage of taking cognizance and summoning the accused, only prima facie case is to be considered. From reading of the statements of the complainant and the witnesses, it cannot be said that no prima facie offence is made out against the petitioners. They therefore, have submitted that this petition challenging the impugned order 23.12.2015 taking cognizance and summoning the petitioners has no merit and liable to be dismissed.

23. In respect of submission that mandatory provision of proviso 2 to sub section 2 of Section 200 Cr.P.C. has not been complied with, they have submitted that it was the protest petition which was treated as complaint case by the learned Magistrate and after examining the complainant and witnesses, when learned Magistrate has found prima facie case to hold further enquiry, he has directed the complainant to file a list of witnesses. List of witnesses has already been filed. Learned Magistrate will examine the complainant and the witnesses on oath to hold an enquiry as provided under Section 202 Cr.P.C. before committing matter of Sessions Court. They have, therefore, submitted that there is no illegality in the procedure adopted by learned Magistrate, and the present petition has no merit which is liable to be dismissed.

24. I have considered the submissions of Mr.R.P. Mishra, learned counsel appearing for the petitioners, Mr.Anurag Singh, learned counsel appearing for the complainant and Mr.Rao Narendra Singh, learned A.G.A. for the State.

25. From the statements of the complainant and the witnesses recorded under Sections 200 and 202 Cr.P.C., it cannot be said that no offence under Sections 147, 302, 201 IPC has been made out. Post mortem report has only corroborative value, and it is not a primary evidence. Post mortem is an expert opinion and if there is an eye witness account, the accused cannot get away only on the basis of post mortem report.

26. I, therefore, do not find any substance in the submissions of learned counsel for the petitioners that there is no evidence available against the petitioners

for summoning them to face trial under Sections 147, 201, 302 IPC

27. So far as submission of the learned counsel for the petitioners that in absence of list of witnesses with the complaint/protest petition, protest petition was required to be rejected, this Court considers that proviso 2 to Section 202(2) Cr.P.C. provides that in an enquiry if the Magistrate is of the opinion that offence complained of is triable exclusively by the Court of Session, then the learned Magistrate is required to call upon the complainant to produce all his witnesses and then he should examine them on oath.

28. In this case, after considering the statement of the complainant and the witnesses recorded under Section 200 and 202 Cr.P.C. learned Magistrate was of the opinion that prima facie offence under Sections 147, 201, 302 IPC is made out against the petitioner which is triable by the Sessions Court, therefore, learned Magistrate has called upon the complainant to submit list of witnesses for examining them on oath. Learned Magistrate has not committed any error of law in passing the impugned order and directing the complainant to file a list of witnesses to be examined on oath before committing the case to the learned Sessions Court.

29. The Supreme Court in the case of **Rosy & Anr vs State of Kerala : (2000) 2 SCC 230** has held that under Section 200 read with 202 Cr.P.C., it is only at the discretion of Magistrate to decide whether to hold an inquiry or not before issuing process to the accused. Question of complying with the proviso 2 to Section 202(2) Cr.P.C. would arise only in cases where the Magistrate before taking cognizance of the case decides to hold the inquiry, and further decides to take evidence of witnesses on oath. The object and purpose of holding inquiry or investigation under Section 202 Cr.P.C. is to find out whether there is sufficient ground for proceeding against the accused or not and that holding of inquiry or investigation is not an indispensable course before issuing of process against the accused or dismissal of the complaint. The Supreme Court has held that it is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any doubt that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath.

30. Enquiry under Section 202 Cr.P.C. is of limited nature. Firstly, to find out whether there is prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out whether or not there is sufficient ground for proceeding against the accused. The standard to be adopted by the Magistrate in scrutinizing the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 Cr.P.C. accused has no right to intervene and that it is the duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made.

31. The Supreme Court in the case **of Shivjee Singh vs Nagendra Tiwary & Ors: (2010) 7 SCC 578** has held that non

examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the Magistrate of the jurisdiction to take cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so.

32. The complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. Only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issuance of process. Then the choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when the Magistrate is not required to enter into detailed discussions on the merits or demerits of the case. At the stage of taking cognizance and issuing process, the Magistrate has only to see whether there exists sufficient ground or not.

33. Considering the proviso 2 of Section 202 (2) Cr.P.C. and the judgments cited above, I am of the considered view that the list of witnesses can be called at later stage from the complainant, if the learned Magistrate is of the opinion that the offence is exclusively triable by the Sessions Court in order to examine the complainant witnesses on oath to hold an enquiry under Section 202 Cr.P.C. at the initial stage, even if the list of witnesses are not filed with the complaint/protest petition, but on examination of the complainant and the witnesses produced, learned Magistrate is of the opinion that there is a *prima facie* case against the accused, the order passed by the learned Magistrate would not get vitiated.

34. In the present case, learned Magistrate has called upon the complainant to furnish list of witnesses to be examined on oath to hold an enquiry as the offence is exclusively triable by the Sessions Court, and this Court does not find that learned Magistrate has committed any error of law or jurisdiction in doing so.

35. In view of the aforesaid discussion, present petition being devoid of merit and substance is hereby ***dismissed***. If the petitioners surrender before the trial Court and apply for regular bail, their bail application(s) should be considered expeditiously in accordance with law.

(2022) 9 ILRA 355
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.08.2022

BEFORE

THE HON'BLE SAMEER JAIN, J.

Criminal Misc. Application U/S 482 No. 2300 of 2016

Raghvendra Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Narendra Kumar Singh

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860 - Sections 420, 468, 471, 506 & 120B-Quashing of –Complaint

as well as summoning order-the dispute was regarding registered Will deed of the deceased-the Registered Will was never challenged by Opposite Party in any competent civil court as there was no evidence which indicate that the Will in question was forged one-Opposite party tried to negotiate the matter but could not finalized then he lodged the complaint on the basis of false allegation with malicious intention only to harass the applicant-Therefore the impugned complaint as well as summoning order is quashed.(Para 1 to 33)

B. In the instant case, the Opposite party had given the colour of criminal offence to a purely civil dispute. As per the allegation, on the basis of forged Will, the mutation proceeding was ended in favour of the applicants but there is no evidence that the Will was forged one, therefore only competent civil court could decide the issue whether the Will in dispute was forged one or not but opposite party did not choose to file any suit for cancellation of Will.(Para 28)

The application is allowed. (E-6)

List of Cases cited:

1. R.P. Kapur Vs St. of Punj. (1690) AIR SC 866

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

3. M/s Neeharika Infra. Pvt. Ltd. Vs St. of Mah. & ors. (2021) AIR SC 1918

4. ParbatbhaiAahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. &anr. (2017) 9 SCC 641

5. Kapil Agarwal & ors. Vs Sanjay Sharma & ors. (2021) 5 SCC 524

6. G. Sagar Suri & anr.. Vs St. of U.P. & ors. (2000) 2 SCC 636

7. IOC Vs NEPC India Ltd & ors. (2006) 6 SCC 736

8. M. Subramaniam & anr. Vs S. Janki & anr. (2020) 16 SCC 728

9. Inder Mohan Goswami & anr. Vs St. of Uttaranchal & ors. (2007) 12 SCC 1

(Delivered by Hon'ble Sameer Jain, J.)

1. Despite service of notice upon opposite party no.2, nobody appeared on behalf of opposite party no.2.

2. Heard Sri N.K. Singh, learned counsel for the applicants and Sri Arvind Kumar, learned AGA for the State.

3. The instant application under Section 482 Cr.P.C. has been filed by the applicants to quash the Complaint Case No. 2439 of 2012 dated 05.07.2011 under Sections 420, 468, 471, 506, 120B IPC pending in the court of Additional Chief Judicial Magistrate, Farrukhabad as well as summoning order dated 19.09.2012 and order dated 03.11.2015 passed by revisional court in Criminal Revision No. 308 of 2012.

4. The necessary facts of the case for the purpose of present application is that opposite party no.2, the complainant on 05.07.2011 filed impugned criminal complaint against the applicants and Raj Bahadur Singh (not applicant), the father of applicant no.1 with the allegation that opposite party no.2 is the son-in-law of Vijay Bahadur Singh, the brother of Raj Bahadur Singh (not applicant) and his marriage was performed with the youngest daughter of Vijay Bahadur Singh. It is further alleged in the complaint that Raj Bahadur Singh (not applicant) with intention to grab the property of father-in-law of opposite party no.2 executed a forged registered Will of Vijay Bahdur Singh (father-in-law of opposite party no.2

and brother of Raj Bahdur Singh) on 30.11.2000 in favour of his grand sons, namely Rohit Bhadauriya and Mohit Bhadauriya under the guardianship of applicant no.2 (daughter-in-law of Raj Bahadur Singh), the mother of Rohit and Mohit. In the complaint dated 05.07.2011 it is further alleged that in the registered Will dated 30.11.2000, applicant nos. 3 and 4 were witnesses and opposite party no.2 came to know about the forged Will dated 30.11.2000 only when mutation proceeding was started and when he made a request from Raj Bahadur Singh and applicants to cancel the forged Will dated 30.11.2000 of Vijay Bahadur Singh then they refused to cancel the same and when opposite party no.2 tried to lodge the FIR then police did not lodge his FIR, therefore, he filed impugned complaint on 05.07.2011.

5. In support of complaint dated 05.07.2011, opposite party no.2 was examined under Section 200 Cr.P.C. and Yogesh Pal Singh and Ghambheer Singh both sons-in-law of Vijay Bahadur Singh were examined under Section 202 Cr.P.C. as PW-1 and PW-2. On 19.09.2012 on the basis of complaint and statements recorded under Section 200 and 202 Cr.P.C., ACJM, Farrukhabad summoned the applicants and Raj Bahadur Singh (not applicant), under Sections 420, 468, 471, 506, 120B IPC.

6. Against the summoning order dated 19.09.2012 applicant nos. 1 and 2 preferred Criminal Revision No. 308 of 2012 before the Sessions Judge but on 03.11.2015 their revision was dismissed, hence the instant application has been moved challenging the complaint dated 05.07.2011, summoning order dated 19.09.2012 and lower revisional court order dated 03.11.2015.

7. Learned counsel for the applicants submitted that present dispute is purely civil dispute and opposite party no.2 has filed the impugned complaint only with intention to harass the applicants. He further submitted that the Will dated 30.11.2000 was a registered Will and on the basis of Will dated 30.11.2000, mutation proceeding was commenced, which ultimately decided in favour of applicants after hearing both the parties and opposite party no.2 neither challenged the order of mutation dated 10.04.2012 nor he ever challenged the Will dated 30.11.2000. Learned counsel for the applicants next submitted that as opposite party no.2, son-in-law of Vijay Bahadur Singh was well aware that Will dated 30.11.2000 is not forged one, therefore, he did not challenge the same before any competent civil court and without filing any suit for cancellation of Will dated 30.11.2000, he directly filed impugned complaint, which is bad in law. He further submitted that opposite party no.2 tried to negotiate the matter but when negotiation could not be finalized then ultimately he lodged the impugned complaint on 05.07.2011 on the basis of false allegation and the fact of negotiation is evident from the complaint itself. Learned counsel for the applicants further submitted that as opposite party no.2 filed impugned criminal complaint with malicious intention only to harass the applicants and impugned complaint does not disclose any criminal offence and efficacious remedy was available to opposite party no.2 before civil court, therefore, impugned complaint as well as summoning order are liable to be quashed. Learned counsel for the applicants next submitted that both the courts below failed to consider these facts and merely on the basis of averments made in the complaint, applicants were summoned and when

applicant nos. 1 and 2 challenged the summoning order before the lower revisional court in revision then, their revision was also dismissed, therefore, both the courts below committed an error of law.

8. Per contra, learned AGA opposed the prayer and submitted that there is specific allegation against the applicants in the impugned complaint that on the basis of forged Will of Vijay Bahadur Singh dated 30.11.2000, the names of the sons of applicant nos. 1 and 2 were mutated over the property of Vijay Bahadur Singh, who was father-in-law of opposite party no.2 and applicant no.2 was the guardian of her sons, namely Rohit Bhadauriya and Mohit Bhadauriya in the Will dated 30.11.2000, therefore, prima facie offence under Sections 420, 468, 471, 506, 120B IPC is made out against the applicants. Learned AGA further submitted that as applicant nos. 3 and 4 are the witnesses of the forged Will and they were very well aware that Will of Vijay Bahadur Singh dated 30.11.2000 is forged one, therefore they too cannot scape from their liability and court below rightly summoned the applicants in the present matter.

9. Learned AGA next submitted that the argument advanced by learned counsel for the applicants can only be properly appreciated during the course of trial and not at this stage. He next submitted that merely on the basis of fact that dispute is civil in nature, the proceeding pending against the applicants cannot be quashed as complaint dated 05.07.2011 also discloses prima facie cognizable offences against the applicants, therefore, instant application under Section 482 Cr.P.C. is liable to be dismissed.

10. I have given thoughtful consideration on the rival submissions and perused the record of the case.

11. The power under Section 482 Cr.P.C. of this court is although wide enough but law has been settled by catena of decisions of the Apex Court that only in rarest of rare cases, the criminal proceedings should be quashed at its inception.

12. The three judge Bench of the Apex Court in the case of **R.P. Kapur Vs. State of Punjab AIR 1690 SC 866** after discussing the power of this Court under Section 561A old code (pari materia with Section 482 Cr.P.C.) observed in paragraph no.6 as:-

"6. Before dealing with the merits of the appeal it is necessary to consider the nature and scope of the inherent power of the High Court under Section 561 -A of the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code. In the present case the magistrate before whom the police report has been filed under Section 173 of the Code has yet not applied his mind to the merits of the said report and it may be assumed in favour of the appellant that his request for the quashing of the .proceedings is not at the present stage covered by any specific provision of the Code. It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a

proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the a11egations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no ques- tion of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. ***A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge.*** *In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magis- trate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and' contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. xxxxxxxx"*

(Emphasis supplied)

13. Again Supreme Court discussed the power of this Court under Section 482 Cr.P.C. very elaborately in the case of **State of Haryana and others Vs. Bhajan Lal and others 1992 Supp (1) SCC 335** and in paragraph 102 enumerated 7 categories of the cases where power under Section 482 Cr.P.C. can be exercised by this Court which is quoted below:-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by

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

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

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

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

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

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

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

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

14. Recently the three Judge Bench of the Apex Court in the case of **M/s. Neeharika Inrastructure Pvt. Ltd. Vs. State of Maharashtra and others reported in [AIR 2021 Supreme Court 1918]** again discussed the scope of Section 482 Cr.P.C. and Article 226 of Constitution of India in detailed manner and summarised in paragraph-23 as under:-

"23. In view of the above and for the reasons stated above, our final conclusions on the principal/core issue, whether the High Court would be justified in passing an interim order of stay of investigation and/or "no coercive steps to be adopted", during the pendency of the quashing petition under Section 482 Cr.P.C and/or under Article 226 of the Constitution of India and in what circumstances and whether the High Court would be justified in passing the order of not to arrest the accused or "no coercive

steps to be adopted" during the investigation or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of/not entertaining/not quashing the criminal proceedings/complaint/FIR in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India, our final conclusions are as under:

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the "rarest of rare cases (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

xvi) The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically. Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under Section 438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India.

xvii) Even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order.

xviii) Whenever an interim order is passed by the High Court of "no coercive steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or misapplied."

(Emphasis supplied)

15. Therefore, the law is now settled that if a case falls under the parameters of R.P. Kapur case (supra) and State of Haryana and others Vs. Bhajan Lal and others (supra) then this Court can quash the proceedings while exercising its power under Section 482 Cr.P.C.

16. Before proceeding further it is necessary to have a glance of Section 482 Cr.P.C. which runs as:-

*"482**. Saving of inherent power of High Court**. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent*

abuse of the process of any Court or otherwise to secure the ends of justice."

17. Therefore, Section 482 Cr.P.C. deals with the inherent power of this Court to prevent the abuse of process of any Court or to secure the ends of justice.

18. The three judges Bench of the Apex Court in the case of **Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others Vs. State of Gujarat and another (2017) 9 SCC 641** held that Section 482 Cr.P.C. is prefaced with an overriding provision and this Court being a superior Court has the inherent power to make such orders as are necessary (i) to prevent an abuse of the process of any Court; or (ii) otherwise to secure the ends of justice.

19. Recently, the Apex Court in the case of **Kapil Agarwal and others Vs. Sanjay Sharma and others (2021) 5 SCC 524** observed in paragraph no. 18.1 in respect of power of this court under Section 482 Cr.P.C. as:-

"As observed and held by this Court in catena of decisions, inherent jurisdiction under Section 482 Cr.P.C. and/or under Article 226 of the Constitution is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into weapon of harassment. When the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused, in exercise of inherent powers, such proceedings can be quashed."

20. Applying the law laid down by the Apex Court referred to herein-above, now I will proceed to discuss the fact of the present case.

21. The impugned complaint was filed by opposite party no.2 against the applicants with the allegation that on the basis of forged Will of his father-in-law applicant no.1 and 2 mutated the name of their sons but admittedly Will in dispute dated 30.11.2000 was registered one and on the basis of registered Will after hearing both the parties, the mutation court passed the order in favour of applicants and except the bald allegation, there is no evidence on record on the basis of which, it can be said that the alleged registered Will dated 30.11.2000 was forged one.

22. The Apex Court in case of R.P. Kapur (supra) observed that if there is no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to charge then proceedings of such cases can be quashed while exercising the power under Section 482 Cr.P.C. (Section 561A of the old code).

23. In the present case except bald allegation there is no legal evidence on record which can show that either applicants prepared the forged Will or they executed the forged Will, rather there is order of mutation dated 10.04.2012 (Annexure No.9 to the affidavit filed in support of present application) which shows that after hearing both the parties, on the basis of registered Will dated 30.11.2000, the name of sons of applicant nos. 1 and 2 were mutated and opposite party no.2 did not even challenge the order dated 10.04.2012, therefore, in view of the law laid down in R.P. Kapur (supra), the instant application is liable to be succeeded.

24. Further, opposite party no.2 did not even challenge the alleged forged Will dated 30.11.2000 in any competent civil court and directly filed impugned complaint and further as per the complaint itself he tried to negotiate the matter with the applicants but when failed then he filed the impugned complaint against the applicants and Raj Bahadur Singh (not applicant). Apparently, the present dispute is of civil nature, therefore, question arises, whether in such cases, which are purely civil in nature, criminal proceedings should be permitted to continue.

25. The Apex Court in the case of **G. Sagar Suri and another Vs. State of U.P. and others (2000) 2 SCC 636** observed in paragraph no. 8 as:-

"Jurisdiction under Section 482 of the Code has to be exercised with a great care. In exercise of its jurisdiction High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code, Jurisdiction- under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

26. The Supreme Court in the case of **Indian Oil Corporation Vs. NEPC India Limited and others (2006) 6 SCC 736** observed as:-

"13. xxxxx There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged"

27. The three judge Bench of the Apex Court in the case of **M. Subramaniam and another Vs. S. Janki and another (2020) 16 SCC 728** cautioned that a civil dispute should not be given the colour of criminal offence.

28. If I apply the above principles on the facts of the case at hand then I find that opposite party no.2 has given the colour of criminal offence to a purely civil dispute. As per the allegation, on the basis of forged Will, the mutation proceeding was ended in favour of the applicants but there is no evidence that the Will dated 30.11.2000, the registered Will was forged one, therefore, only competent civil court having jurisdiction over the matter could decide the issue whether the Will in dispute dated 30.11.2000 was forged one or not but opposite party no.2 did not choose to file any suit for cancellation of Will dated 30.11.2000, therefore, it appears that he wanted to settle his score through criminal proceedings as criminal proceedings can be very easily initiated and can harass the applicants too. Therefore, from this point of view too, the present application filed on behalf of the applicants can succeed.

29. The three judge Bench of the Apex Court in the case of **Inder Mohan Goswami and another Vs. State of Uttaranchal and others (2007) 12 SCC 1** also deprecated the practice that if the dispute is purely of civil in nature and can only be ascertained on the basis of evidence

by competent court then criminal proceedings should not be permitted to continue.

30. In case at hand, the question whether Will dated 30.11.2000 is forged could only be ascertained through evidence and documents by a civil court of competent jurisdiction but opposite party no.2 did not challenge the Will before any civil court, therefore, impugned complaint can be nipped in the bud while exercising the jurisdiction under Section 482 Cr.P.C.

31. As, the present dispute is in respect of registered Will deed of deceased and registered Will was never challenged by opposite party no.2 in any competent civil court and there is no evidence on record, which can even indicate that the Will in question dated 30.11.2000 was forged one, therefore, in my considered view, the criminal proceedings instituted by the opposite party no.2 is nothing but an abuse of the process of law and it has been used by him only as a weapon of oppression against the applicants.

32. Therefore, from the discussion made above, I find merit in the case and accordingly the proceedings of Complaint Case No. 2439 of 2012 dated 05.07.2011 under Sections 420, 468, 471, 506, 120B IPC pending in the court of Additional Chief Judicial Magistrate, Farrukhabad as well as summoning order dated 19.09.2012 and order dated 03.11.2015 passed by revisional court in Criminal Revision No. 308 of 2012, Police Station Maudarwaza, District Farrukhabad are hereby **quashed**.

33. The instant application stands **allowed**.

(2022) 9 ILRA 365

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.08.2022

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Criminal Misc. Application U/S 482 No. 3246 of 2019

Shani @ Sani Kumar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Jai Prakash Prasad, Vaishali Sahu

Counsel for the Opposite Parties:
G.A., Sri Rajiv Tiwari, Sri S.P.S. Chauhan, Sri Sukhendra Singh

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860 - Sections 498-A, 323, 504, 506 - ¾ D.P. Act,1961 -Quashing of entire criminal proceedings-accused applicants were demanding dowry of Rs. 2 lac for construction of house and on refusal they assaulted her- the victim alleged in her statement u/s 161 Cr.P.C. that the husband came house after consuming liquor abused her and torn her private part-statement made u/s 164 Cr.P.C, she corroborated the version of 161 Cr.P.C.-medical evidence clearly indicates that the victim sustained injury in her private part and she was admitted to hospital for treatment-the order of cognizance was passed on the order-sheet and not on the printed proforma-At this stage, Court cannot marshal the evidence and adjudicate the reliability of evidence rather it as to only see whether the prima facie case of cognizable offence is made out or not-Hence, no illegality in the impugned order.(Para 1 to 12)

The application is dismissed. (E-6)

List of Cases cited:

1. Geeta Mehrotra & anr.. Vs St. of U.P. &anr. (2013) AIR SC 181

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

3. Pankaj jaiswal Vs St. of U.P. & anr. (2021) 0 Supreme (All) 491

4. St. of Har. & ors. Vs Ch. Bhajan Lal & ors. (1992) AIR 604 , 1990 SCR Supl. 3 259 M/s Neeharika infra. Pvt. Ltd. Vs .St. of Mah. & ors. (2020) SCC Online SC 850

5. R.P. Kapur Vs St. of Punj.(1960) AIR SC 866

6. Ramaesh Vs St. of T.N. (2005) SCC (Crl.) 735 at 738,

7. KahkashanKausar @ Sonam Vs St. of Bih. (2022) 0 Supreme SC 117

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

1. Heard Sri Jai Prakash Prasad, learned counsel for applicants, Sri Sukhendra Singh, learner counsel for opposite party no.2 as well as Sri S.N. Mishra, learned A.G.A. appearing on behalf of State of U.P. and and perused the record.

2. The instant application under Section 482 Cr.P.C. has been moved seeking quashing of entire criminal proceedings of Case No.1044 of 2018 (State vs. Shani and Others), arising out of Case Crime No. 02 of 2018, under Sections 498-A, 323, 504, 506 I.P.C and Section 3/4 of Dowry Prohibition Act, Police Station- Mahila Thana, District- Aligarh as well as charge-sheet no. 22 of 2018 dated 18.06.2018 and cognizance order dated 04.08.2018, pending in the court of learned Additional Chief Judicial Magistrate, Court No.8, Aligarh.

3. Brief facts necessary for disposal of this application are that opposite party no.2, Preeti daughter of Ranveer Singh lodged the first information report against the applicants on 09.01.2018 at 13:13 hrs. on the basis of written complaint alleging therein that her marriage with applicant, Shani took place on 05.02.2017 according to Hindu rites and rituals. In the marriage, her father had spent about a sum of Rs.11 lakhs. Her husband was working in a private company and was getting about Rs.20,000/- as salary. After sometime of marriage, her husband started demanding Rs.2 lakhs for construction of his house which was refused by her on account of which her husband started assaulting and maltreating her on persuasion of her in-laws. On 25.04.2017, her husband came home in drunken condition and started abusing her vulgarly and forcibly took off her shalwar and lacerated her vagina mercilessly, then she cried in pain and hearing the cry the applicant nos. 2 to 5 started laughing saying that she deserves it. Due to excess bleeding she became unconscious and on 26.04.2017 she was admitted in Safdarjung Hospital, New Delhi due to her bad condition. Her husband had also threatened her. On 15.10.2017 her husband left her at Aligarh. When she came at her parental house, she told the entire incident to her parents and close relatives who tried to convince her husband and other in-laws but resulted in vain. The applicant no.1 had admitted the victim/complainant in Safdarjung Hospital, Delhi for treatment on 26.04.2017 after causing injury in her private part by both hands (the photocopy of the treatment prescription dated 26.04.2017 has been annexed as Annexure No.2 to the affidavit). The relevant portion of the treatment prescription is quoted as follows:-

Preeti wife of Sani resident of Nai Basti N.D.

26/04/2017 8.01A.M.

Nullipara female with post coital tear

L/E

0.5x0.5cm tear with continuous bleeding.

On Admission-----P/A/Soft

Procedure - repair in I/V Sedition Perop-Haemostatic Suture

Advised-Amlox 500mg O-O-O 5 Days

-Tab Brufen sos

-T. Fs/Bl/Oc/Ps 1od

-T. Chipmoral Fort

O-O-O 4hours Tdsx14 Days

-Perineal Care O-O-O

COD. Satisfactory Vital Stable

4. Investigating Officer recorded the statement of opposite party no. 2 under Section 161 Cr.P.C. (typed copy of the statement has been annexed as annexure no.3), wherein she stated that the members of her in-laws' family were not satisfied with the dowry given in the marriage and were demanding Rs. 2 lakh as additional dowry and on account of non-fullfilment of demand of additional dowry, her husband (applicant no.1), mother-in-law (applicant no.2), father-in-law (applicant no.3), sister-in-law, unmarried Nanad (applicant no.4) and brother-in-law, Devar (applicant no.5) started beating and maltreating her. The opposite party no.2 was medically examined on 15.02.2018 at Pt. Deen Dayal Upadhyay Hospital, Aligarh. On internal examination, no fresh injury was seen. On external examination no fresh injury of recent use of force was found. Two smear slides were prepared and sent for pathological examination in which no spermatozoa was seen and supplementary injury report was prepared in which doctor opined that on the basis of pathological, medical and physical examination, there was no sign of recent use of force, however, final opinion was reserved depending on FSL report. The above reports were copied by investigating officer in the case diary (the typed and photocopy of the case diary is annexed as annexure no.4 to the affidavit). Investigating officer also recorded statement of Ranveer Singh, father of the informant, Smt. Pushpa Devi, mother of the informant, the copy of the statements is annexed as annexure no.6. The statement under Section 164 Cr.P.C. of the informant/victim was recorded by Additional Chief Judicial Magistrate-VIII, Aligarh, copy of which has been annexed as annexure no.7 to the affidavit. In the statement under Section 164 Cr.P.C., she stated that her marriage with Shani, resident of New Delhi was solemnized on 05.02.2017. After marriage, she was living happily at her matrimonial home, but on 25.04.2017 her husband in drunken condition lacerated her private part mercilessly, thereafter, her husband, mother-in-law, Nanad and Devar got her admitted in Safdarjung Hospital, New Delhi on 26.04.2017. She further stated that accused persons were not keeping her properly and used to beat her on account of demand of Rs. 2 lakhs as dowry. On 15.10.2017 her husband took her at Aligarh and left her at the bus stand. Investigating Officer also recorded the statement of Dr. Vijaya Jutesi, Medical Officer, Safdarjung Hospital, Delhi and Dr. Alveera Shah, Medical Officer, Deen Dayal Upadhyay Hospital, Aligarh, copies of the same have been annexed as annexure nos. 8 & 9. After investigation, it was found that offence under Section 376 I.P.C. is not made out and the charge-sheet was submitted against the accused-applicants under Sections 498-

A, 323, 504, 506 I.P.C. and Section 3/4 of Dowry Prohibition Act.

5. It has been submitted by learned counsel for the applicants that in this case mother, father, brother and unmarried sister of husband (applicant no.1) of opposite party no.2 have been falsely implicated in this case. The general allegations have been levelled against the accused, therefore, no case is made out against the applicants in view of the law laid down by Hon'ble Apex Court in ***Geeta Mehrotra & Anr. vs. State of UP & Anr.***, reported in ***AIR 2013 Supreme Court 181, Mirza Iqbal @ Golu & Anr. vs. The State of Uttar Pradesh, 2021 0 Supreme(SC)795,*** and the law laid down by this Court in ***Pankaj Jaiswal vs. State of U.P. & Another, 2021 0 Supreme(All) 491***. It is further submitted that according to prosecution version, the cause of action arose from 05.02.2017 to 15.10.2017 at the residence of applicants, i.e., House No. 63/331, Nai Basti, Village Jamiya Nagar, South Delhi but opposite party no.2 lodged the first information report at Police Station- Mahila Thana, District- Aligarh. According to Sections 177 and 178 Cr.P.C., every offence shall ordinarily be enquired into and tried by a Court within whose local jurisdiction it was committed and when it is uncertain in which of several local areas an offence was committed, or where an offence is committed partly in one local area and partly in another, or where an offence is a continuing one, and continues to be committed in more local areas than one, or where it consists of several acts done in different local areas, it may be enquired into or tried by a court having jurisdiction over any of such local areas. In this case, the offence is alleged to have been committed in Delhi, therefore, the court at Aligarh has no territorial jurisdiction to take cognizance of the offence on the basis of charge-sheet. It is further submitted that according to prosecution case, applicant no.1 assaulted the opposite party no.2 for non-fulfilment of demand dowry of Rs. 2 lakhs on the goading of his family members, but she did not get herself medically examined by any doctor nor any medico-legal injury report has been filed which establishes that she was assaulted by applicant no.1 on the direction of his family members. Neither any demand of dowry was made by the applicants nor she was tortured in any manner. In fact, the opposite party no.2 had gone to her parental house on her own free will and volition and was continuously residing with her parents since 11.10.2017, thereafter, she has lodged the first information report on the basis of false, fabricated and concocted story with ulterior motive to harass the applicant no.1 (husband) and his family members to pressurise her husband to live with her separately on rental house. It is further submitted that opposite party no.2 sustained injury in her private part during coitus and the treating doctor in her statement has stated that the injury in question on the private part of opposite party no.2 cannot be caused by hand as alleged by the prosecution. The applicant no.1 is ready to keep opposite party no.2 and he has filed a suit for restitution of conjugal rights in the court of Principle Judge Family Court (South-East), Saket Court, New Delhi. It is further submitted that applicant no.3 is a tailor and running a shop on rent of Rs.5000/- per month village of Okhla Jamiya Nagar, New Delhi and applicant no.1 is helping him in tailoring work. The aforesaid criminal proceedings have been initiated by opposing party no.2 against the applicants in abuse of process of law and the same is liable to be set-aside.

6. Per contra, learned A.G.A. as well as learned counsel for opposite party no.2 have submitted that perusal of first information report, statements under Section 161 and 164 Cr.P.C. of opposite party no.2, statements under Section 161 Cr.P.C. of her parents, namely, Ranveer Singh, Smt. Pushpa Devi and the material available on record, prima facie, discloses the commission of cognizable offence punishable under Sections 498-A, 323, 504, 506 I.P.C. and Section 3/4 of Dowry Prohibition Act, therefore, in view of the law laid down by Hon'ble Apex Court in ***State of Haryana & Ors. vs. Ch. Bhajan Lal & Ors., 1992 AIR 604, 1990 SCR Supl. (3) 259*** and ***M/s Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra & Ors, 2020 SCC Online SC 850***, the application under Section 482 Cr.P.C. is not maintainable. It is further submitted that so far as the genuineness of the prosecution case is concerned, it cannot be adjudicated in the proceedings under Section 482 Cr.P.C. and it can only be adjudicated by trial court after recording the evidence. In exercise of power conferred under jurisdiction 482 Cr.P.C., the High Court cannot appreciate the pros and cons of the evidence in view of law laid down by Hon'ble Apex Court in ***R.P. Kapur Vs. State of Punjab, A.I.R. 1960 (SC) 866.*** It is further submitted that although the occurrence has taken place at New Delhi but the part of act of cruelty was taken place at Aligarh, because due to injury in her private parts, her private part was not in good condition as it was earlier on account of which applicant no.1 cut-off his relation with her, and thereafter, on 15.10.2017 in continuance of cruelty her husband left her at Aligarh bus stand and threatened her that she is not suitable for him and when she reached at her parental house, she narrated the entire incidents to her parents. The part of the cruelty punishable under Section 498-A was committed by the accused-applicants at New Delhi and the part of the cruelty i.e. "the act of threatening her that she is not suitable for him" was committed at Aligarh, therefore, the court at Aligarh has jurisdiction to take cognizance of occurrence and police at Aligarh is empowered to lodged first information report and to investigate the matter. The marriage of opposite party no.2 with the applicant no.1 has taken place on 05.02.2017 at Damodar Guest House, Aligarh and just after marriage she had gone to her matrimonial house. It is also submitted that the injury in vagina may be sustained in the early weeks of coitus and it will not happen after passage of about more than two months. There was 0.5 cm x 0.5 cm tear in the vagina of opposite party no.2 and on 26.04.2017 she was admitted to Safdarjung Hospital, Delhi at that time the injury was found bleeding continuously. From the perusal of treatment prescription of Safdarjung Hospital, it transpires that the doctor has repaired tears by stitching under I/V sedition and medicines were prescribed. Although, Dr. Vijaya Jutesi in her statement has stated that the injury in question may occur during sexual intercourse and it could not be caused by hand, but the victim in her statement stated that the accused-applicant no.1 had torned her vagina by hands. It is further submitted that it can only be decided after recording the evidence of doctor at the time of trial, because at that stage the prosecution may suggest the manner in which the alleged injury was caused by applicant no.1. In the first information report, opposite party no.2 has also alleged that her husband, mother-in-law, father-in-law, unmarried Nanad and Devar were taking all the household work by her day and night and were not treating

her with honour. She has further stated that the demand of dowry was made by the accused-applicants to construct the house and on account of its non-fulfillment her husband and other in-laws were beating and maltreating her. It is next submitted that specific allegations have been levelled against all the accused-applicants and the facts and circumstances of this case is different than that of the case relied on by learned counsel for the applicants in ***Geeta Mehrotra & Anr. vs. State of UP & Anr.,*** reported in ***AIR 2013 Supreme Court 181, Mirza Iqbal @ Golu & Anr. vs. The State of Uttar Pradesh, 2021 0 Supreme(SC)795,*** and the law laid down by this Court in ***Pankaj Jaiswal vs. State of U.P. & Another, 2021 0 Supreme(All) 491,*** and therefore, the above cited case law is not applicable in the case in hand. The instant application under Section 482 Cr.P.C. is devoid of merits and is liable to be dismissed.

7. I have given thoughtful consideration to the contentions raised by learned counsel of the parties as well as learned A.G.A. for the State and gone through the file.

8. The informant in the first information report stated that her marriage had taken place at Aligarh with applicant no.1 Shani on 05.02.2017 and her father had given dowry according to his capacity. After marriage, she had gone to her matrimonial house at Nai Basti Okhla, Jamiya Nagar, New Delhi. She had further alleged that her husband, mother-in-law, father-in-law, Nanad and Devar were taking all household work from her day and night and were not giving her respect. After sometimes of marriage her husband started demanding Rs.2 lakhs for construction of house and on refusal to meet out the demand, her husband on persuasion of his family members started assaulting and maltreating her. She had further alleged that her husband had torn her private part in the night on 25.04.2017 at that time her husband was drunken. On 26.04.2017, she was admitted in Safdarjung Hospital, New Delhi by her husband and in-laws in critical condition, where she was threatened not to tell anything to anyone otherwise they would give poison to her, due to this reason she kept mum. She further alleged that her private part was not getting normal due to which her husband refused to have a relationship with her like husband and wife and on 15.10.2017 her husband left her at Aligarh bus stand saying that now she is not suitable for him. Thereafter, her relatives had tried to persuade the accused persons, but it resulted in vain. In the statement under Section 161 Cr.P.C., she stated that all accused-applicants were demanding Rs. 2 lakhs as dowry for construction of house and on refusal they assaulted her and on 25.04.2017 her husband came house after consuming liquor and started abusing her in obscene words and torn her private part ruthlessly by his both hands, and thereafter, they got her admitted in Safdarjung Hospital, New Delhi on 26.04.2017. In the statement under Section 164 Cr.P.C., she corroborated the version of her statement recorded under Section 161 Cr.P.C. From the perusal of medical prescription, it is very much clear that the victim/informant sustained injury in her private part on 25.04.2017 and continued to bleed till the time of admission in the hospital in the next morning where the tear was repaired by stitching under I/V seditions, and thereafter, she was discharged from the hospital. It has also been alleged that when the victim sustained injury in her private part, the family members of her in-laws

were making fun of her saying that she only deserves it.

9. So far as the submission of learned counsel for applicants regarding applicability of the law laid down by Hon'ble Apex Court in ***Geeta Mehrotra & Anr. vs. State of UP & Anr. (supra)*** is concerned, in that ruling it was held that in the first information report allegation against Geeta Mehrotra and Ramji Mehrotra, who are unmarried sister elder brother of husband of the complainant, was found absent and mere casual reference to their names in the first information report was found insufficient to take cognizance against unmarried sister and elder brother of husband of the complainant. In the case in hand, the victim/complainant had alleged in her statements under 161 & 164 Cr.P.C. that all the accused-applicants were not treating her well and were demanding Rs. 2 lakhs as additional dowry and used to harass and torture her and even after she sustained injury in her private part, her husband after treatment told her that now she is not suitable for him and left her at Aligarh bus stand. In above circumstances, prima facie, it cannot be said that there was no active involvement of accused-applicants including father-in-law, mother-in-law, Nanad and Dever in the present case. It is also pertinent to mention that when the victim/complainant sustained injury in her private part, the accused-applicants were making fun of her saying that she deserves only it. The Hon'ble Apex Court ***in Geeta Mehrotra & Anr. vs. State of UP & Anr. (supra)*** had relied on the law laid down in ***Ramaesh vs State of Tamil Nadu,*** *reported in (2005) SCC (Crl.) 735 at 738,* where the sister of husband of the complainant, who was living at a different place, was named in the first information report. In that circumstances, Hon'ble Apex Court held that sister of husband of the complainant was roped in on the basis of bald allegation which was not sufficient to take cognizance against her and the cognizance order against sister of husband of the complainant, who was living at a different place, was quashed. So far as the applicability of the case law of Hon'ble Apex Court in **Kahkashan Kausar @ Sonam vs The State Of Bihar 2022 0 Supreme (SC) 117** is concerned, in that case it was held that if the allegations made against the in-laws (appellants) are general and omnibus allegations, they are liable to be quashed and also held that in absence of any specific role attributed to accused persons, it would be unjust if appellants are forced to go through tribulations of a trial, i.e., general and omnibus allegations cannot manifest in a situation where the relatives of the complainant's husband are forced to undergo trial and a criminal trial leading to an eventual acquittal also inflicts severe scars upon the accused, and such an exercise must therefore be discouraged. In this case, specific allegations were made against the accused persons that all applicants were demanding Rs. 2 lakhs as additional dowry for construction of joint house; they were treating the victim/complainant like a mad and were taking all the household work by her day and night; and were not respecting her and harassing her and also persuading her husband to beat her and even when she sustained injury in her private part they were making fun of her. In above circumstances, the law laid down by Hon'ble Apex Court in ***Kahkashan Kausar @ Sonam vs The State Of Bihar (supra)*** is not applicable in this case because the facts and circumstances of this case are different and specific allegations were made against all the accused-applicants. So far as the law laid down by Hon'ble Apex Court in ***Mirza***

Iqbal @ Golu & Anr. vs. The State of Uttar Pradesh (supra) is concerned, the 1st Appellant therein, was brother-in-law of the deceased was working as a Cashier in ICICI Bank, Khalilabad. On the date of incident i.e. on 24.07.2018, he was on duty and was residing at Khalilabad in view of his employment in ICICI Bank and his mother 2nd Appellant Shamima Bano alias Sammi was also living with him at Khalilabad. In that case, the occurrence had taken place at Gorakhpur, in above circumstances, the proceeding against brother-in-law and mother-in-law of the complainant-respondent was quashed. The facts and circumstances of this case are different from that of aforesaid case, therefore, the law laid down in ***Mirza Iqbal @ Golu & Anr. vs. The State of Uttar Pradesh (supra)*** is not applicable in this case.

10. In this case, the order of cognizance was passed on the order-sheet and not on the printed proforma, therefore, there is no illegality in passing the impugned order.

11. So far as the submission of the counsel of applicants regarding lodging of false and concocted first information report is concerned, it can be adjudicated after recording the evidence by trial court. At the stage of proceeding under Section 482 Cr.P.C., the Court is to see whether perusal of uncontroverted evidence recorded by Investigating Officer during investigation discloses any cognizable offence or not. At this stage, Court cannot marshal the evidence and adjudicate on the reliability of the evidence. The court has to only see whether the prima facie case of commission of cognizable offence is made out or not in the light of law laid down by Hon'ble Apex Court in ***"R.P. Kapur Vs. State of Punjab, A.I.R.*** *1960 (SC) 866*, ***State of Haryana & Ors. vs. Ch. Bhajan Lal & Ors.,*** *1992 AIR 604, 1990 SCR Supl. (3) 259 and* ***M/s Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra & Ors,*** *2020 SCC Online SC 850".* In above circumstances, the impugned order of taking cognizance of offence on the basis of charge-sheet, impugned charge-sheet and the proceedings of lower court are not liable to be quashed and the instant application under Section 482 Cr.P.C. is moved with mala fide intention to delay the proceedings of the lower court.

12. The instant application under Section 482 Cr.P.C. lacks merit and is, accordingly, ***dismissed***.

(2022) 9 ILRA 372
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2022

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Misc. Application U/S 482 No. 21647 of 2019

Yogesh Pandey ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Manoj Kumar Tripathi, Sri Rama Shankar Mishra

Counsel for the Opposite Parties:
G.A., Sri Bablu Singh

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 498A, 323, 504, 506 & 406 -¾ D. P. Act, 1961-Quashing of criminal proceeding-matrimonial dispute-compromise-In the

Instant case, the compromised had been entered into between the parties and the proceedings were liable to be quashed but prior to compromise the Court had granted ample opportunities to the parties to settle their dispute-Initially applicant was enlarged on bail, later on, mediation took place and decided to live together, after some time dispute arose again and parties started living separately-Again they entered into compromise, second application u/s 482 was filed in which mediation failed again-The Court granted ample opportunity for six months and again for three months, enabling them to resolve their disputes-Ultimately the efforts of the Court succeeded-The Court considered it to be its societal duty to make attempts to repair the strained relations of husband and wife by way of amicable settlement since the marriage occupies vital role to play in the society.(Para 1 to 12)

The application is allowed. (E-6)

List of Cases cited:

1. Jitendra Raghuvanshi & ors. Vs Babita Raghuvanshi & ors. (2013) 4 ADJ 40

2. Smt. Manbhawati Vs St. of U.P. & anr. (2006) 55 ACC 509

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard Sri Rama Shanker Mishra, learned counsel for the applicant, Sri Bablu Singh, learned counsel for the opposite party no.2, Sri Rakesh Chandra Srivastava and Si Adarsh Kumar Pandey, learned A.G.A. for the State and perused the material on record.

2. By means of the instant application under Section 482 Cr.P.C., the applicant is challenging the proceedings of Case No. 4912 of 2017 (State Vs. Yogesh Pandey and another) arising out of Case Crime No. 0159 of 2017 under Sections 498A, 323, 504, 506, 406 I.P.C. and Section 3/4 of Dowry Prohibition Act, at Police Station Mahila Thana, District Ghaziabad pending before learned VIIIth Additional Chief Judicial Magistrate, District Ghaziabad.

3. Brief facts of the case are that the marriage of the applicant was solemnised with the opposite party no.2 on 26.11.2015 according to Hindu rites and rituals but due to matrimonial discord, the party started living separately since 28.11.2016. Later on, a first information report dated 27.04.2017 was lodged by the opposite party no.2 in Case Crime No. 0159 of 2017 under Sections 498A, 323, 504, 506, 406 I.P.C. and Section 3/4 of Dowry Prohibition Act, at Police Station Mahila Thana, District Ghaziabad against the applicant and one Sudha Pandey. Thereafter, the matter was entrusted for investigation, which culminated in submission of charge sheet against the applicant and co-accused Sudha Pandey, upon which cognizance was taken and case was registered as Case No. 4912 of 2017 (State Vs. Yogesh Pandey and another).

4. Perusal of the record shows that earlier Criminal Misc. (482) Application No. 4996 of 2018 (Yogesh Pandey and another Vs. State of U.P. and another) was filed before this Court challenging the chargesheet as well as the proceedings of Case No. 4912 of 2017, which was disposed of vide order dated 23.07.2018, with the direction to the present applicant to appear and surrender before the Court below and apply for bail, pursuant to which, the applicant appeared before the Court below and was enlarged on bail. Thereafter, mediation between the parties was held at District Court at Ghaziabad in which both the parties have agreed to live

together peacefully as husband and wife, copy of compromise deed dated 12.11.2018 has been annexed as Annexure SCA-1 to the short counter affidavit.

5. Present second Criminal Misc. (482) Application has been filed for quashing the proceedings of the Case No. 4912 of 2017 (State Vs. Yogesh Pandey and another) on the basis of compromise dated 12.11.2018. Vide order dated 30.05.2019, a co-ordinate Bench of this Court had referred the matter before the Mediation and Conciliation Centre of this Court. Thereafter, mediation took place between the parties before Mediation and Conciliation Centre of this Court, where the parties had decided to re-unite and live together as husband and wife and in this regard interim settlement agreement dated 03.7.2019 was also executed and the matter was fixed for 07.08.2019 but thereafter, the dispute continued between the parties ultimately the mediation between the parties had failed as per report of the incharge Mediation Centre dated 16.10.2019.

6. When the case was listed on 19.01.2021, the counsel for the parties argued that the matter has been compromised between the parties and relying upon the statement of learned counsel for the parties, the co-ordinate Bench of this Court had referred the matter to the trial Court to ascertain the veracity of the compromise pursuant to which, the parties appeared on 27.01.2021 before the court below and the said compromise was verified by the Court below vide order dated 15.02.2021, copy of which is annexed as Annexure-SA1 to the supplementary affidavit dated 14.03.2021. Again the matter was listed on 05.10.2021, on which date, the learned counsel for the parties jointly submitted that the husband and wife are willing to live together and the co-ordinate Bench of this Court vide order dated 05.10.2021 had directed the applicant Yogesh Pandey as well as opposite party no.2 Smt. Mamta Dubey to remain present before the Court fixing the matter for 10.11.2021. It appears that after verification of compromise and prior to 05.10.2021, some dispute again arose between the parties which was again settled on account of which, the learned counsel for the parties jointly made statement that parties are willing to live together. Considering the statement, co-ordinate Bench of this Court directed the parties to remain present on 10.11.2021. Thereafter, the case was listed before this Court on 10.11.2021 on which date, the husband and wife appeared before this Court and had jointly stated that they want to live together and have buried all their disputes but they had stated that the matter may again be placed on board after six months by that time, the pending cases filed against each other may be withdrawn, thus the Court had directed the matter to be listed on 11.05.2022. The parties appeared before this Court on 11.05.2022 on which date again the husband and wife had sought further three months' time to resolve all their disputes. For the said reason, the case was directed to be listed on 23.08.2022 in Chambers.

7. Today when the case was taken up in Chambers, the applicant-Yogesh Pandey (husband) and opposite party no.2 Smt. Mamta Devi (wife) are present before this Court. Both the parties have stated that this Court has granted plenty of time to resolve their disputes due to which the parties got ample opportunity to settle their differences and they have understood each other and now they have finally decided to live

together. The statement of the husband-Yogesh Pandey has been recorded in a separate sheet, which is kept as a part of the record, wherein it has been stated that out of their mutual consent they have decided to live together and will withdraw all the pending cases filed by him against his wife (opposite party). Furthermore, he has stated that he will also pay Rs. 5000/- per month through R.T.G.S. to the opposite party no.2 for a period of 12 years. On the other hand, the statement of the opposite party no.2 (wife) has also been reduced in writing on a plain sheet, which is also kept as a part of the record. She stated that the matter has been compromised between her and her husband and she is living with her husband since 16.11.2021, furthermore she will withdraw all the cases filed by her against the applicant and there is no dispute between the parties.

8. The Hon'ble Apex Court in catena of Judgements has held that it becomes the duty of the Court in the matrimonial matters to encourage genuine settlements of the matrimonial disputes and in the case of ***Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and others, [2013 (4) ADJ 40],*** the Hon'ble Supreme Court has again reiterated the findings as laid down in the case of B.S. Joshi's case. Relevant paragraphs 12 & 13 of the judgment are reproduced herein below:-

"12) In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

13) There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders."

9. In the matter of **Smt. Manbhawati Vs. State of U.P. and another, reported in (2006)55 ACC 509**, wherein initially panchayat was convened but the attempt of compromise failed but by the efflux of time

parties have entered into compromise and thus this Court quashed the pending proceedings on the basis of compromise entered into between the parties.

10. Following the view that efforts and encouragement should be made to resolve controversy through mediation especially in the matrimonial cases, in the instant case, the Court has devoted too much precious time and had granted accommodation to the parties in order to enable them to reach an amicable settlement of the dispute as all is well that ends well.

11. In the instant case, the compromise has been entered into between the parties and the proceedings are liable to be quashed but prior to compromise, this Court had granted ample opportunities to the parties to settle their dispute. Initially the applicant was directed to appear before Court below to apply for bail and was enlarged on bail, later on, parties entered into compromise and before the Mediation Centre at District Ghaziabad, where they have decided to live together as husband and wife but thereafter, dispute again arose and both parties started living separately. Again, they entered into compromise, which gave rise to filing of present second 482 Cr.P.C. petition in which the co-ordinate Bench had referred the matter before the mediation centre of this Court, where the parties arrived at interim settlement but that later on failed. Relying on the statement of the parties that the matter has been settled, a co-ordinate Bench of this Court had sent the matter for verification of the compromise, which compromise was verified but it appears that some misunderstanding again took place between the parties and on several occasions, this Court granted accommodation to the parties, as per their whims and fancies once for six months and again for three months, enabling them to resolve their disputes as the Court considers it to be its societal duty to make attempts to repair the strained relations of husband and wife by way of amicable settlement since the marriage occupies vital role to play in the society. Ultimately, the efforts of the Court succeeded and the differences as well as plight between the husband and wife got amicably settled in terms of the compromise entered between the parties. The parties appeared before the Court and have stated that they are living happily and have no grievance against each other. Furthermore, the opposite party no.2 has stated that she has no objection in case, the proceedings are quashed by this Court.

12. Accordingly, the instant application is allowed. The proceedings of Case No. 4912 of 2017 (State Vs. Yogesh Pandey and another) arising out of Case Crime No. 0159 of 2017 under Sections 498A, 323, 504, 506, 406 I.P.C. and Section 3/4 of Dowry Prohibition Act, at Police Station Mahila Thana, District Ghaziabad pending before learned VIIIth Additional Chief Judicial Magistrate, District Ghaziabad are hereby quashed.

(2022) 9 ILRA 376
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.07.2022

BEFORE

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

Criminal Misc. Application U/S 482 No. 21995 of 2021

Pradeep Kumar Jain ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Satyendra Narayan Singh

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Sections 482 & 311 - Indian Penal Code, 1860-Section 364-rejection-recall application u/s 311 Cr.P.C.-victim was kidnapped and murdered-during pendency of the investigation, one co-accused was kidnapped by rest of the accused persons-second FIR lodged in which mother stated that his son was also accused in earlier murder in which first FIR was lodged and she was examined as PW-4 but she had been declared hostile-the present applicant moved application for re-examination of PW-4 on the ground that in the audio cassette she had accepted that her son and other accused were involved in the murder of victim and in that case she was examined as PW-1-Trial court rejected the application on the ground that her extra judicial confession before the news channel is not documentary evidence while she had been examined and cross-examined earlier-the same had been filed only for lingering on the trial of the case-the fairness of trial has to be seen not only from point of view of the victim, but also from the point of view of the accused and the society-The accused cannot have the witness recalled for re-examination as a matter of right and extraordinary provision cannot be used as an afterthought to fill the gaps.(Para 1 to 30)

B. It is well settled that the power conferred u/s 311 Cr.P.C. should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of view that the application has been filed as an abuse of the process of law.(Para 23)

The application is rejected. (E-6)

List of Cases cited:

1. Natasa Singh Vs C.B.I (2013) 5 SCC 741,

2. Raja Ram Prasad Yadav Vs St. of Bih. & anr. (2013) 14 SCC 461

3. Mannan SK & ors. Vs St. of W.B. & anr. (2014) SC 2950

4. V.N. Patil Vs K. Niranjan Kumar & ors. (2021) 3 SCC 661

5. Vijay Kumar Vs St. of U.P. & anr. (2011) 8 SCC 136

6. Mannan Shaikh & ors. Vs St. of W.B. & anr. (2014) AIR 13 SCC 59

7. Ratanlal Vs Prahlad Jat & ors. (2017) 9 SCC 340

8. Swapan Kumar Chattejee Vs C.B.I. (2019) 14 SCC 328

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

1. Heard Mr. Satyendra Narayan Singh, learned counsel for the applicant and Mr. Mayank Awasthi, learned counsel representing for the State as well as perused the entire material available on record.

2. The present 482 Cr.P.C. application has been filed to quash the order dated 04.10.2021 passed by learned Additional District and Sessions Judge, Court No.12, Muzaffar Nagar, in Session Trial No.592 of 2004 (State vs. Dharmpal), arising out of Case Crime No.24 of 2004, under Section

364 IPC, Police Station-Nai Mandi, District-Muzaffar Nagar whereby the application of the applicant under Section 311 Cr.P.C. for further examination of P.W.4/Smt. Rajeeri, has been rejected.

3. Brief facts of the case are that for the incident dated 24.01.2004 at about 07:00 pm, the F.I.R. was lodged on 25.01.2004 at about 06:30 p.m. stating therein that the applicant's son, namely, Sachin Jain aged about 20 years had gone with his Maruti Car bearing No.UP 12G 2333, but he did not return in the night and on the next day at about 11:00 a.m., the student leader Katar Singh informed that Sachin Jain was seen at about 09:00 p.m. on 24.01.2004 alongwith Raju s/o Vedpal, who had abducted him with the help of his friend.

An application was moved on 26.01.2004 before the concerned S.O. furnishing the name of two eye witnesses, namely, Tasavvar Husain and Mam Chand Verma, who have seen the incident dated 24.01.2004 wherein the victim Sachin Jain was kidnapped by Rohit, Katar Singh, Dharmpal, Raju and Kapil. On the aforesaid application, the Investigating Officer recorded the statements of Mam Chand and Tasavvar, who have stated that they were eye witness of abduction of Sachin Jain by Dharmpal, Rohit, Kapil and Raju. During course of investigation, maruti car of Sachin Jain bearing No.UP 12G 2333 was recovered in the presence of two independent witnesses, namely, Babu Bangali and Sonu wherein the seat of Maruti Car was found blood stained. The aforesaid blood stained seat cover was sent to the Forensic Science Laboratory, U.P. for examination and its report has been submitted on 06.08.2004. From the said report dated 06.08.2004, it was found that the blood stained seat cover of the Maruti car was that of victim Sachin Jain, whose dead body was found in the canal. The aforesaid fact of throwing the dead body of victim Sachin Jain in the canal has been admitted by the accused persons. During investigation, the statements of co-accused Dharmpal was recorded, who has stated that the victim Sachin Jain was kidnapped by him alongwith other co-accused persons and subsequently, murdered, thereafter, his dead body was thrown in the canal. Stereo and two speakers of the said Maruti car was also recovered on pointing out of co-accused Dharmpal.

During pendency of the aforesaid investigation, the co-accused Raju was kidnapped by rest of the accused persons, hence an F.I.R. has been lodged by Smt. Rajveeri, (mother of co-accused Raju) against the co-accused persons Dharmpal and Rohit on 14.04.2008 at about 11:00 a.m., which was registered as Case Crime No.151 of 2004, under Section 364 IPC, P.S.-Nai Mandi, District-Muzaffar Nagar. After investigation, charge sheet has been submitted against the named accused persons and trial of the accused persons has been proceeded as Session Trial No.457 of 2004. During trial, Smt. Rajveeri has been examined before the court concerned as P.W.-1, who has supported the version of FIR as lodged by her. She has stated that her son, namely, Raju was also accused in the murder of Sachin Jain and the aforesaid fact was also disclosed by the co-accused Dharmpal in his statement. Subsequently, in the incident of murder of co-accused Raju, the co-accused Dharampal and other co-accused persons have been acquitted in Session Trial No.457 of 2004.

4. Learned counsel for the applicant submits that earlier the applicant approached before this Court by means of filing an application U/s 482 No.19433 of

2007 wherein the Co-ordinate Bench of this Court vide order dated 20.08.2007 has stayed the further proceedings of Session Trial No.592 of 2004. The said order dated 20.08.2007 was extended from time to time. Thereafter, in view of the judgment of Apex Court in the case of Asian Surface Road Transport vs. State, the court concerned has proceeded in Session Trial No.592 of 2004 and the statements of PW-1, Pradeep Jain and PW-2, Amit Kumar Jain has been recorded.

5. Learned counsel for the applicant further submits that during pendency of trial, the applicant moved an application before the trial court to summon the Fard recovery which was identified by the applicant, however, the trial court has rejected the said application vide order dated 05.04.2021. Aggrieved by the order dated 05.04.2021, the applicant approached this Court by means of filing application U/s 482 No.13699 of 2021, which is still pending before this Court.

6. He further submits that in Session Trial No.592 of 2004, Smt. Rajveeri has been examined before the trial court as PW-4, but she has been declared hostile. However, in the entire record which was recorded in the case diary, SCD-15, Smt. Rajveeri has accepted the murder of Sachin Jain and in the Case Crime No.151 of 2004, Smt. Rajveeri has also stated that in the murder of Sachin Jain, the co-accused Dharmpal and Rohit etc. are involved. Subsequently, the applicant moved an application u/s 311 Cr.P.C. before the trial court for re-examination of Smt. Rajveeri on the ground that in the audio cassette Smt. Rajveeri has accepted that involvement of co-accused Dharmpal, Rohit and other persons and the same has also been stated by her in her statement given in Case Crime No.151 of 2004, under Section 364 IPC in Session Trial No.757 of 2004 wherein she was examined as P.W.-1. The said application was also moved on the ground of re-examining Smt. Rajveeri with respect to her extra judicial confession before the news channel.

7. The trial court has rejected the said application U/s 311 Cr.P.C. of the applicant vide impugned order dated 04.10.2021 on the ground that the question which has been stated to be asked from Smt. Rajveeri is not documentary evidence.

8. Learned counsel for the applicant further submits that the trial court has not considered the contents of the application u/s 311 Cr.P.C. dated 23.09.2021 in which he has been categorically stated regarding the question for cross examination from P.W.-4 Smt. Rajveeri and without considering the same, rejected the said application u/s 311 Cr.P.C. in mechanical manner, which is unjust, improper and bad in the eye of law.

9. Learned counsel for the applicant further submits that since some relevant facts had been left to be examined, therefore, re-examination of PW-4 is necessary for proper adjudication of the trial. While exercising the power under Section 311 Cr.P.C., paramount consideration of the court is to do justice to the case and court concerned can examine a witness at any stage, even if the same results in filling up lacuna or loop holes. Learned counsel for the applicant lastly submits that the impugned order may kindly be quashed and the applicant may be permitted to cross examine PW-4 Smt. Rajveeri in the interest of justice.

10. Per contra, Mr. Mayank Awasthi, learned counsel representing for the State has opposed the submission made by the

learned counsel for the applicant by contending that the order impugned passed by the court below is legal and valid. The court below has recorded pure finding of fact while rejecting the application filed by the applicant under Section 311 Cr.P.C. for re-examination of P.W.-4 Smt. Rajveeri. The court below has not committed any error in passing the impugned order, therefore, it does not call for any interference by this Court. Hence, he submits that the present application is liable to be rejected.

11. I have considered the submissions made by the learned counsel for the parties and gone through the records of the present application.

12. Before fathoming correctness of the submissions made by the learned counsel for the parties, it will be worthwhile to refer to Section 311 Cr.P.C., which reads as under:-

"311. Power to summon material witness, or examine person present:-. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re- examine any person already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case."

13. Assiduous scrutiny of aforesaid provision clearly suggests that court enjoys vast power to summon any person as a witness or recall and re-examine a witness, provided, same is essentially required for just decision of the case. Moreover, such exercise of power can be at any stage of inquiry, trial or proceedings under the Code, meaning thereby, applicant can file an application at any time before conclusion of trial. Very object of Section 311 is to bring on record evidence not only from the point of view of accused and prosecution, but also from the point of view of the orderly society.

14. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 of Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as 'any Court', 'at any stage', or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible

terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

15. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interest of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same.

16. Close scrutiny of aforesaid provision of law further suggests that Section 311 has two parts; first part reserves a right to the parties to move an appropriate application for re-examination of a witness at any stage; but definitely the second part is mandatory that casts a duty upon court to re-examine or recall or summon a witness at any stage if his/her evidence appears to be essential for just decision of case because, definitely the underlying object of aforesaid provision of law is to ensure that there is no failure of justice on account of mistake on the part of either of parties in bringing valuable piece of evidence or leaving an ambiguity in the statements of witnesses examined from either side.

17. In this backdrop, it would be useful to make a reference to certain decisions rendered by the Supreme Court on the interpretation of Section 311 of the Code, wherein the Apex Court highlighted the basic principles which are to be borne in mind while dealing with an application under Section 311of the Code.

18. In ***Natasa Singh v. C. B. I.,*** reported in ***(2013) 5 SCC 741,*** the Apex Court, after referring the various decisions of the Supreme Court, has observed that the power conferred under Section 311 Cr.P.C. must therefore, be invoked by the court only in order to meet the ends of justice and such power should be exercised with great caution and circumspection.

19. The scope of Section 311 Cr.P.C. has been dealt in the case of ***Raja Ram Prasad Yadav vs. State of Bihar and another***, reported in ***(2013)14 SCC 461,*** wherein the Apex Court has held that power under Section 311 Cr.P.C. to summon any person or witness or examine any person already examined can be exercised at any stage provided the same is required for just decision of the case. It may be relevant to take note of the following paras of the judgment:-

"14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial",

"other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

20. In this context, I also wish to make a reference to the judgment of the Apex Court in ***Mannan SK and others vs. State of West Bengal and another*** reported in ***AIR 2014 SC 2950,*** wherein the the Apex Court Court has held as under:-

"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or reexamination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and

arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."

21. Further in the case of ***V.N. Patil vs. K. Niranjan Kumar and Ors.*** reported in ***(2021) 3 SCC 661*** wherein the Apex Court has held that the aim of every Court is to discover the truth. Section 311 Cr.P.C. is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 Cr.P.C. has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

22. The principles related to the exercise of the power under Section 311 Cr.P.C. have been well settled by this Court in ***Vijay Kumar vs. State of Uttar Pradesh and Another***, reported in ***2011 (8) SCC 136***:-

"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

10.

23. This principle has been further reiterated in ***Mannan Shaikh and Others vs. State of West Bengal and Another***, reported in ***2014 (13) SCC 59*** and thereafter in the case of ***Ratanlal vs. Prahlad Jat and Others, 2017 (9) SCC 340*** and ***Swapan Kumar Chatterjee vs. Central Bureau of Investigation, 2019 (14) SCC 328***. The relevant Paras of ***Swapan Kumar Chatterjee (supra)*** are as under:-

"10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely: (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and reexamine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and reexamine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons

and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for reexamination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

24. Aforesaid exposition of law clearly suggests that a fair trial is main object of criminal jurisprudence and it is duty of court to ensure such fairness is not hampered or threatened in any manner. It has been further held in the aforesaid judgments that fair trial entails interests of accused, victim and society and therefore, grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. The Apex Court has categorically held in the aforesaid judgment that adducing evidence in support of the defence is a valuable right and denial of such right would amount to denial of a fair trial.

25. The Apex Court, while culling out certain principles required to be borne in mind by the courts while considering applications under Section 311, has held that exercise of widest discretionary powers under Section 311 should ensure that judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts. Hon'ble Apex Court has further held that if evidence of any witness appears to be essential for the just decision of the case, it is the duty of the court to summon and examine or recall and re-examine any such person because very object of exercising power under Section 311 is to find out truth and render a just decision. Most importantly, in the judgment referred to herein above, the Apex Court has held that court should bear in mind that no party in trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

26. From perusal of the records of the present application and applications filed by the application under Section 311 Cr.P.C. as well as from examining the order impugned, it is an admitted position that the P.W. No.4 has already been examined and cross-examined. The plea of the applicant for summoning P.W. No.4, Smt. Rajveeri for further cross-examination has only been taken to be rejected on the ground that the question which has been stated to be asked from P.W-4 Smt. Rajveeri is not documentary evidence. From the application made by the applicant under Section 311 Cr.P.C., it is apparently clear that the same has been filed only for lingering on the trial of the case.

27. The fairness of trial has to be seen not only from the point of view of the victim, but also from the point of view of the accused and the society. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of power under Section 311 Cr.P.C. has to be considered from case to case.

28. The accused cannot have the witness recalled for re-examination as a matter of right and extraordinary provision

cannot be used as an afterthought to fill the gaps.

29. Considering the materials brought on record and keeping the principles laid down by the Hon'ble Supreme Court for exercise of power under section 311 Cr.P.C., this Court is of the opinion that observations and findings recorded by the trial Court in rejecting the application under Section 311 Cr.P.C. of the applicant under the facts and circumstances of the case are fully sustainable. The trial Court has committed no illegality or infirmity in the order impugned by rejecting the application of the applicant. There appears no abuse of process of the Court also. There is no evidence on record to satisfy this Court that trial would be seriously prejudiced if the said witnesses is not recalled for re-examination or further examination.

30. In view of the above, the application of the applicant having no merit deserves to be rejected. In the result, the application is **rejected**.

31. The office is directed to communicate this order to the court concerned to proceed with the case in accordance with law.

32. The Court would like to appreciate the hard work put in by Mr. Hari Harsh Gaur, Law Clerk, who has drawn attention to detail and the same shows in his work of providing legal assistance in this matter.

(2022) 9 ILRA 385
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.07.2022

BEFORE

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

Criminal Misc. Application U/S 482 No. 22092 of 2021

Amar Dayal Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Hari Nath Chaubey

Counsel for the Opposite Parties:
G.A., Sri Anil Kumar Ray

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Companies Act, 2013-Section 452-Quashing of summoning order-Applicant was appointed as an employee of M/s Hindalco Industries Ltd., later he was dismissed from service-After dismissal, he had to leave company's quarter allotted to him-After several reminders and final notice, a complaint was filed-Funds for which the applicant was entitled, was already paid to him with interest, but the applicant was illegally withholding the same-Hence, the Court below rightly summoned the applicant u/s 452 of the Companies Act, 2013.(Para 1 to 20)

The application is rejected. (E-6)

List of Cases cited:

1. Beer Bala Gupta Vs 15th Addl. Session Judge, Meerut (2002) 0 Supreme(All) 307

2. Jagdish Chandra Nijhawan Vs S.K. Saraf (1999) 1 SCC 119

3. Gopika Chandrabhushan Saran &anr. Vs M/s XLO India Ltd. & anr.. (2009) 3 SCC 342,

4. St. of Har. & ors. Vs Bhajan Lal & ors. (1992) Suppl. 1 SCC 335

5. Ramveer Upadhyay & anr.. Vs St. of U.P. & anr.. (2022) LiveLaw SC 396

6. R.P. Kapur Vs St. of Punj. (1960) AIR SC 866

7. St. of Har. Vs Bhajan Lal (1992) SCC Cr. 426

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

1. Heard Sri Hari Nath Chaubey, learned counsel for the applicant, Sri Anil Kumar Ray, learned counsel for the opposite party no.2, Sri Mayank Awasthi, learned AGA for the State and perused the records.

2. The present 482 Cr.P.C. application has been filed to quash the entire proceedings of Complaint Case no. 859 of 2020 (Hindalco Industries Ltd. Vs. Amar Dayal Singh), under Section 452 of the Companies Act, 2013 (Erstwhile Section 630 of Companies Act, 1956), Police Station-Pipri, District-Sonebhadra, pending before the Court of Special Chief Judicial Magistrate, Allahabad

3. The brief facts of the case, which are required to be stated as alleged in the application are that:-

(i) The applicant was appointed as an employee of M/s. Hindalco Industries Limited (hereinafter called as "Company"), which is represented by Mr. Ashok Kumar Singh, Deputy Officer, who was duly authorized representative of the company.

(ii) The appointment letter was issued to the applicant on 24.11.1994 and he joined the services of company. Thereafter, the applicant was allotted company's quarter No.PB-318 by the company in its colony vide License of Quarter dated 11.09.2006 subject to certain conditions mentioned therein. One of the conditions as mentioned in the license is that the license shall stand automatically revoked on termination of service, for any reason whatsoever, retirement, resignation, transfer etc. Subsequently, the applicant was dismissed from services of the company vide letter dated 07.03.2011.

(iii) Accordingly, the applicant was no more an employee of the company with effect from 07.03.2011, i.e. the date of his dismissal from service, therefore, he had to leave the company's quarter as allotted to him. When the quarter was not vacated by the applicant, notice dated 11.03.2011 was given to the applicant to vacate the aforesaid quarter of the company by 21.03.2011 and handover the possession of the same to the company.

(iv) After several reminders and final notice, when the company's quarter was not vacated, a complaint was filed on 20.10.2020 by opposite party no.2. On the aforesaid complaint, the concerned court below has summoned the applicant under Section 452 of the Companies Act, 2013 (erstwhile Section 630 of the Companies Act, 1956).

4. Submissions of the learned counsel for the applicant are that:-

(i) While summoning the applicant, the court concerned has formed its opinion that the applicant is in wrongful possession of the company's quarter without realizing the fact that the company has not paid the entire gratuity amount to the applicant for which he is entitled. No offence under Section 452 of the Companies Act, 2013 is made out against the applicant.

(ii) For delayed payment of funds for which the applicant is entitled, he has already filed a C.P. No.19 of 2014 before the Deputy Labour Commissioner, Pipri, Sonebhadra, which is still pending.

(iii) The applicant has also filed an application dated 25.10.2018 for payment of interest on delayed payment of gratuity as the Assistant Labour Commissioner, Pipri, Sonebhadra has passed the order dated 30.06.2018 directing for payment of 10% interest on gratuity amount of Rs. 2,10,610/-, which was paid to the applicant on 17.01.2018. The aforesaid application dated 25.10.2018 filed by the applicant is still pending.

(iv) As per the relevant section, the applicant cannot be said to be wrongfully withholding the company's quarter. As the interest on gratuity amount has not been paid to the applicant, hence the summoning order is not justified in the eyes of law and the entire proceedings are bad in the eye of law. In support of his contention, he has relied upon the judgment of this Court in the case of ***Beer Bala Gupta vs. 15th Additional Session Judge, Meerut*** reported in ***2002 0 Supreme(All) 307*** wherein it has been held that company did not discharge its obligation, inasmuch as it did not pay the gratuity amount to the petitioner and in such view of the matter, the petitioner cannot be said to have wrongfully retained the quarter belonging to the company and, therefore, the applicant is not liable for punishment under Section 452 of the Companies Act, 2013 (erstwhile Section 630 of the Companies Act, 1956).

(v) He has also placed reliance upon the judgment of ***Jagdish Chandra Nijhawan vs. S.K. Saraf*** reported in ***(1999) 1 SCC 119***

(vi) Therefore, the prosecution against the applicant is bad in law and the entire proceedings of the aforesaid complaint case is liable to be quashed by this Court.

5. On the other hand, Mr. Mayank Awasthi, learned AGA as well as Mr. Anil Kumar Ray, learned counsel for the opposite party no.2 have opposed the submission advanced by the learned counsel for the applicant by submitting that as per the license of quarter wherein one of the conditions of license mentioned is that the license shall stand automatically revoked on termination of service, the applicant was not entitled to retain the quarter after being dismissed from service on 07.03.2011, therefore, after 07.03.2011, the applicant, who had retained the company's quarter was illegally withholding the same, hence he was liable to be punished under the relevant section of Company Act.

6. So far as the submission made by the learned counsel for the applicant regarding payment of the funds for which the applicant was entitled, learned counsel for the opposite party no.2 has stated in his counter affidavit that the provident fund of Rs. 1,17,896/- and gratuity of Rs.2,10,610/- has already been paid through Cheque No.668080 dated 27.12.2017 and interest on gratuity of Rs.1,42,806/- has already been paid to the applicant through Cheque No.015289 dated 18.08.2018. Therefore, as per the Section 452 of the Companies Act, 2013, the applicant is liable to be punished for withholding the company's quarter.

7. Learned AGA as well as learned counsel for the opposite party no.2, therefore, submits that the application filed by the applicant for payment of interest on delayed payment, is nothing but a via media to show that certain payments have not been paid to the applicant in order to wrongly withhold the company's quarter allotted to him.

8. Learned counsel for the opposite party no.2 further submits that the applicant is not entitled for any relief, as, once the

right of the employee to retain the possession of property on account of dismissal from services has extinguished, then he is under an obligation to return the property back to the company. In support of his contention, he has relied upon the judgment of Apex Court in the case of ***Gopika Chandrabhushan Saran and Another vs. M/s. XLO India Ltd. and Another*** reported in ***(2009) 3 SCC 342***, wherein the Apex Court has held as under:-

"The capacity, right to possession and the duration of occupation are all features which are integrally blended with the employment. Once the right of the employee or the officer to retain the possession of the property, either on account of termination of services, retirement, resignation or death, gets extinguished, they (persons in occupation) are under an obligation to return the property back to the company and on their failure to do so, they render themselves liable to be dealt with under Section 630 of the Act for retrieval of the possession of the property."

6. On the cumulative strength of the aforesaid, learned AGA as well as learned counsel for the opposite party no.2 submits that available material is enough to summon accused person and considering material on record, it can not be said that no evidence is made out against the applicant, therefore, the proceedings of the aforesaid case cannot be quashed, as such no interference is required in the matter by this Court at this stage.

10. I have considered the submissions advanced by the learned counsel for the parties as well as have gone through the records of the present application along with the impugned order.

11. Before proceeding to deal with the submissions made by the learned counsel for the parties, it will be appropriate to place the extract of Section 452 of the Companies Act, 2013, which is as follows:-

"Section 452: Punishment for wrongful withholding of property.

(1) If any officer or employee of a company--

(a) wrongfully obtains possession of any property, including cash of the company; or

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorised by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

(2) The Court trying an offence under sub-section (1) may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to two years. {Provided that the imprisonment of such officer or employee, as the case may be, shall not be ordered for wrongful possession or withholding of a dwelling unit, if the court is satisfied that the company has not paid to that officer or employee, as the case may be, any amount relating to--(a) provident fund, pension fund, gratuity fund or any other fund for the welfare of its officers or employees, maintained by the company;

(b) compensation or liability for compensation under the Workmen's Compensation Act, 1923 in respect of death or disablement.}

12. Proviso to the aforesaid section provides that the punishment of the officer or employee, as the case may be, cannot be ordered for wrongful possession or withholding of the company's quarter, the company has not paid to that officer or employee the provident fund, pension fund, gratuity fund or any other funds for which the officer or employee is entitled.

13. From the records, it is clear that the complaint contains the allegation that the company's quarter allotted to the applicant was not vacated in spite of repeated notices to him, after the applicant was dismissed from service on 07.03.2011 and the funds for which the applicant was entitled, was already paid to him with interest, therefore, as per the provisions of Section 452 of the Company's Act, the applicant is liable to be punished for withholding the company's quarter.

14. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. The Court can not look into the fact as to whether the allegations in the complaint are true or untrue and the same has to be decided by the trial court, thus no interference is required in such cases as the present one. Even though, the inherent power of the High Court under Section 482 Cr.P.C., to interfere with criminal proceedings is wide, such power has to be exercised with circumspection, in exceptional cases. Jurisdiction under Section 482 of the Cr.P.C. is not to be exercised for the asking.

15. The aforesaid has been held by the Apex Court in the case of ***State of Haryana and Ors. vs. Bhajan Lal and Ors. reported in 1992 Suppl.(1) SCC 335***. The relevant paragraph of the aforesaid judgment reads as under:-

"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

16. The following observations has also been made by the Apex Court in the latest judgment of ***Ramveer Upadhyay & another vs. State of U.P. & another*** reported in ***2022 Livelaw (SC) 396.*** Paragraph no.39 of the aforesaid judgment reads as under:-

"39. In our considered opinion criminal proceedings cannot be nipped in the bud by exercise of jurisdiction under Section 482 of the Cr.P.C. only because the complaint has been lodged by a political rival. It is possible that a false complaint may have been lodged at the behest of a political opponent. However, such possibility would not justify interference under Section 482 of the Cr.P.C. to quash the criminal proceedings. As observed

above, the possibility of retaliation on the part of the petitioners by the acts alleged, after closure of the earlier criminal case cannot be ruled out. The allegations in the complaint constitute offence under the Attrocities Act. Whether the allegations are true or untrue, would have to be decided in the trial. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence....."

17. In fact while exercising the inherent jurisdiction under Section 482 Cr.P.C. or while wielding the powers under Section 226 of the Constitution of India the quashing of the complaint can be done only if it does not disclose any offence or if there is any legal bar which prohibits the proceedings on its basis. The Apex Court decisions in ***R.P. Kapur Vs. State of Punjab*** reported in ***AIR 1960 SC 866*** and ***State of Haryana Vs. Bhajan Lal*** reported in ***1992 SCC(Cr.) 426*** make the position of law in this regard clear recognizing certain categories by way of illustration which may justify the quashing of a complaint or charge sheet.

18. In view of the above, this Court finds that the applicant was dismissed from services on 07.03.2011, thus he is under an obligation to return back the company's quarter, but the applicant was illegally withholding the same, hence he is liable to be punished under the relevant section. The payment for which he was entitled has already been paid, therefore, the case laws referred by learned counsel for the applicant is not applicable in the present case and the court concerned has rightly summoned the applicant under Section 452 of the Companies Act, 2013.

19. Considering the facts and circumstances of the case, this Court finds that the present matter does not fall in any of the categories recognized by the Apex Court, which might justify interference by this Court in order to quash the proceedings. Therefore, the prayer for quashing the entire proceedings of aforesaid complaint case is refused as I do not see any abuse of the court's process either.

20. The present application lacks merit and is, accordingly, **rejected**.

(2022) 9 ILRA 390
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.08.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Bail Application No. 4988 of 2022

Pushpa Devi ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Suresh Kumar Yadav

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Bail - Indian Penal Code, 1860 - Sections 302, 120-B - The Code of criminal procedure, 1973 - Section 319 - Power to proceed against other persons appearing to be guilty of offence - Constitution of India - Article 21 - Power under Section 319 CrPC is a discretionary and an extraordinary power - to be exercised sparingly and only in those

cases where the circumstances of the case so warrant - not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence - Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised - not in a casual and cavalier manner. (Para - 5,7)

Applicant not named in F.I.R. - name was taken by P.W.7, P.W.9 and P.W.10 - summoned under Section 319 Cr.P.C. - court below not applied its judicial mind - summoned applicant in a cursory manner - main accused and co-accused also not named - summoned under Section 319 Cr.P.C - granted bail.

HELD:- No convincing material to indicate the possibility of tampering with the evidence and considering the larger mandate of the Article 21 of the Constitution of India, applicant may be enlarged on bail. **(Para -12)**

Bail application allowed. (E-7)

List of Cases cited:-

1. Hardeep Singh Vs St. of Punj. & ors., (2014) 3 SCC 92

2. Labhuji Amratji Thakor & ors. Vs The St. of Guj. & anr. , 2018 (0) Supreme (SC) 1147

3. Brijendra Singh & ors. Vs St. of Rajasthan, (2017) 7 SCC 706

4. Periyasami & ors. Vs S. Nallasamy, (2019) 4 SCC 342

5. Dataram Singh Vs St. of U.P. & anr., (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Pleadings have already been exchanged between the parties are on the record.

2. Heard Shri Suresh Kumar Yadav, the learned counsel for the applicant, learned A.G.A. for the State and perused the record.

3. The applicant, **Puspha Devi**, has moved the present bail application seeking bail in Case Crime No. 327 of 2018, under Sections 302, 120-B I.P.C., Police Station Mohammadpur Khala, District Barabanki.

4. Learned counsel for the applicant submits that accused applicant has falsely been implicated in the present case. It is further submitted that the applicant was not named in the F.I.R. and she was summoned under Section 319 Cr.P.C. on the premise of statements of witnesses, P.W.7, P.W.9 and P.W.10 in the trial court who have maliciously taken the name of applicant with intention to implicate the applicant falsely. The complainant in her statement before the trial court has not taken the name of applicant. As per prosecution case, the main role has been assigned to co-accused Gajraj Singh, who has already been granted bail by a co-ordinate Bench of this Court vide order dated 24.04.2019 passed in Bail No.8940 of 2018. One another co-accused, Jaikaran Singh @ Chhoti, who was not named in the F.I.R. and was summoned under Section 319 Cr.P.C. has also been granted bail by a coordinate Bench of this Court vide order dated 26.02.2020 passed in bail No. 10612 of 2020, and the case of applicant is not on the worse footing than that of the co-accused, Jaikaran Singh @ Chhoti, who has been enlarged on bail.

5. Learned counsel for the applicant further submits that summoning order dated 31.07.2019 is also against the spirit of various judgments of Hon'ble Supreme Court. He placed reliance upon a judgment

of Constitution Bench of Hon'ble Apex Court in the case of **Hardeep Singh Vs. State of Punjab & others**, (2014) 3 SCC 92, wherein paragraphs-105 and 106 it has been observed as under:-

"105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

6. The above Constitution Bench judgment was duly considered by the Hon'ble Apex Court in the case of **Labhuji Amratji Thakor & others Vs. The State of Gujarat and another, 2018 (0) Supreme (SC) 1147**. Paragraph-9 of the aforesaid judgment reads as under:-

"9. The Constitution Bench has given a caution that power under Section 319 Cr.P.C. is a discretionary and extraordinary power, which should be exercised sparingly and only in those cases where the circumstances of the case so warrant. The crucial test, which has been laid down as noted above is "the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction." The present is a case, where the trial court had rejected the application filed by the prosecution under Section 319 Cr.P.C. Further, in the present case, the complainant in the F.I.R. has not taken the names of the appellants and after investigation in which the statement of victim was also recorded, the names of the appellants did not figure. After carrying investigation, the Charge Sheet was submitted in which the appellants names were also not mentioned as accused. In the statement recorded before the Police, the victim has named only Natuji with whom she admitted having physical relations and who took her and with whom she went out of the house in the night and lived with him on several places. The mother of victim in her statement before the Court herself has stated that victim girl returned to the house after one and a half months. In the statement, before the Court, victim has narrated the entire sequence of events. She has stated in her statement that accused

Natuji used to visit her Uncle's house Vishnuji, where she met Natuji. She, however, stated that it was Natuji, who had given her mobile phone. Her parents came to know about she having been given mobile phone by Natuji, then they went to the house of Natuji and threatened Natuji."

7. Learned counsel for the applicant has further made reliance upon the judgment of Hon'ble Apex Court in the case of **Brijendra Singh and others vs. State of Rajasthan, (2017) 7 SCC 706,** wherein in paragraphs-13 and 15 it has been observed as under:-

"13. In order to answer the question, some of the principles enunciated in Hardeep Singh?s case may be recapitulated:

Power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some ?evidence? against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The ?evidence? herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross- examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

xx xx xx

15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so- called verbal/ocular version. Thus, the ?evidence? recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether ?much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the

notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

8. Learned counsel for the applicant has further relied upon the judgment of Hon'ble Apex Court in the case of **Periyasami and others vs. S. Nallasamy, (2019) 4 SCC 342** wherein in paragraphs-14 and 15 it has been observed as under:-

"14. In the First Information Report or in the statements recorded under Section 161 of the Code, the names of the appellants or any other description have not been given so as to identify them. The allegations in the FIR are vague and can be used any time to include any person in the absence of description in the First Information Report to identify such person. There is no assertion in respect of the villages to which the additional accused belong. Therefore, there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 of IPC in view of the judgment in Hardeep Singh case (supra). The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence. Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused.

15. The High Court has set aside the order passed by the learned Magistrate only on the basis of the statements of some of the witnesses examined by the Complainant. Mere disclosing the names of the appellants cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code, especially when the Complainant is a husband and has initiated criminal proceedings against family of his in-laws and when their names or other identity were not disclosed at the first opportunity."

9. Learned counsel for the applicant further submits that prosecution story as set up is totally false and fabricated, no role has been assigned to the applicant, no incriminating article has been recovered from her possession or on her pointing out, the recover of alleged E-Shram Card of applicant from the place of occurrence is false and implanted by the police, there is no strong motive against the applicant and the alleged motive of dispute of money shown by the complainant is baseless and has no force because the alleged amount was taken by the deceased about ten years ago and since then there was no dispute and the applicant has falsely been implicated in the case, therefore, she should be released on bail by this Court sympathetically.

10. Several other submissions regarding legality and illegality of the allegations made in the F.I.R. have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused, have also been touched upon at length. It has been assured on behalf of the applicant that she is ready to cooperate with the process of law and shall faithfully make herself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon her. The applicant undertakes

that in case she is released on bail she will not misuse the liberty of bail and will cooperate in trial. It has also been pointed out that the applicant is not having any criminal history, which fact has been stated in para-33 of the affidavit filed in support of bail application. The applicant is in jail since 21.04.2022 and that in the wake of heavy pendency of cases in the courts, there is no likelihood of any early conclusion of trial.

11. Learned A.G.A. opposed the prayer for bail, but has not disputed that applicant was not named in the F.I.R. and her name was surfaced for the first time in the statements of P.W.7, P.W.9 and P.W.10.

12. After perusing the record in the light of the submissions made at the Bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, and considering the fact that the applicant was not named in the F.I.R.; her name was taken by P.W.7, P.W.9 and P.W.10 and she was summoned under Section 319 Cr.P.C., whereupon learned court below has not applied its judicial mind and in a cursory manner summoned the applicant to face the trial; and the main accused, Gajraj Singh has already been granted bail; another co-accused, Jaikaran Singh @ Chhoti, who was also not named and was summoned under Section 319 Cr.P.C., has also been granted bail, as well as considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the cases of **Hardeep Singh (supra), Labhuji Amratji Thakor (supra), Brijendra Singh (supra), Periyasami and others (supra) and Dataram Singh vs. State of U.P. and another**, reported in (2018) 3 SCC 22, this Court is of the view that the applicant may be enlarged on bail.

13. The prayer for bail is granted. The application is allowed.

14. Let the applicant, **Puspha Devi**, involved in Case Crime No. 327 of 2018, under Sections 302, 120-B I.P.C., Police Station Mohammadpur Khala, District Barabanki, be enlarged on bail on her executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and her personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

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

(5) In case, the applicant misuses the liberty of bail and in order to secure her presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against her, in

accordance with law, under Section 174-A of the Indian Penal Code.

(6) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of her bail and proceed against her in accordance with law.

(7) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

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

15. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

16. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merit of the case.

(2022) 9 ILRA 396
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. 1st Bail Application No. 21223 of 2022

Peeyush Kumar Jain ...Applicant (In Jail)
Versus
Union of India ...Opposite Party

Counsel for the Applicant:
Sri Rahul Agarwal, Sri Malay Prasad, Ms. Tanya Makker, Ms. Saloni Mathur, Sri Piyush Kant Shukla, Sri Anurag Khanna (Sr. Advocate)

Counsel for the Opposite Party:
Sri Dhananjay Awasthi, Sri Digvijay Nath Dubey

(A) Criminal Law - Bail in economic offences - The Central Goods and Services Tax Act, 2017 - Section 74(7),132 (1) (a) r.w. Section 132 (1) (i) & 132 (5), Section 138 – Compounding of Offences - in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration - right to bail is not to be denied merely because of the sentiments of the community against the accused - mere denial of bail by another High Court on the facts of a particular case, without laying down any proposition of law, would not amount to a binding precedent. (Para - 25,29,30)

Search on residential and official premises of applicant by Officers of DGGI - Cash amounting to Rs. 196.57 Crores seized - recovery of 23 kilograms gold - handed over to Officers of Directorate of Revenue Intelligence - applicant arrested - collectively engaged in illicit supply of finished goods, namely perfumery compounds - without issuing any tax invoice and without payment of GST – application for bail before trial court – rejected – ground – no reasonable explanation - matter serious in nature - very harmful to economic health of country - granting bail in such a matter would be likely to promote such type of modus-operandi in evasion of tax. **(Para - 3,4,7)**

(B) Criminal Law - basic jurisprudence relating to bail in economic offences - remains same - grant of bail is the rule and refusal is the exception - to ensure that accused has opportunity of securing fair trial - not advisable to categorize all the economic offences into one group and deny bail on that basis - Even if the allegation is one of grave economic offence - not a rule that bail should be denied in every case - no bar created in relevant enactment passed by legislature - nor does bail jurisprudence provide so. (Para - 30)

HELD:-Offence alleged against applicant is compoundable. Vague allegation that applicant may tamper with evidence. No material to give rise to a reasonable apprehension that applicant will misuse his liberty to subvert justice or tamper with the evidence or witnesses. Fit case to grant bail to the applicant. **(Para -22,31)**

Bail application alowed. (E-7)

List of Cases cited:-

1. Dataram Singh Vs St. of U.P., (2018) 3 SCC 22

2. P. Chidambaram Vs C.B.I., (2020) 13 SCC 337

3. Satender Kumar Antil Vs C.B.I., 2022 SCC OnLine SC 825

4. Nitin Verma Vs U.O.I. & anr., 2022 SCC OnLine All 512

5. Paras Jain Vs U.O.I., Criminal Miscellaneous Bail Application No. 21848 of 2022

6. Vimal Yashwantgiri Goswami Vs St. of Guj., R/Special Civil Application No. 13679 of 2019

7. Vimal Yashwantgiri Goswami Vs St. of Guj., 2022 SCC OnLine Guj 713

8. Basudev Mittal Vs U.O.I. MCRC No. 3919 of 2022

9. Arvind Kumar Munka Vs U.O.I., CRM No. 10075 of 2019

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Anurag Khanna, the learned Senior Counsel assisted by Sri Rahul Agarwal, Ms. Tanya Makker, Sri. Malay Prasad, Ms. Saloni Mathur and Sri. Piyush Kant Shukla, the learned counsel for the applicant and Sri Dhananjay Awasthi and Sri Digvijay Nath Dubey, the learned Senior Standing Counsel for the Directorate General of Goods and Services Tax Intelligence (DGGI).

2. By means of the instant application, the applicant is seeking his release on bail in Criminal Case No. 7646 of 2022 in the Court of learned Special Chief Judicial Magistrate (Economic Offences) / Additional Metropolitan Magistrate-III, Kanpur Nagar, arising out of a complaint filed in respect of offence under Section 132 (1) (a) read with Section 132 (1) (i) and 132 (5) of the Central Goods and Services Tax Act, 2017.

3. Briefly stated, the facts of the case are that on 22-12-2021 the Officers of the DGGI started making a search on the residential and official premises of the applicant at Kannuaj and Kanpur, which continued till 28-12-2021. Cash amounting to Rs. 196.57 Crores was seized from the applicant's premises besides recovery of 23 kilograms gold, which was handed over to the Officers of the Directorate of the Revenue Intelligence. The applicant was arrested on 26-12-2021.

4. On 22-02-2022, the DGGI filed a complaint before the learned Special Chief Judicial Magistrate (Economic Offences) / Additional Metropolitan Magistrate-III, Kanpur Nagar against the applicant seeking his prosecution and punishment for committing the aforesaid offences. It has

been stated in the complaint that the applicant is one of the partners in the firm M/S Odochem Industries and he used to operate and manage two proprietorship concerns namely Odosynth Inc., (of which the applicant's wife Smt. Kalpana Jain is the proprietor) and M/S Flora Naturale (of which Smt. Vijay Laxmi Jain, wife of Sri Ambrish Kumar Jain is the proprietor) and it was revealed during investigation that the aforesaid firms operated by the applicant along with his brother Ambrish Kumar Jain were collectively engaged in illicit supply of finished goods, namely perfumery compounds, without issuing any tax invoice and without payment of GST.

5. It has further been stated in the complaint that in his voluntary statement recorded on 25-26.12.2021, 06-07-08.01.2022 and 05.02.2022 under Section 70 of the CGST Act, 2017, the applicant had admitted having made illicit supply of perfumery compounds by the aforesaid firms and he had offered to pay Rs. 52 Crores towards his tax liability along with the applicable interest and penalty and that he has managed purchase of raw materials required for manufacturing of perfumery compounds without accounting for in the books and without payment of GST, but he has not disclosed the names and particulars of the buyers and sellers of the aforesaid firms.

6. As per the complaint averments, the amount of GST evasion far exceeds Rs. 500 lakhs prescribed under Section 132 (1) (i) of the Act and the offence committed by the applicant is punishable for a term which may extend to five years.

7. On 02-03-2022, the applicant filed an application before the learned Trial Court for being released on bail and on 05-02-2022, the Trial Court passed an order rejecting the bail application on the ground that the applicant is an active partner in all the three firms; that more than Rs. 196.58 Crores cash was seized from the applicant's premises; that the financial records of the firms showed different liability of tax than seized amount of cash and no reasonable explanation was provided for the huge amount of cash seized; that the applicant has neither denied the ownership of the searched premises nor did he deny possession of the huge amount of the cash; that the matter is serious in nature and is very harmful to the economic health of the country and granting bail in such a matter would be likely to promote such type of modus-operandi in evasion of tax.

8. On 04-04-2022, the applicant filed an application before the Sessions Judge seeking his release on bail, and the learned Sessions Judge rejected the bail application by means of an order dated 28-04-2022 on similar grounds.

9. It has further been stated in the affidavit that the applicant is suffering from multiple illnesses like double vision, glaucoma, insomnia, hypertension, anxiety and blood pressure for which he is undergoing treatment.

10. The DGGI has filed a counter affidavit stating that during the searches conducted at the business and residential premises of the firms operated by the applicant along with his family members, unaccounted cash of Rs.196,57,02,539/- has been seized; that the applicant has admitted that the amount seized is the sales proceed of the goods clandestinely supplied by him without payment of tax and the applicant has paid Rs. 54.09 crores towards GST liability along with interest and

penalty as per his own calculation, but as the investigations are still in progress, DGGI is yet to ascertain the final tax liabilities under Section 74 (7) of the CGST Act, 2017.

11. It has further been stated in the counter affidavit that the department has recovered several fake invoices and fictitious LRs (transport documents) evidencing clandestine supplies of taxable goods. Additionally, 23 Kgs of Gold bullions believed to be having foreign origin markings, have also been recovered from the residential premises of the applicant and separate proceedings have been initiated against the applicant in respect thereof under the provision of the Customs Act, 1962.

12. In the rejoinder affidavit filed on behalf of the applicant it has been stated that the alleged "voluntary statement' of the applicant had been obtained by the DGGI under duress and coercion and it was not voluntary and that the applicant is a person of clean antecedents and he is not a habitual offender.

13. The rejoinder affidavit further contains an averment that after the applicant's firm paid the tax and interest, the DGGI has released the goods that had been seized from the applicant's premises.

14. The rejoinder affidavit further contains that the prosecution complaint had been filed way back on 22-02-2022 and yet even the charges have not been framed till date and there appears to be no likelihood that the trial will commence soon.

15. It has further been stated in the rejoinder affidavit that in the counter affidavit filed by the DGGI before the Trial Court, it was categorically stated that since the applicant has not made any payment of tax, the plea of the applicant cannot be entertained. Now the applicant has paid the amount of tax along with interest and penalty, the DGGI is pleading that the voluntary payment of tax has no impact on the present proceedings, which stand is clearly and afterthought and a mischievous and deliberate attempt to keep the applicant incarcerated.

16. Regarding the DGGI's contention that it is yet to ascertain the tax liability of the assessment, it has been stated in the rejoinder affidavit that the assessment proceedings (which typically start with the issuance of a show-cause notice) have not even been initiated till date.

17. Sri. Anurag Khanna, the learned Senior Advocate for the applicant has submitted that the offences alleged carry a minimum punishment of six months' imprisonment and a maximum of five years' imprisonment and the offence is compoundable, which indicates that the offence is not grave. Moreover, mere gravity of the offence cannot be a ground to deny bail. He has further submitted that the applicant has already paid a sum of Rs.54.09 Crores towards tax, interest and penalty and he has undertaken to deposit the amount of any additional liability whereas the Department is yet to ascertain his tax liability. He has further submitted that since the applicant has already deposited the amount of tax, interest and penalty and the DGGI has seized the cash amount of Rs. Rs.196,57,02,539/-, the interest of the Revenue as well as that of the public at large is protected; that the applicant has already spent more than 8 months in jail and during this period the department has not sought his custodial

interrogation, which shows that his custody is not at all required. He has further submitted that investigation against the applicant stands completed and the trial is yet to commence and that the applicant cannot be kept in custody on the ground that investigation against the suppliers of the raw materials to the applicant and the buyers of the applicant is still pending.

18. Sri. Khanna has also submitted that the applicant does not have a passport and, therefore, he has not a flight risk. He has further submitted that the entire evidence in the present case is documentary in nature, which is already in possession of the department and the statement of the applicant has already been recorded and, therefore, there is no possibility of the applicant tampering with any evidence and moreover, a mere apprehension of the applicant tampering with the evidence is not a ground to deny bail to the applicant.

19. Before proceeding to decide the prayer for grant of bail, it would be apt to have a look at the following relevant statutory provisions contained in Section 132 and 138 of the Act: -

132. Punishment for certain offences.-- *(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely:--*

(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

* * *

(ii) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

* * *

shall be punishable--

(iii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with ***imprisonment for a term which may extend to five years*** *and with fine;*

* * *

(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, ***be for a term not less than six months.***

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

* * *

138. Compounding of offences.-- *(1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed:*

Provided that nothing contained in this section shall apply to--

(a) a person who has been allowed to compound once in respect of any of the offences specified in clauses (a)

to (f) of sub-section (1) of Section 132 and the offences specified in clause (l) which are relatable to offences specified in clauses (a) to (f) of the said sub-section;

(b) a person who has been allowed to compound once in respect of any offence, other than those in clause (a), under this Act or under the provisions of any State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the Integrated Goods and Services Tax Act in respect of supplies of value exceeding one crore rupees;

(c) a person who has been accused of committing an offence under this Act which is also an offence under any other law for the time being in force;

(d) a person who has been convicted for an offence under this Act by a court;

(e) a person who has been accused of committing an offence specified in clause (g) or clause (j) or clause (k) of sub-section (1) of Section 132; and

(f) any other class of persons or offences as may be prescribed:

Provided further that any compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law:

Provided also that compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences.

(2) The amount for compounding of offences under this section shall be such as may be prescribed, subject to the minimum amount not being less than ten thousand rupees or fifty per cent. of the tax involved, whichever is higher, and the maximum amount not being less than thirty thousand rupees or one hundred and fifty per cent. of the tax, whichever is higher.

On payment of such compounding amount as may be determined by the Commissioner, no further proceedings shall be initiated under this Act against the accused person in respect of the same offence and any criminal proceedings, if already initiated in respect of the said offence, shall stand abated.

20. A bare perusal of the aforesaid provisions leave no room to doubt that that the offences alleged carry a minimum punishment of six months' imprisonment and a maximum of five years' imprisonment and Section 138 of the Act provides that the offence is compoundable.

21. Although the learned Counsel for the DGGI have contended that the applicant is also accused of committing offence under the Customs Act and the present case falls under clause (c) of the Proviso appended to Section 138 and it is not compoundable, but the aforesaid submission appears to be misconceived. For the aforesaid clause to be attracted, the person should have been accused of c*ommitting an offence under this Act which is also an offence under any other law for the time being in force.* The allegations against the applicant which amount to an offence under the Customs Act, are not an offence under this act and vice versa and, therefore, clause (c) of the Proviso appended to Section 138 is not attracted in the present case.

22. The learned Counsel for the DGGI have also submitted that the applicant has not disclosed the names and particulars of his suppliers of raw material and, therefore, he is not co-operating in investigation and thereby he appears to have committed the offence under Section 132 (1) (k) of the Act. However, the complaint mentioned the accusations against the applicant only under Section 132 (1) (a) read with Section 132 (1) (i) and

132 (5) and there is no accusation for committing an offence under Section 132 (1) (k) of the Act. Therefore, I am of the view that the offence alleged against the applicant is compoundable.

23. The law regarding grant of bail has been explained in numerous decisions of the Hon'ble Supreme Court and it will be apt to refer to a few of the relatively recent judgments on the subject. In the case of **Dataram Singh v. State of Uttar Pradesh**, (2018) 3 SCC 22, the Hon'ble Supreme Court was pleased to reiterate the law of bail in the following words:--

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

* * *

5. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in Nikesh Tarachand Shah v. Union of India [(2018) 11 SCC 1] going back to the days of the Magna Carta. In that decision, reference was made to Gurbaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565] in which it is observed that it was held way back in Nagendra v. King-Emperor [AIR 1924 Cal 476] that bail is not to be withheld as a punishment. Reference was also made to Emperor v. Hutchinson [AIR 1931 All 356] wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days."

24. In **P. Chidambaram v. CBI**, (2020) 13 SCC 337, the Hon'ble Supreme court reiterated the following principles for grant of bail: -

"21. The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:

(i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution;

(ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses;

(iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence;

(iv) character, behaviour and standing of the accused and the circumstances which are peculiar to the accused;

(v) larger interest of the public or the State and similar other considerations.

25. In a recent decision in the case of **Satender Kumar Antil v. Central Bureau of Investigation**, 2022 SCC OnLine SC 825, the Hon'ble Supreme Court has summarized and reiterated the law regarding grant of bail in economic offences, as laid down in its earlier decisions, in the following words:--

"66. What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in the case of P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791, after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence. ***After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis.*** *Suffice it to state that law, as laid down in the following judgments, will govern the field:--*

Precedents

-P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791:

23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. ***One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.***

-Sanjay Chandra v. CBI, (2012) 1 SCC 40:

"39. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two

grounds : the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. ***It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.***

40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, ***right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.*** *xxxxxxxxx*

46. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI."

(emphasis supplied)

26. In a recent decision of this Court in the case of **Nitin Verma versus Union of India and another**, 2022 Scc OnLine All 512, this Court granted bail to a person accused of committing offence under Section 132 (1) (b) and 132 (1) (i) of the CGST Act, 2017 where the allegation was that the total invoice value of the fake supplies made by the 126 bogus firms of the accused was Rs. 691.35 Crores and the total GST evasion involved in it is Rs. 100.30 Crores, after taking into consideration the legal position referred to in the last preceding paragrahs, on the following reasons: -

"28. Analyzing the facts of the case in light of the law laid explained in the case of Y. S. Jagan Mohan Reddy, Dataram Singh and Satender Kumar Antil (Supra), it has to be taken into consideration that (1) the applicant has been implicated on the basis of the statement of a co-accused Chandra Prakash Kriplani, who has already been granted bail by this Court; (2) earlier, the applicant himself had been granted anticipatory bail by this Court; (3) the applicant has no criminal history; (4) the department had initiated proceedings on 31.12.2019 by issuing a summons under

Section 70 of CGST Act and after completion of the investigation, on 22.11.2021 the department has filed a complaint in the Court of Special Chief Judicial Magistrate, Agra and, therefore, it cannot be said that now the applicant is in a position to influence the investigation of the case; (5) the applicant is languishing in jail since 26-09-2021; (6) the maximum punishment that can be imposed upon the applicant is five years' imprisonment and (7) the offence is compoundable as per the provision contained in Section 138 of the CGST Act, I am of the considered view that the applicant is entitled to be released on bail."

27. In **Paras Jain versus Union of India**, Criminal Miscellaneous Bail Application No. 21848 of 2022, decided on 29-07-2022, wherein it was stated in the counter affidavit that "from the analysis of incriminating material recovered, the involvement of the applicant with 75 fake firms was discovered. No one turned up in response to the summons from 75 firms. The aforesaid firms have availed fraudulent I.T.C. Of Rs.5,28,91,94,250/-.", a co-ordinate Bench of this Court granted bail in an offence under Section 132 (1) (b) of the CGST Act, 2017, keeping in view the facts that the applicant was in jail since 18-02-2022, he had no criminal history, the offence is compoundable and the trial will take a its own time to conclude.

28. The learned Counsel for the DGGI have submitted that in the case of **Vimal Yashwantgiri Goswami versus State of Gujarat**, R/Special Civil Application No. 13679 of 2019 decided on 20-10-2019, the Gujarat High Court had declined to give any relief to the petitioner, as the case against him involving allegations of GST evasion was found to be serious in nature and the petitioners had not offered to compound the offence. In the aforesaid case, the relief sought by the petitioner which was declined by the High Court was stay of arrest of the petitioner. However on 28-04-2022, the Gujarat High Court has passed an order granting bail to the petitioner **Vimal Yashwantgiri Goswami versus State of Gujarat**, in its order reported in 2022 Scc OnLine Guj 713: -

"9. _ _ _Even, if the tax evasion is taken more than 5 crores, the maximum punishment which can be imposed is five years. It is not disputed by the department that if the tax evasion of the applicant is less than Rs. 5 crores, then it will be a bailable offence as per the provisions of Section 132(1)(i) read with Sections 132(4) and 132(5) of the Gujarat GST Act and the Central GST Act, 2017. Considering the aforesaid observations, the applicant has carved out his case for grant of bail under the provision of section 438 of the Cr.P.C."

29. The learned Counsel for the DGGI have placed reliance upon a judgment of the Chhattisgarh High Court in the case of **Basudev Mittal versus Union of India**, MCRC No. 3919 of 2022 decided on 15-07-2022 and the decision dated 24-12-2019 given by Calcutta High Court in **Arvind Kumar Munka versus Union of India**, CRM No. 10075 of 2019, in which the High Courts had denied bail to the accused. However, mere denial of bail by another High Court on the facts of a particular case, without laying down any proposition of law, would not amount to a binding precedent.

30. The position of law regarding grant of bail which emerges from the judgments of the Supreme Court referred to

above, is that the basic jurisprudence relating to bail in economic offences remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. It is not advisable to categorize all the economic offences into one group and deny bail on that basis. One of the circumstances to consider the gravity of the offence is the term of sentence that is prescribed for the offence the accused is alleged to have committed. Even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. While considering the prayer for grant of bail in any offence, including an economic offence, the Court has to consider: -

(i) the nature of accusation and the severity of the punishment to which the party may be liable in the case of conviction and the nature of the materials relied upon by the prosecution;

(ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses;

(iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence;

(iv) character, behaviour and standing of the accused and the circumstances which are peculiar to the accused;

(v) larger interest of the public or the State and similar other considerations.

A prayer for bail is not to be denied merely because of the sentiments of the community are against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

31. Having considered the facts and submissions made in light of the law laid down by the Hon'ble Supreme Court in various cases, which has been summarized in the preceding paragraphs and keeping in view that: -

(i) the offences alleged carry a minimum punishment of six months' imprisonment and a maximum of five years' imprisonment and that the offences are compoundable, which indicates that the offences are not grave;

(ii) The applicant has already paid a sum of Rs. 54.09 Crores towards tax, interest and penalty and he has undertaken to deposit the amount of any additional liability;

(iii) the Department is yet to ascertain the applicant's tax liability;

(iv) the amount of Rs.196,57,02,539/- seized by the DGGI from the applicant's premises is still lying with the Department and, therefore, the interest of the Revenue as well as that of the public at large is protected;

(v) the applicant has already spent more than 8 months in jail and during this period the department has not sought his custodial interrogation, which shows that his custody is not at all required;

(vi) the trial is yet to commence;

(vii) the applicant has no previous criminal history and he has already been granted bail in the case under the Customs Act;

(viii) the applicant does not hold a passport and, therefore, he is not at a flight risk;

(ix) Besides a mere vague allegation that the applicant may tamper with the evidence, no material is there to give rise to a reasonable apprehension that the applicant will misuse his liberty to subvert justice or tamper with the evidence or witnesses;

I find it a fit case to exercise this Court's discretion of granting bail to the applicant.

32. Let the applicant - **Peeyush Kumar Jain** be released on bail in Criminal Case No. 7646 of 2022 in the Court of the Special Chief Judicial Magistrate (Economic Offences) / Additional Metropolitan Magistrate-III, Kanpur Nagar, arising out of the complaint filed by DGGI in respect of offence under Section 132 (1) (a) read with Section 132 (1) (i) and 132 (5) of the Central Goods and Services Tax Act, 2017, on his furnishing a personal bond of Rs.10,00,000/- and two reliable sureties each of the like amount to the satisfaction of the court concerned subject to following conditions:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the date fixed, unless his personal presence is exempted, in which case he will appear through his Counsel.

(iv) The applicant will not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court to any police officer or tamper with the evidence.

33. In case of breach of any of the above conditions, the prosecution shall be at liberty to move an application before this Court seeking cancellation of the present order bail.

(2022) 9 ILRA 407
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2022

BEFORE

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

FAFO No. 80 of 2000

Smt. Somwati & Ors.
...Appellants/Claimants
Versus
N.I.C.L. & Ors.
...Respondents/Opposite Parties

Counsel for the Appellants:
Sri R.K. Porwal, Sri P.K. Mukerjee

Counsel for the Respondents:
Sri Y.K. Saxena, Sri Alok Sharma, Sri Alok Singh, Sri P.K. Sinha

A. Civil Law - Motor Vehicle Act, 1988-Section 176-Enhancement of compensation-deceased was 56 years and he was a Principal in Inter College-Tribunal awarded a sum of Rs. 3,29,500/- together with interest @ 12% per annum as compensation but not granted future loss of income-the deceased was survived by five dependents-By applying the multiplier of 9, the total loss of dependency is assessed Rs.12,42000/- Thus, the claimants held entitled for

increase of compensation a sum of Rs.13,12000/-@ 7% from Rs. 3,29,500/- (Paras 1 to 18)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors.. 2017 LawSuit(SC) 1093.

2. Sarla Verma & ors. Vs Delhi Transport Corrporation& anr.. 2009 LawSuit(SC).

3. F.A.F.O. No. 2389 of 2016 (National Insurance Co. Ltd. Vs Smt. Vidyawati Devi & 2 Ors0 decided on 27.7.2016 and in First Appeal From Order No. 3381 of 2003 (Raghuraj Singh Vs Gyan Singh & ors.) decided on 8.4.2022

4. National Insurance Co. Ltd. Vs Lavkush& anr.. 2018 (1) T.A.C. 431

5. Gobald Motor Service Ltd. & anr.. Vs R.M.K Veluswami& ors., 1962 SCR(1) 929,

6. N. Jayasree & ors.. Vs Cholamandalam MS General Insurance Co. Ltd. , 2021 LawSuit(SC) 656

7. A.V. Padma Vs Venugopal 2012 91) GLH(SC) 442.

8. Smt. Hansagauri P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007(2) GLH 291.

9. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors..

10. First Appeal From Order No. 3381 of 2003(Raghuraj Singh Vs Gyan Singhh& ors.) decided on 8.4.2022

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

1. Heard Sri R.K. Porwal, learned counsel for the appellants, Sri P.K. Sinha, learned counsel for respondent-insurance company and perused the judgment and order impugned.

2. This appeal, at the behest of the claimant, challenges the judgment and award dated 14.10.1999 passed by the Motor Accident Claims Tribunal/VIIth Additional District Judge, Etawah (hereinafter referred to as 'Tribunal') in M.A.C.P No.121 of 1997 awarding a sum of Rs.3,29,500/- as compensation with interest at the rate of 12%.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is also not in dispute. The issue to be decided is the quantum of compensation awarded and oral objection to finding of fact as far as licence is concerned and compensation is concerned.

4. The accident took place on 24.1.1997. The deceased was 56 years of age. Deceased- Man Singh Yadav who was 56 years of age left behind him, his widow, two minor son and two minor daughter which fact is not in dispute. The Tribunal considered his income to be Rs.15,000/- per month, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 8.

5. In this appeal a very technical issue has arisen before this Court in appeal filed under Section 173 of Motor Vehicles Act,1988. It is contended that in the body of the application for compensation, the appellants had mentioned that the application was filed under Section 166 and 163(A) of the Motor Vehicles Act, 1988. Claim petition was filed in the year 2000; namely, much before the judgment in Deepal Girishbhai Soni and Ors. Vs. United India Insurance Company Limited, Baroda, AIR 2004 SC 2017, has held that claim petition preferred u/s 163A is under No Fault Liability and though decided the petition as of it is under Section 166 of Act

granted compensation as per Section 163A whether such approach is sustainable.

6. It is clear that the matter when it proceeded, the learned Judge also mentioned that it was filed under Section 166 read with Section 163A of Motor Vehicles Act, 1988 and while passing the award granted a sum of Rs.3,29,500/- holding that under the Section 163A of Motor Vehicles Act, the said amount was admissible and granted interest at the rate of 12%. The Tribunal has decided issue no.1, namely, the issue of negligence in favour of claimants.

7. It is contended by Sri R.K.Porwal, learned counsel for appellants that the matter has been decided as per Section 166 of Motor Vehicles Act, if the Tribunal had decided the issue of negligence and it cannot grant compensation as per Section 163A which bad in eye of law. The income slab was not considered by the Tribunal as income of deceased was exceeding Rs.40,000/- per annum as per schedule.

8. Sri R.K.Porwal, learned Advocate further submits that in the year 1997, it was a general tradition to file claim petition under Section 166 read with Section 163A of Act as it was considered that to be interim application under 163A was interim compensation. Application substituting Section 140 of Act.

9. Sri R.K. Porwal, learned counsel for the appellant further submitted that the income of the deceased should be considered to be at least Rs.15,294/- per month. It is further submitted by learned counsel for the appellants that the Tribunal has not added any amount under the head of future loss of income which should be granted in view of decision in of the Apex Court in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 Lawsuit (SC) 1093.** It is also submitted that the Tribunal has granted the split multiplier of 8 for three years of service which would be 9 in view of the decision of the Apex Court in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC).**

10. As against this, Sri P.K. Sinha, learned counsel appearing on behalf of respondent insurance company submits that just because the issue of negligence was decided it cannot be said that the matter was decided under Section 166 of Motor Vehicles Act, 1988. The compensation is decided as per the claim petition and does not call for any upward enhancement as despite the income being Rs.12,000/- per month, Tribunal has considered it as Rs.15,000/- per month.

11. Sri P.K. Sinha, learned Advocate further submits that as far as issue no. 4 is concerned, the Tribunal has decided that the income would be Rs.15,000/- p.m. The income on record was Rs.12,294/- p.m. and that is what the Tribunal had to consider, therefore, it is submitted that future prospect has not to be added as Rs.15,000/- is granted as amount is already granted and the Tribunal has considered the income to be Rs.12,294/- and deducted 1/3rd and granted multiplier of 8 as the deceased was aged about 56 years and therefore it is submitted that the appeal should be dismissed.

12. Sri P.K. Sinha, learned counsel for respondent has contended that multiplier of 8 granted by Tribunal is not exorbitant and it would suffice for non grant of amount under the head of non pecuniary loss and future loss of income. Learned counsel

further submits that in the year of accident in the State of U.P., no future prospect was granted. Learned counsel further submits that even in the year of accident in 1997, the repo rate was not 12% and interest granted at the rate of 12 % is exorbitant and requires to be reworked. It is submitted by learned counsel on his oral submission that there is breach of policy as licence of driver was not produced and relied the judgment of this Court in **F.A.F.O. No.2389 of 2016 (National Insurance Co. Ltd. Vs. Smt. Vidyawati Devi And 2 Others) decided on 27.7.2016** and in **First Appeal From Order No.3381 of 2003 (Raghuraj Singh Vs. Gyan Singh and other) decided on 8.4.2022**. Order 43 Rule 1 (r) of C.P.C. learned counsel would like to press the issue of interest also which should be at the rate of 7% and not 12% as granted by the Tribunal in view of the decision of this Court in **National Insurance Company Limited Vs. Lavkush and another, 2018 (1) T.A.C. 431** and U.P. Motor Vehicle Rules.

13. Heard the learned counsels for the parties and considered the factual data. It is an admitted position of fact that the Insurance Company has accepted the award and has not challenged the same. There is a categorical finding by the Tribunal that before Tribunal neither the driver was produced nor was policy produced and the Tribunal decided issue no.2 against the insurance company. Thus this ground taken for first time in appeal after 22 years cannot be accepted. This Court finds that the accident occurred on 24.1.1997 causing death of Man Singh Yadav who was 56 years of age at the time of accident. The Tribunal has assessed his income to be Rs.15000/- per month as he was a Principal in a Indra Gandi Inter College, Khadakpur, Saraiya which according to this Court, in the year of accident, is just and proper. To which as the deceased was in the age bracket of 56-60, 15% of the income will have to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra).** Looking to the general trend even in **Gobald Motor Service Ltd. and another Vs. R.M.K Veluswami and other, 1962 SCR(1) 929**, the addition of 15% can be granted. The deduction as granted by the Tribunal is maintained. The multiplier would be 9 to which looking to the pendency of the matter which has been pending here since more than 22 years. Rs.70,000/- under the head of non pecuniary damages would suffice for claimants.

14. Sri R.K. Porwal, learned Advocate has relied on the judgment of Supreme Court in **N. Jayasree and others Vs. Cholamandalam MS General Insurance Company Limited, 2021 LawSuit(SC) 656** on split multiplier and no deduction for pension.

15. Hence, the total compensation payable to the appellants is computed herein below:

i. Annual Income Rs.1,80,000/- (Rs.15,000/- per month)

ii. Percentage towards future prospects : 15% namely Rs.27,000/-

iii. Total income : Rs.1,80,000/- + Rs.27,000/- = Rs.2,07,000/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.1,38,000/-

v. Multiplier applicable : 9(there cannot be split multiplier)

vi. Loss of dependency: Rs.1,38,000/- x 9 = Rs.12,42,000/-

vii. Amount under non pecuniary heads : Rs.70,000/-

viii. Total compensation : Rs.13,12,000/-

16. As far as issue of rate of interest is concerned, the Tribunal has granted 12% rate of interest which is disturbed but on enhanced amount it would be slab-wise as held herein below.

17. No other grounds are urged orally when the matter was heard.

18. In view of the above, the appeal is partly allowed. The award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today. The interest on the enhanced amount would be 7% from the date of filing of claim petition till the award and thereafter it would be 4% as the matter has remained pending without fault of insurance company. The amount already deposited be deducted from the amount to be deposited.

19. Record be sent back to Tribunal forthwith.

20. The finding of Tribunal in issue no.2 is that firstly, the xerox copy of cover note is there but no policy is filed and secondly that the insurance company has not tried to examine their application to examine the driver is sufficient. The fact that challenge by cross objection is not tried will not preclude from granting.

21. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

22. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagauri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

23. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As 22 years have elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

24. In view of the above, the Insurance Company is granted recovery

rights subject to the aforesaid rider and in view of the judgment of this Court passed in **First Appeal From Order No.3381 of 2003 (Raghuraj Singh Vs. Gyan Singh and other) decided on 8.4.2022.**

25. This Court is thankful to both the counsels for getting this old matter decided.

(2022) 9 ILRA 412
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2022

BEFORE

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

FAFO No. 883 of 2017

Smt. Rajni Singh & Ors.
...Appellants/Claimants
Versus
IFFCO TOKIYO & Ors.
...Respondents/Defendants

Counsel for the Appellants:
Sri Bhanu Prakash Verma, Sri Mayank

Counsel for the Respondents:
Sri Pawan Kumar Singh

A. Civil Law - Motor Vehicle Act, 1988-Sections 173 & 166-Appeals-rejection of claim petition-deceased was Assistant Teacher in primary school and monthly income of deceased was Rs. 28,528/-per month-the deceased was survived by five dependents and the age of deceased was 30 years, By applying the multiplier of 17, the total loss of dependency is assessed Rs.65,47,176 and also awarded 2,70000/- for medical expenses and non-pecuniary damages-Thus, the claimants held entitled for total compensation of Rs. 68,17,176/ with interest @ 7.5%-Finding of the Tribunal set aside-Filing of charge-sheet prima facie proof of accident having taken place-Thus the Tribunal committed error in rejecting the claim petition.(Para 1 to 42)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. UPSRTC Vs Km Mamta & ors. (2016) AIR SC 948

2. Smt. Meenakshi Srivastava & ors. Vs Dhiraj Pandey & ors. (2022) Law Suit All. 247

3. Bimla Devi & ors. Vs Himachal Road Trans. Corp. & ors. (2009) AIR SC 2819

4. Ravi Vs Badrinarayan & ors. (2011) AIR V SC 1226 Para 20

5. Jai Prakash Vs National Ins. Co. Ltd. & ors. (2010) 2 SCC 607

6. Dulcina Fernandes & ors. Vs Joaquim Xavier Cruz & ors. (2014) AIR SC 58

7. Mangla Ram Vs O.I.C. Ltd. & ors..

8. Sunita & ors. Vs RSRTC & ors. (2019) AIR SC 994

9. Anita Sharma Vs New India Assur. Co. (2021) AIR SC 302

10. Vimla Devi & ors. Vs National Ins. Co. Ltd & ors. (2019) AIR 2 SCC 186

11. Jai Prakash Vs National Ins. Co. Ltd. & ors.. SLP (Civil) Nos. 11801-11804 of 2005

12. Ranjeet Singh Vs The O.I.C. Ltd. & ors. FAFO No. 1902 of 2010

13. Deen Dayal & ors. Vs Nishan Singh & ors. FAFO No. 1556 of 2002

14. Prabha Sharma & ors. Vs The New India Assur. Co. Ltd. & ors. FAFO No. 3602 of 2021

15. Vinita Kesarwani & ors. Vs O.I.C. Ltd. & ors.. FAFO No. 316 of 2012

16. Brestu Ram Vs Anant Ram & ors. (1990) ACJ 333 (HP)

17. ICICI Lombard General Ins. Co. Ltd. Vs Smt. Reena Tyagi & ors. FAFO No. 2190 of 2010 (All.)

18. Rylands Vs Fletcher (1868) 3 HL (LR) 330

19. Bithika Mazumdar & anr.. Vs Sagar Pal & ors. (2017) 2 SCC 748 O.I.C. Ltd.Vs Smt. Ummida Begum & ors. FAFO No. 1999 of 2017

20. Smt. Ragini Devi & ors. FAFO No. 1404 of 1999

21. Anita Sharma Vs New India Assur. Co.L.td. (2021) 1 SC 171

22. Reliance General Ins. Co. Ltd. Vs Subbulakshmi & ors. C.M.A. No 1482 of 2017 [C.M.P. No. 7919 of 2017 . (CMA Sr. No. 76893 of 2016]

23. Puspabai Purshottam Udeshi Vs Ranjit Ginning & Pressing Co. (1977) ACJ 343 SC

24. Vimal Kanwar & ors.. Vs Kishore Dan & ors. (2013) AIR SC 3830

25. Sarla Verma Vs DTC (2009) 6 SCC 121

26. NICL Vs Pranay Sethi & ors. (2017) SCC 1050

27. Karvan Ansari @ Kurvan Ali Vs Shyam Kishore Murmu (2010) (0) AIJEL SC 67995

28. NICL Vs Mannat Johal & ors. (2019) 2 T.A.C. 705 SC

29. A.V. Padma & ors. Vs R. Venugopal (2012) 3 SCC 378

30. Gen. Mgr. KSRTC Trivandrum Vs Susamma Thomas & ors. (1994) AIR SC 1631

31. O.I.C. Ltd. Vs Chief Commr of Income Tax(TDS) R/Spl. Civil Appl. No. 4800 of 2021

32. Bajaj Allianz Gen. Ins. Co. Pvt. Ltd. Vs U.O.I. & ors..

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

1. Heard learned counsel for the appellants and learned counsel for the respondents. Perused the record.

2. This appeal has been preferred by appellants/claimants against the judgment and award dated 13.01.2017 passed by Motor Accident Claims Tribunal, Court No.3, Mathura (hereinafter referred to as, 'Tribunal') in Motor Accident Claim Petition No.268 of 2015 (Smt. Rajni Singh and Others v. Iffco Tokiyo General Insurance Co. Ltd. and Others) by which the claim petition of appellants was rejected by learned tribunal.

3. The brief facts as culled out from the record are that on 06.03.2015 at about 03:30 p.m. (night), deceased Jitendra Singh was coming to his Village Virzapur from Mandi Samiti on foot, when he reached on NH-2 near Jai Gurudev Ashram within the jurisdiction of Police Station Highway Mathura, a EON Car bearing No.UP 85 AF 2955 came from behind and hit him (deceased). The driver of the car was driving the vehicle rashly and negligently. In this accident, the deceased sustained serious injuries. The deceased was admitted in Prabha Hospital, Mathura, but due to serious condition of the deceased, he was referred to Kamayani Hospital, Agra where he was admitted from 06.03.2015 to 11.03.2015, when the condition of the deceased became more serious, he was admitted to Rainbow Hospital, Agra on 11.03.2015 and for better treatment he was carried to Delhi, but on the way he died on 23.03.2015, namely, after 20 days of the accident having taken place.

4. The Apex Court in ***UPSRTC Vs. Km. Mamta and others, reported in AIR 2016 SC 948,*** has held that all the issues raised in the memo of appeal are required to be addressed and decided by the first appellate court.

5. It is an admitted position of fact that deceased was a married person and the claimants are the legal representatives of the deceased, namely, widow, two minor sons and one minor daughter, the mother of the deceased was also dependent on him. The multiplier would be as per the judgment of Sarla Verma (infra), which would have to be as per the age of the deceased.

6. Learned counsel for claimants submitted that at the time of accident, deceased was Assistant Teacher in Primary School. Hence, the monthly income of the deceased was Rs.28,528/-. Learned counsel for claimants also submitted that for the future loss of income, 50% of the income should have been added by the learned tribunal which has not been added.

7. Learned counsel for the appellants has submitted that this case is covered by the judgment of this Court in ***Smt. Meenakshi Srivastava and others vs. Dhiraj Pandey and others,*** 2022 LawSuit All.247.

8. Learned counsel for the appellants has cited the following judgments so as to substantiate his written arguments:-

(i) Bimla Devi and others v. Himachal Road Transport Corporation and others reported inn AIR 2009 Sc 2819;

(ii) Ravi v. Badrinarayan and others reported in AIR 2011 V SC 1226 paragraph 20 relied upon;

(iii) Jai Prakash v. National Insurance Company Ltd and others; reported in 2010 2 SCC 607;

(iv) Dulcina Fernandes and others v. Joaquim Xavier Cruz and others reported in AIR 2014 SC 58;

(v) Mangla Ram v. The Oriental Insurance Co. Ltd. and others;

(vi) Sunita and others v. Rajasthan State Road Transport Corporation and others reported in AIR 2019 SC 994;

(vii) Anita Sharma the New India Assurance Co. reported in AIR 2021 SC 302;

(viii) Vimla Devi and others v. National Insurance Company Limited and others reported in AIR (2019) 2 SCC 186; and

(ix) Jai Prakash v. National Insurance Co. Ltd. and Ors, Special Leave petition (Civil) Nos. 11801-11804 of 2005 decided on 17.12.2009.

9. Learned counsel for Insurance Company vehemently objected the submissions made by appellant and further submitted that learned tribunal has considered each and every aspect while awarding compensation and has awarded just compensation. Hence, the impugned judgment does not call for any interference by this Court.

10. The facts as revealed which are not disputed are that the vehicle in question was involved in the accident is accepted by the owner of the said vehicle. The decision of this Bench in **Ranjeet Singh v. The Oriental Insurance Co. Ltd. and others.,** First Appeal From Order No.1902 of 2010 decided on 04.03.2022. The judgment of

this Court in **Deen Dayal and others v Nishan Singh and others,** First Appeal From Order No.1556 of 2002 decided on 23.3.2022 will also enure for the benefit of the appellant herein. The judgment of **Prabha Sharma and others v. The New India Assurance Co. Ltd. and others,** First Appeal From Order No.3602 of 2021 dated 24.09.2021 will also enure for the benefit of the owner. In our case, it is also accepted that the accident having taken place.

11. In **Vinita Kesarwani and others v. The Oriental Insurance Co. Ltd and others,** First Appeal From Order No.316 of 2012 decided on 01.04.2022 which judgment penned by one of us also will apply for the benefit of the appellants. In this backdrop, can it be said that the finding of the learned tribunal while rejecting the claim petition that it was not proved that vehicle was involved and that the appellants did not specify in which hospital the deceased was first moved for treatment. The second ground of rejection by the tribunal is that the First Information Report was belatedly lodged. The factual scenario as it goes enumerates that deceased after meeting with the accident was hospitalized, the family so busy looking after the injured so as to see that he survives, he was advised to be shifted from one hospital to another and the FIR was lodged immediately on his breathing last at the place of accident having taken place. The tribunal has not taken a holistic view of the beneficial piece of legislation.

12. The FIR cannot be said to be belated and holding that filing of charge sheet is not conclusive proof also belies the decisions of the Apex Court in catena of judgments. This Court time and again has held that filing of charge sheet is prima facie proof of accident having taken place. The charge sheet was laid and, therefore, it cannot be said that it was not proved that the vehicle was not involved in the accident, this hyper technical finding of fact cannot be accepted.

13. The burden of proof as far as motor accident claims cases are concerned, the civil jurisdiction that the tribunal should not go by what a known as strict proof of civil evidence rather filing of an FIR sine qua non for filing claim petition.

14. The eye witnesses have categorically mentioned that the accident took place. The two decades old judgment of the Himachal Pradesh reported in **Brestu Ram v. Anant Ram & others, 1990 ACJ 333 (HP)** and the decision of this Court in F.A.F.O. No.2190 of 2010 (All), **ICICI Lombard General Insurance Co. Ltd v. Smt. Reena Tyagi and ors.** and also the judgment of Mangla Ram (supra) will apply in full force and the claim petition could not have been dismissed in the manner in which the tribunal has dismissed the same.

15. The evidence of PWs-2 and 3 have been brushed aside, the evidence of PW-1 and 3 is very important just because the documentary evidence of Prabhu Hospital is not filed, it cannot be said that the accident has not taken place. The judgment of Jai Prakash (supra) would apply in full force just because the number of vehicle was not mentioned by the informant will not make any difference of the Apex Court in Jai Prakash (supra) ought to have been applied by the learned tribunal and just because some persons did not inform the police about the number of the Car does not make it a doubtful propositions. The learned tribunal in its

order to dismiss the claim petition as proceed the entire investigation papers, namely, post mortem report will goes to show that injuries were because of the accidental injuries, there were medical reports which were filed of several hospitals.

16. Paragraph 4 of the judgment itself is self contradictory, once the owner who is respondent no.2 files his reply can it be said that it is not proved that the accident occurred with the involvement of EON Car.

17. This takes us to the next issue orally mentioned by counsel for the State that the tribunal has not decided the issue of negligence. They may be permitted to raise even the issue of negligence if this Court comes to the conclusion that the vehicle was involved in the accident. We have permitted to same in view of propositions of Order 43 Rule 1 of the Code of Civil Procedure.

18. As far as the liability of the insurance company is concerned, while deciding issue No.2, the driving licence is found to be valid, the policy was produced and it is proved that the vehicle was insured on the said date of accident.

19. As far as issue No.4 is concerned, as the tribunal has held that against the claimants for issue No.1, it did not grant any compensation. The inquest report and the post mortem report are substantive piece of evidence and absence of rebuttal evidence being brought on record, the tribunal should not have decided the matter in the manner it has done.

20. As the issue of negligence is raised by Insurance company in this appeal contending that as this is a statutory appeal, the insurance company can raise objection even without filing appeal, would have to be decided, who was negligent whether the deceased had contributed in the accident having taken place will have to be evaluated on the fact and circumstances of the case.

21. The term Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

22. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed

without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

23. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

24. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330.*** From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

25. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

26. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).

27. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that

there is equal negligence on the part the other side.

28. The next issue which arises is that the matter has remained pending for long, the record and proceedings are before this Court and the matter whether be remanded to the Tribunal or decided here? The answer is in the affirmative as per the judgments of the Apex Court in ***Bithika Mazumdar and another Vs. Sagar Pal and others, (2017) 2 SCC 748*** and of this Court in ***F.A.F.O. No. 1999 of 2007 (Oriental Insurance Company Limited vs. Smt. Ummida Begum and others)*** and in ***F.A.F.O. No. 1404 of 1999 (Smt. Ragini Devi and others Vs. United India Insurance Company Limited and another)*** decided on 17.4.2019 where in it has been held that if the record is with the appellate Court, it can decide compensation instead of relegating the parties to the Tribunal.

29. We are fortified in our view by the decision of the Apex Court in ***Anita Sharma vs. New India Assurance Co.Ltd., 2021 (1) SCC 171,*** in which it is held that standard of proof in claim petition under Motor Vehicles Act, 1988 cannot be equated with the standard of proof as it is in civil or criminal law. There is not requirement to decide the issue of accident in claim petitioners that it should be proved beyond all reasonable, but the standard of proof is much lesser and it should be decided on the basis of preponderance of probabilities keeping in mind the intent of legislature as this is benevolent piece of legislation.

30. The Division Bench of Madras High Court also held in ***Reliance General Insurance Co. Ltd. Vs. Subbulakshmi and Others,*** passed in C.MA. No. 1482 of 2017 [C.M.P. No. 7919 of 2017. (CMA Sr. No. 76893 of 2016)] has referred the case ***of Puspabai Purshottam Udeshi Vs. Ranjit Ginning and Pressing Co.,*** 1977ACJ 343 (SC), in which it is observed that the normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident 'speaks for itself or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care.

Compensation :

31. Having heard learned counsels for the parties and considered the factual data, the accident occurred on 6.3.2015 causing death of Jitendra Singh who left behind him his wife, two sons, one daughter and mother. The Tribunal has not assessed the income of the deceased as per facts proved

required to be **granted to Rs.28,528/- per month.** The age of the deceased was 30 years. Hence in the light of the judgment of Pranay Sethi (supra), 50% would be added as future loss of income.

32. In the judgment of **Vimal Kanwar and others v. Kishore Dan and others, AIR 2013 SC 3830,** the Hon'ble Apex Court held that it would be reasonable to say that a person who is self employed or is engaged on fixed wages will also get 50% increase in his total income for a period of time. Hence, 50% of the income shall be added for future loss of income. The appellant was of 30 years of age, hence multiplier of 17 would be applicable. There are five dependents on the deceased, hence 1/4 would be deducted for personal expenses in the light of the judgment of ***Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121.***

33. As far as beneficial piece of legislation is concerned, the strict rules of Civil Procedure Code and Evidence Act are not required to adhered to.

34. In this backdrop we evaluate the income in view of the judgment of ***National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050, Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121*** and ***Kurvan Ansari Alias Kurvan Ali v. Shyam Kishore Murmu, 2010 (0) AIJEL SC 67995,*** the recalculation of compensation would be as follows:

i. Income Rs.28,528/- p.m., it would be Rs.3,42,336/- p.a.

ii. Percentage towards future prospects :Rs.1,71,168/-

iii. Total income : Rs.5,13,504/-

iv. Income after deduction of 1/4 : Rs.3,85,128/-

v. Multiplier applicable : 17 (as the deceased was in the age bracket of 26-30 years)

vi. Loss of dependency: Rs.3,85,128 x 17 = Rs.65,47,176/-

vii. Medical expenses : Rs.2,00,000/-

viii. Under the head of non pecuniary damages = Rs.70,000/-

ix. Total compensation (vi+vii +viii) : **Rs.68,17,176/-.**

35. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in National 7 Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.) wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

36. We deem it fit to rely on the judgment of the Apex Court in the case ***of A.V. Padma and others Vs. R. Venugopal, 2012 (3) SCC 378*** wherein the Apex Court has considered the judgment rendered in ***General Manager, Kerala State Road Transport Corporation, Trivandrum Vs.***

Susamma Thomas and others, AIR 1994 SC 1631 for disbursement.

37. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma (supra), the order of investment is not passed because claimants are neither illiterate nor rustic villagers.

38. Recently the Gujarat High Court in case titled the ***Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS), R/Special Civil Application No.4800 of 2021*** *decided on 05.04.2022,* it is held that interest awarded by the tribunal or appellate court under Section 171 of Motor Vehicles Act is not taxable under the Income Tax Act, 1961

39. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunal shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra),** the same is to be applied looking to the facts of each case.

40. In view of the above, both the appeals are partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount of Rs.68,17,176/- within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited.

41. Record be transmitted to tribunal.

42. The Tribunal shall follow the guidelines issued by the Apex Court in ***Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others*** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As 7 years have elapsed since occurrence of accident, the amount be deposited in the Saving Account of claimants in Nationalized Bank. The amount shall be credited in the said account with without investment as the case may be.

43. We are thankful to learned counsels for the parties for ably assisting this court in getting this old appeal disposed of.

(2022) 9 ILRA 420
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2022

BEFORE

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

FAFO No. 1161 of 1993

E.S.I.C. ...Appellant/Opposite Party
Versus
Triyugi Narain Pandey ...Respondent/Applicant

Counsel for the Appellant:
Sri Rajesh Tiwari

Counsel for the Respondent:

A. Civil Law - Employees State Insurance Act, 1948-Section 82 - Appeal-ESIC preferred appeal against the judgment of Employees Insurance Court, Kanpur for

awarding 10% loss of earning-respondent sustained employment injuries-medical board did not consider the injury as causing any loss of earning capacity-Whether the appeal involves a substantial question of law or not depends upon the facts of each case, if the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons-In the present case, the so–called question of law framed by the Insurance Company are answered against it-In fact the substantial question of law raised are the question of fact.

The appeal is dismissed. (E-6)

List of Cases cited:

1. Golla Rajanna Etc. Etc. Vs Div. Mgr. &anr. (2017) 1 TAC 259 SC

2. E.S.I.C. Vs S.Prasad F.A.F.O. 1070 of 1993

3. North East Karnataka Road Trans. Corp. Vs Smt. Sujatha Civil Appeal No. 7470 of 2009

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

1. Heard Shri Rajesh Tiwari, learned counsel for appellant and perused the judgment and order impugned.

2. This appeal has been preferred under Section 82 of the Employees State Insurance Act, 1948, at the behest of the Employee State Insurance Corporation, has been preferred against the judgment and order dated 21.9.1993 passed by Employees Insurance Court, Kanpur in appeal. No. 70 of 1993 awarding 10% loss of earning.

3. The factual matrix as necessary for our purpose are that respondent sustained employment injuries on 11.6.1991 in his right eye. The medical board did not considerthe injury as causing any loss of earning capacity, which dissatisfied the respondent herein. The respondent preferred an appeal and has claimed 10% loss of earning capacity which appeal has been accepted by the 1st appellate authority.

4. The objections were filed by the appellant-herein and the medical examination of the injury of the insured person and the reports were also placed on record. The medical board did not find any diminution of vision and, therefore, held that the respondent was not entitled for any compensation.

5. The moot question which arises for consideration of this Court is that can this Court in appeal preferred under Section 82 of the Employees State Insurance Act 40 inquire with and the factual findings.

6. It is submitted by counsel for appellant that there is no evidence about diminution of vision of the eye and, there was no loss of earning capacity just holding that injury falls within Serial 32 of II Schedule of the Act can this be considered to be a substantial question of law, the answer to the same is 'No'. The reason being finding as to whether the injury was covered by Serial No.32 of the II Schedule is finding of fact and not question of law.

7. The grounds urged are basically question of facts. The award passed by Employees Insurance Court cannot be said to be perverse. It is not necessary that the owner should be declared as insolvent as alleged.

8. The appeal under Workmen Compensation Act has to be viewed very seriously in view of the judgment in **Golla**

Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC). The finding of fact is that the injured was an employee who had sustained employment injury and was incapacitated to the tune 10%.

9. The Apex Court recently in Golla Rajanna (Supra) has been considered by this High Court in **F.A.F.O. 1070 of 1993 (E.S.I.C. Vs. S. Prasad)** decided on 26.10.2017 wherein this Court has held as follows:

"The grounds urged before this Court are in the realm of finding of facts and not a question of law. As far as question of law is concerned, the aforesaid judgment in Golla Rajanna Etc. Etc. Versus Divisional Manager and another (supra) in paragraph 8 holds as follows "the Workman Compensation Commissioner is the last authority on facts. The Parliament has thought it fit to restrict the scope of the appeal only to substantial questions of law, being a welfare legislation. Unfortunately, the High Court has missed this crucial question of limited jurisdiction and has ventured to re-appreciate the evidence and recorded its own findings on percentage of disability for which also there is no basis."

10. I am even supported in my view by the decision of the **Apex Court in Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha** decided on 2.11.2018 wherein it has been held that the Court has held as under:

"15. Such appeal is then heard on the question of admission with a view to find out as to whether it involves any substantial question of law or not. Whether the appeal involves a substantial question of law or not depends upon the facts of each case and needs an examination by the High Court. If the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons that it does not involve any substantial question/s of law.

16. Now coming to the facts of this case, we find that the appeal before the High Court did not involve any substantial question of law on the material questions set out above. In other words, in our view, the Commissioner decided all the material questions arising in the case properly on the basis of evidence adduced by the parties and rightly determined the compensation payable to the respondent. It was, therefore, rightly affirmed by the High Court on facts.

17. In this view of the matter, the findings being concurrent findings of fact of the two courts below are binding on this Court. Even otherwise, we find no good ground to call for any interference on any of the factual findings. None of the factual findings are found to be either perverse or arbitrary or based on no evidence or against any provision of law. We accordingly uphold these findings."

11. A recent decision of the Apex Court in the case of Mayan Vs. Mustafa and another, 2022 ACJ 524 also holds that the Court cannot interfere unless there is a question of law involved. In our case the injury was during the course of employment. The percentage of injury was decided by the court below. The judgment of Apex Court in Salim Versus New India Assurance Co. Ltd. and another, 2022 ACJ 526 will also not permit this Court to interfere in the well-reasoned judgment of the court below.

12. In view of the above, the appeal fails and is **dismissed**. The show called questions of law framed by the Insurance Company are answered against it. In fact, the substantial questions of law raised are the questions of fact.

13. Interim relief, if any, shall stand vacated forthwith.

(2022) 9 ILRA 423
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Second Appeal No. 2974 of 1982

Vindhyachal (Deceased)
...Plaintiff/Appellant
Versus
Sri Kalika (Deceased) & Ors.
...Defendants/Respondents

Counsel for the Appellant:
Sri Kamlesh Kumar Kanojiya, Sri Bachchu Lal Yadav, Sri Kamlesh Kumar Kanojiya

Counsel for the Respondents:
Sri S.P. Tripathi, Sri Gautam Chaudhary, Sri Prem Shanker Prasad, Sri Rishikesh Pati Tripathi, Sri Suresh Chandra Pandey

A. Civil Law - Second Appeal- Civil Procedure Code, 1908 - Section 100 - Res-judicata-Section 11-Ingredients of-substantial question of law-whether suit barred by principle of res-judicata-discussed-Court below rightly adjudge the issue of res-judicata against the plaintiff.(Para 1 to 21)

B. "Where persons litigate bona-fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section be deemed to claim under the persons so litigating." But it is only when the conditions of Explanation VI are satisfied that a decision in the litigation will bind all persons interested in the right litigated and the onus of proving the want of bona fides in respect of the previous litigation is on the party seeking to avoid the decision. The words "public right" have been added in Explanation VI in view of the new Section 91 C.P.C. and to prevent multiplicity of litigation in respect of public right. In view of Explanation VI it cannot be disputed that Section 11 applies to public interest litigation as well but it must be proved that the previous litigation was the public interest litigation not by way of a private grievance. It has to be bonafide litigation in respect of a right which is common and is agitated in common with others. (Para 19)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Forward Construction Co. Vs Prabhai Mandal Andheri & ors.

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. B.L. Yadav and Mr. K.K. Kanojiya, learned counsel for the appellant and Mr. Prem Shanker Prasad, learned counsel for the respondent.

2. This is plaintiff's second appeal under Section 100 of Civil Procedure Code against the judgment and decree dated 07.08.1982 passed in Civil Appeal No.153 of 1980 arising out of original suit No.880 of 1976.

3. The present second appeal was admitted on 21.07.1983 but substantial question was not framed at that time.

4. Learned counsel for the appellant is pressing the only substantial question of law which has been framed by him in his memo of Second Appeal, accordingly, this appeal shall be heard on following substantial question of law:

1. "Whether judgment and decree in a suit between the father of the appellant and some other defendant, who is defendant in the present suit about the same land, which is ancestral and not self acquired property of the father of the appellant, principle of res-judicata will apply or not?"

5. Both parties agreed that second appeal be heard and disposed of on the substantial question of law as framed by this Court today itself.

6. Plaint in brief is that plaintiff's house and Sahan is situated in plot No.998 Shikkimi Plot Nos. 248, 249, 250, 251 which is ancestral house and Sahan of the plaintiff; village in question is partitioned village; plaintiff's grand father Badloo was alive at the time of partition; one Doodh Nath brother of Badloo had died issueless accordingly, Badloo came in possession on the house and Sahan of Doodh Nath. Shikkimi No.248 was recorded as parti but plaintiff's grand father established his Sahan over the same with the permission of zamindar and the same is being used in the same manner till date. Shikkimi No.248 was in the shape of Banjar and abadi, as such it was recorded as Banjar in order to avoid any difficulty plaintiff got the settlement of the same from Gaon Sahba. Plaintiff was born before the date of vesting and he was living separate from his father as such father was impleaded as defendant IInd set. Defendant Ist set put a palani in the disputed land 2-3 months before the institution of the suit and plaintiff reside outside due to employment. Plaintiff requested the defendant Ist set to remove palani and ghoora etc. when plaintiff came back to his home defendant Ist set did not pay any attention to the request, hence the suit.

7. Defendant denied the plaint allegation and alleged in his additional statement that plaintiff and defendant No.6 are son and father and reside together for all purposes. He further alleged that in respect to disputed property plaintiff's father who is defendant No.6 (Naurangi) instituted a suit No.687 of 1967 in the court of Munsif IIIrd Deoria against defendant Ist and their predecessor in interest which was dismissed by trial court and the Civil Appeal filed before District Judge Deoria was also dismissed, hence present suit in respect of same property is barred by principle of res-judicata. He further alleged that suit is also barred by principle of estoppal and acquiescence. He further alleged that property has been settled with defendant Ist set under Section-9 of U.P.Z.A. & L.R. Act as such suit filed by plaintiff is frivolous and is liable to be dismissed.

8. Plaintiff and Defendant Ist set adduced oral and documentary evidences in support of their. Defendant Ist filed judgment and decree of suit No. 687 of 1967 and Civil Appeal No. 290 of 1971 as well as the map prepared in suit No.687 of 1967 in order to demonstrate that property in dispute in both the cases are same and identical.

9. Before trial court 8 issues were framed in which issue No.3 was whether suit is barred by res-judicata as alleged in para No.5 of the written statement.

10. Trial Court considering the each and every oral and documentary evidence, came to conclusion that present suit filed by plaintiff is barred by res-judicata in view of judgment and decree passed in earlier suit No.687 of 1967 in respect of same property.

11. While deciding the issue No.3 trial Court has discussed about the oral statement of P.W.1 (Plaintiff himself) who in his examination-in-chief admit that he came to know about the suit No.687 of 1967 about 5-6 years before but in his cross-examination he denied about the knowledge of Suit No.687 of 1967 accordingly trial court recorded finding that plaintiff is making false statement as trial court while considering the documentary evidence relating to Suit No.687 of 1967 recorded finding that property of earlier Suit No.687 of 1967 as well as present suit is same and identical. Accordingly issue No.3 was decided against the plaintiff and in favour of the defendant Ist set. Other issues were decided accordingly.

12. Lower Appellate Court confirmed the finding of fact recorded by trial court on issue No.3 that present suit is barred by principle of res-judicata due to decree passed in suit No.687 of 1967 filed by plaintiff's grand father in respect to same property.

13. Counsel for the appellant submitted that present suit is not barred by principle of res-judicata as judgment and decree passed in earlier suit No.687 of 1967 was filed by plaintiff's father, although plaintiff and plaintiff's father were residing separate since long. He further submitted that property in dispute is ancestral property of the plaintiff. He further submitted that property in dispute has been settled with the plaintiff and his father under Section 9 of U.P.Z.A.& L.R. Act accordingly counsel for the appellant submitted that judgement and decree passed by courts below be set aside.

14. On the other hand, learned counsel for the respondent Ist set submitted that property in dispute of present suit is same and identical to the property in dispute of earlier suit No.687 of 1967 filed by plaintiff's father, as such present suit is barred by principle of res-judicata. He further submitted that concurrent finding of fact have been recorded by trial court as well as by lower appellate court that present suit is barred by principle of res-judicata, as such no interference is required and second appeal is liable to be dismissed.

15. Heard Counsel for the parties and perused the record on the substantial question of law as quoted above.

16. In order to appreciate the argument advanced by learned cousnel for the parties as well as to consider the substantial question of law as framed the perusal of section-11 of Civil Procedure Code will be necessary, which is as follows:

"CPC Section 11. Res judicata.

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in

question whether or not it was instituted prior thereto.

Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

1[Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

"Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]"

17. The trial Court while deciding the issue No.3 relating to res-judicata as held as follows:

"वाद पद सं० 3 : चूंकि यह वाद पद विधिक वाद पद है और इसके निर्णयन पर ही प्रस्तुत वाद का परिक्षण आधारित है अतएंव मैं इसे पहले विवेचित करता हूँ।

वादी विन्ध्याचल ने अपने मौखिक साक्ष्य बतौर पी.डब्ल.1 में अपनी आयु 41 वर्ष लिखाई है अतएंव यह स्पष्ट है कि विवादित भूमि पर उसे स्तत्व पूर्ण जमीदारी उन्मूलन हिन्दू पारिवारिक विधि के प्राविधानों के अन्तर्गत प्राप्त हो सकता था। उस दशा मेंं उसका अपने पिता के साथ स्वतंत्र स्वत्व विवादित भूमि पर हो सकता था इसमें संदेह नहीं है। परन्तु जहां तक वाद संख्या 687 सन् 67 का प्रश्न है वादी इस तथ्य को स्वीकार तो नहीं करता पर अपने मौखिक साक्ष्य में यह कहता है कि मुझे कोई जानकारी नहीं है कि मेरे पिता नें कभी कोई दावा किया था। इस तथ्य को वह अपने ब्यान खास में ही स्वीकार करता है कि उसे इस प्रकार का दावा होने की जानकारी 5-6 साल पहले हुई है। इस प्रकार उसे इस प्रकार की जानकारी सन् 1974-75 में हुई। वाद पत्र सन् 76 का है और प्रस्तुत वाद दिनांक 7/9/76 को संस्थित किया गया पर वादी ने अपने वाद पत्र में इस तथ्य का कहीं उल्लेख नहीं किया अपितु यह कहा जा सकता है कि उसने इस तथ्य को छिपाया।

अलावा इसके उसने अपने वाद पत्र या मौखिक साक्ष्य में यह कहीं नही कहा कि वह कब से अपने पिता से अलग रह रहा है। वाद सं० 687 सन् 67 आज से 13 साल पूर्व संस्थित हुआ और वादी द्वारा दौरान मौखिक साक्ष्य बताई गयी आयु 41 वर्ष को सही मानने पर यह प्रतीत होता है कि उक्त वाद संस्थित होने पर उसकी आयु 28 साल थी और अब अवस्था में यह लगभग अविश्वसनिय है कि पिता द्वारा लाये गये वाद की जानकारी

वादी को न हो। उक्त वाद का (सम्भवतः) अन्तिम निपटारा 28/4/72 को हुआ जब माननीय जिला जज महोदय के यहां से उक्त वाद संबंधि सिविल अपील नम्बर 29 सन् 1971 नौरंगी प्रति श्रीमति तेतरी वगैरह खारिज हुई। इस प्रकार उक्त वाद 5 वर्षो तक लड़ा गया। इतने लम्बे समय तक लड़े गये वाद के विषय में वादी को कोई जानकारी नहीं थी यह कदापि विश्वनीय प्रतीत नहीं होता।

जहां तक दोनों वादों कि विवादित भूमि का प्रश्न है कागज सं० 481 ग जो वाद सं० 687 सन् 67 नवरंगी प्रति श्रीमति तेतरी वगैरह बअदालत III Add. Munsif महोदय, देवरिया का निर्णय है, से यह स्पष्ट हो जाता है कि उक्त वाद में शिकमी नं० 248 पर ही वादी के पिता ने अनुतोष चाहा था और उक्त वाद में भी प्रतिवादीगण ने यही अभिकथित किया था कि विवादित शिकमी नं० 248 कभी वादी (उक्त वादी) का नहीं रहा और इस पर प्रतिवादीगण की धारी है और उक्त वाद में यह तथ्य पाया गया कि नौरंगी का शिकमी नं० 248 पर कोई स्वत्व प्राप्त नहीं है। अतएंव यह सिध्य हो जाता है कि दोनों वादों की विवादित भूमि एक ही है।

अब वादी यह स्वंय कह कर आता है कि वह हिन्दू विधि के अनुसार कोपार्सनरी राइट के रूप में विवादित भूमि का स्वामी है। उसकी पैदाइश से पूर्व हो इस भूमि पर उसके पिता को उसी रूप में स्वत्व प्राप्त हो गया होगा। पर वाद सं० 687/67 में जब उसके पिता का ही स्वत्व और अध्यासन दोनों अस्वीकृति हो गया तो वादी को स्वत्व और अध्यासन प्राप्त होना अत्यन्त असम्भव हो जाता है।

जहां तक वादी कि विश्वसनियता का प्रश्न है उसके मौखिक साक्ष्य का विवेचन आवश्यक है। उसने अपने ब्यान खास में कहा है कि उसे अपने पिता द्वारा संस्थित वाद की जानकारी 5-6 साल पहले हुई पर अपने प्रति परीक्षण में उसने इन्कार किया कि उसे ऐसे किसी वाद की जानकारी है। उसने यहां तक स्पष्ट कहा कि आज तक इस विषय में कुछ नहीं मालुम। इससे यह स्पष्ट हो जाता है कि वादी असत्य कथन कर रहा है।

विषय प्रांगन्याय से हटकर भी वादी की अविश्वशसनियता के अनेक उदाहरण है। अपने ब्यान खास में वह कहता है कि विवादित भूमि अब्बूराम जमीदार से उनके आजा ने ली थी पर अपने प्रति परीक्षण में कहता है कि मैं अपने पिता से बोलता नही अतएंव यह जमीन उनको कैसे मिली मैनें पूछा नहीं। उसने अपने प्रतिपरीक्षण में यह भी कहा है कि वह सन् 1967 से 1971 के बीच कम कम से कम 4 बार घर गया होगा पर यह भी कहता है कि उसके बाल-बच्चों ने किसी मुकदमें के बारे में नहीं बताया। वाद सं० 687 सन् 67 में नक्शा बनाने हेतु वकील आयुक्त गये थे और उनका बनाया हुआ नक्शा 471 ग2 दिनांक 15/2/70 का है। इस नक्शे को बनाने हेतु कमिश्नर महोदय मौके पर अवश्य गये होगें। नाप जोख भी हुई होगी और इसकी जानकारी भी करीब-करीब सभी गांव के लोगों को हो गयी होगी। ऐसी दशा में वादी के घर जाने पर उसे इस तथ्य की जानकारी नहीं होना असम्भव और सर्वथा अस्वभाविक प्रतीत होता है।

उपरोक्त समस्त चर्चा से यह प्रगट होता है कि वादी का यह कहना कि उसे वाद सं० 687 सन् 67 की कोई जानकारी नही थी सर्वथा असत्य है। इस कारण से वाद सं० 687 सन् 67 उसके विरूद्ध Res Judicata है और यह वाद धारा-11 दीवानी प्रक्रिया संहिता से बाधित है।

वाद यह तद्नुसार वादी के विरूद्ध तथा प्रतिवादिगण प्रथमपक्ष के पक्ष में निर्णित किया जाता है।

वाद पद सं०2, 4, 5 व 6 इन वाद पदो पर में चर्चा आवश्यक नहीं समझता क्योंकि वाद पद सं०3 की चर्चा से यही स्पष्ट हो गया है कि वाद धारा-11 दीवानी प्रक्रिया संहिता से वाधित है।"

18. Trial Court while deciding the issue No.3 has taken into consideration the oral evidence as well as documentary evidences adduced by the parties. In the oral evidence statement in chief of P.W.1 will be relevant where he stated that he came to know about the judgment and decree passed in suit No.687 of 1967, 5-6 years before although in cross examination he denied knowledge about the judgment and decree passed in suit No.687 of 1967,

the trial court came to conclusion that pliantiff is stating wrong fact about the judgment and decree passed in suit No.687 of 1967. Trial Court further examined the judgment and decree as well as the map prepared in the suit and came to the conclusion that property in earlier No.687 of 1967 as well as in the present suit is same and identical. Trial court also recorded finding that according to plaint allegation plaintiff states that according to Hindu law plaintiff is owner of the disputed property having coparcenary right in the property as such the right decided in favour or against the plaintiff's father will bind plaintiff also. Considering each and every aspect trial court decided the issue No.3 against the plaintiff and recorded finding of fact that present suit is barred by principle of res-judicata and is barred by section-11 of Civil Procedure Code.

19. Hon'ble Apex Court in the case of ***Forward Construction Co. Vs. Prabhat Mandal Andheri and other*** interpreted the principle of Res-judicata specially explanation- IV to VI of Section 11 of Civil Procedure Code paragaraph Nos 19, 20 and 21 of the judgment rendered in Forward Construction Co. (Supra) are as follows:

The second question for consideration is whether the present writ petition is barred by res judicata. This plea has been negatived by the High Court for two reasons: (1) that in the earlier writ petition the validity of the permission granted under r.4(a)(i) of the Development Control Rules was not in issue; and (2) that the earlier writ petition filed by Shri Thakkar was not a bona fide one in as much as he was put up by some disgruntled builder, namely, of M/s. Western Builders.

"19. The second question for consideration is whether the present writ petition is barred by res judicata. This plea has been negatived by the High Court for two reasons: (1) that in the earlier writ petition the validity of the permission granted under r.4(a)(i) of the Development Control Rules was not in issue; and (2) that the earlier writ petition filed by Shri Thakkar was not a bona fide one in as much as he was put up by some disgruntled builder, namely, of M/s. Western Builders.

20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to S.11 C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming with the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.

21. The second reason given by the High Court however, holds good. Explanation VI to S.11 provides :

"Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section be deemed to claim under the persons so litigating."

But it is only when the conditions of Explanation VI are satisfied that a decision in the litigation will bind all persons interested in the right litigated and the onus of proving the want of bona fides in respect of the previous litigation is on the party seeking to avoid the decision. The words "public right" have been added in Explanation VI in view of the new S.91 C.P.C. and to prevent multiplicity of litigation in respect of public right. In view of Explanation VI it cannot be disputed that S.11 applies to public interest litigation as well but it must be proved that the previous litigation was the public interest litigation not by way of a private grievance. It has to be a bonafide litigation in respect of a right which is common and is agitated in common with others.

20. Judgment and decree of trial court dated 21.04.1980 has been maintained by lower appellate Court by dismissing civil appeal by judgment and decree dated 07.08.1982 considering the point of section-11 of Civil Procedure Code.

21. Considering the finding recorded by courts below ratio of law laid down by Apex Court as well as from the perusal of records it is very much clear that present suit filed by plaintiff is barred by principle of res-judicata, the substantial question of law framed is answered accordingly.

21. In the result, it cannot be said that the courts below have erred in deciding the issue of res-judicata against the plaintiff. The appeal lacks merit and is liable to be dismissed. Appeal is hereby dismissed.

(2022) 9 ILRA 429
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.09.2022

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Writ-A No. 12015 of 2016

Ashish Pandey & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Rakesh Kumar Singh, Pramendra Kumar Singh, Ravi Shanker Tripathi

Counsel for the Respondents:
C.S.C., Dr. L.P. Mishra, Gaurav Mehrotra, Narendra Kumar Pandey, Prafulla Tiwari, Sameer Kalia, Sidharth Verma

A. Service Law – Selection - Uttar Pradesh Group-C Direct recruitment (Mode and Procedure) Rules-2015 - Rule 8 (1) - Expression prior approval and approval connotes different situation, where a statue uses the term prior approval anything done without the prior approval, is nullity. However, where a stature employs expression approval, in such cases subsequent rectification can make the act valid. (Para 15 to 17)

In the present case, it is apparent that the 20 maximum marks of the interview prescribed by the UPSSSC on 03.02.2016 has been approved by the Government on 10.06.2016, therefore the condition of Rule 8(1) of Rules of 2015 stands fulfilled, therefore it cannot be said that the selection has been held in violation of the said rule. (Para 18)

B. The examination of the record...not for the purpose to make a roving and fishing enquiry and fish out discrepancies in the selection process. The entire purpose of examining the record...limited to the extent of the allegations made by the petitioner in his writ petition and further fresh facts and grounds cannot be brought on record without the leave of the Court. Fresh facts and new grounds of attack can only be taken on the record only upon an amendment application being filed and not otherwise through supplementary affidavits. (Para 20)

In the present case, petitioner had also tried to argue that the selection has not been made in a fair and proper manner on the ground that in the interview a particular number of marks has been awarded to several candidates who have been selected, but neither there is any pleading in this regard in the petition nor any amendment has been made by the petitioners after coming to know about it. It goes without saying that in such cases the career of a number of candidates is on stake who have participated in the selection after making preparation and have successfully cleared the selection and got the appointment, therefore a roving and fishing enquiry to fish out the discrepancies in the selection process without proper pleading at the instance of unsuccessful candidate, who participated without any demur is not permissible. (Para 19)

C. Petitioners participated in the selection process without any demur or protest and having failed to get the place in the select list, have challenged the selection, whereas they cannot turn around and challenge the selection process. (Para 22)

D. The selection cannot be quashed, unless it is shown by the petitioners that they have prejudiced in any manner by it, even if it is found that there is any discrepancy. In the present case, the petitioners have failed to show that they have been prejudiced in any manner or suffered any harm, injury or they were at disadvantage by subsequent approval on the maximum marks by the Government, which were fixed by the Commission. (Para 23)

E. Words and Phrases – (a) *'approval' -* The dictionary meaning of the word 'approval' includes ratifying of the action, ratification obviously can be given ex-post facto approval. (Para 15)

(b) *'prejudice' -* As per the Law Lexicon, "Prejudice" means injurious effect, injury to or impairment of a right, claim, statement etc. "Prejudice" is generally defined as meaning "to the harm, to the injury, to the disadvantage of someone" and it also means injury or loss. (Para 24)

Writ petition dismissed. (E-4)

Precedent followed:

1. Ashok Kumar Das & ors. Vs University of Burdwan & ors., (2010) 3 SCC 616 (Para 7)

2. Bajaj Hindustan Ltd. Vs St. of U. P. & ors., (2016) 12 SCC 613 (Para 7)

3. Ms. Shaija Shah Vs Executive Committee, Bharat Varshiya national Association & anr., 1994 SCC Online All 654; (1995) All LJ 2033 (Para 7)

4. Joint Director of Education, Azamgarh Mandal & anr. Vs Udai Raj Vishwakarma & anr., 2007 SCC Online All 964; (2007) 3 All LJ 33 (DB) (Para 7)

5. Pawan Kumar Vs St. of U.P. & ors., Writ-A No.50119 of 2006, Judgment and order dated 13.03.2013 (Para 7)

6. Madan Lal Vs St. of J. & K., 1995 (3) SCC 486 (Para 22)

7. Marripati Nagraja Vs St. of Andhra Pradesh, 2007 (11) SCC 522 (Para 22)

8. Dhananjay Malik Vs St. of Uttarakhand, 2008 (4) SCC 171 (Para 22)

9. Amlan Jyoti Barooah Vs St. of Assam, 2009 (3) SCC 227 (Para 22)

10. K.A. Nagamani Vs Indian Airlines, 2009 (5) SCC 515 (Para 22)

11. Manish Kr. Shahi Vs St. of Bihar & ors., 2010 (12) SCC 576 (Para 22)

12. Hc Pradeep Kumar Rai & ors. Vs Dinesh Kumar Pandey & ors., (2015) 11 SCC 493 (Para 22)

13. Madras Inst. Of Dev. Studies & anr. Vs K. Sivasubramaniyan & ors, (2016) 1 SCC 454 (Para 22)

14. Manharibhai Muljibhai Kakadia & anr. Vs Shaileshbhai Mohanbhai Patel & ors., (2012) 10 SCC 517 (Para 24)

Precedent distinguished:

1. Dharmendra Kumar &ors. Vs Abhishek Kumar & ors., Special Appeal No.416 of 2016 (Para 21)

Present petition assails select list dated 17.05.2016, issued by Uttar Pradesh Subordinate Services Selection Commission (UPSSSC), which has been issued after selection in pursuance of the advertisement no.14 / 15 dated 03.09.2015.

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

1. Heard, Shri Rakesh Kumar Singh & Shri Pramendra Kumar Singh, learned counsels for the petitioners, learned Standing Counsel for respondents no.1 and 2, Shri Gaurav Mehrotra, learned counsel for respondent no.3 and Shri Sameer Kalia, learned counsel appearing for respondents no.6, 8, 9 and 10. Shri Prafulla Tiwari, learned counsel appearing on behalf of some of the private respondents submitted that he has instructions not to appear and argue on their behalf.

2. By means of the instant writ petition, the petitioners have approached this Court challenging the select list dated 17.05.2016 issued by the Uttar Pradesh Subordinate Services Selection Commission (here-in-after referred as UPSSSC) / opposite party no.3, which has been issued after selection in pursuance of the advertisement no.14/15 dated 03.09.2015. A further prayer has been made for a direction to the opposite party no.3 for re-selection for the post of X-Ray Technician in accordance with law.

3. The brief facts of the case, as culled out from the pleadings on record, are that the opposite party no.3 issued the advertisement no.14/15 on 03.09.2015 for various posts including the post of X-Ray Technician under the Director, Medical and Health, U.P., Lucknow. The total number of posts advertised were 403. The mode of selection on the post of X-Ray Technician was interview. It was also provided in the advertisement that the marks of the interview would be fixed with the approval of the State Government in accordance with the notification dated 11.05.2015, by which the Uttar Pradesh Group-C Direct recruitment (Mode and Procedure) Rules-2015 (here-in-after referred as Rules of 2015) were notified. In pursuance thereof the selection has been held after holding interview, in which the petitioners had also participated, however they could not get the place in select list issued by the UPSSSC, which is impugned in the present writ petition.

4. Learned counsel for the petitioner submitted that the selection for the post in question of X-Ray Technician has been held in violation of Rule 8 (1) of the Rules of 2015 without fixing and disclosing the marks of interview with the approval of the Government. The interviews were held in hurried manner. The interviews were held w.e.f. 06.05.2016 to 14.05.2016, thereafter 15.05.2016 and 16.05.2016 were Saturday and Sunday and the result was declared on 17.05.2016. After filing of the instant

petition by the petitioners on 18.05.2016, appointment letters were issued on 01.06.2016 but the approval of marks of interview in terms of Rule 8 (1) of the Rule of 2015 has been granted by the State Government on 10.06.2016. Therefore, the whole selection vitiates as the interviews have been held and the selection has been held without approval of marks of the interview by the Government in violation of the aforesaid rule. Thus, the selection can not be allowed to continue and the select list is liable to be quashed by this Court with a direction to the respondent no.2 and 3 to make re-selection for the post of X-Ray Technician in accordance with law.

5. Learned counsel for the respondent no.3 submitted that the present writ petition, on behalf of the petitioners, who had participated in the selection without any demur and are unsuccessful, is not maintainable. He further submitted that Rule 8 (1) of the Rules of 2015 only prescribes that the marks of written examination/interview and rules relating thereof shall be such as prescribed by the Commission from time to time with the approval of the Government. The UPSSSC fixed the maximum marks of interview as 20, in its meeting held on 03.02.2016, which were sent to the Government for approval on 05.02.2016 and thereafter the selection proceeded in view of the request of the department through letter dated 19.08.2015 for selection with utmost expedition and the selection was made in accordance with the marks fixed by the UPSSSC and the maximum marks fixed by the Commission has been approved by the Government by means of the letter dated 10.06.2016, and once the approval has been granted by the Government, the condition prescribed under Rule 8 (1) of the Rules of 2015 stands fulfilled because it does not prescribe the prior approval for selection.

6. On the basis of above, learned counsel for the respondent no.3 submitted that there is no illegality or error in the selection in question and the select list has been issued after holding the selection in accordance with law and the rules. The writ petition is misconceived and lacks merit. It is liable to be dismissed.

7. Learned counsel for the respondent no.3 relied on **Ashok Kumar Das and Others Vs. University of Burdwan and Others; (2010) 3 SCC 616, Bajaj Hindustan Ltd. Vs. State of Uttar Pradesh and Others; (2016) 12 SCC 613, Ms. Shaija Shah Vs. Executive Committee, Bharat Varshiya national Association and Another; 1994 SCC Online All 654/ (1995) All LJ 2033, Joint Director of Education, Azamgarh Mandal and Another Vs. Udai Raj Vishwakarma and Another; 2007 SCC Online All 964/ (2007) 3 All LJ 33 (DB) and judgment and order dated 13.03.2013 passed by a coordinate Bench of this Court in Writ-A No.50119 of 2006; Pawan Kumar Vs. State of U.P. and Others**.

8. Learned counsel for the respondents no.6, 8, 9 and 10, adopting the submissions of learned counsel for the respondent no.3, further submitted that the merit of selection does not affect in any manner by the approval of marks subsequent to the issuance of the select list in any manner. He further submitted that the petitioners has failed to point out any prejudice which may have been caused to the petitioners by approval of the maximum marks of interview after issuance of the select list and if no prejudice has been

caused to the petitioners, it does not give right to the petitioners to challenge the selection and would not call for any interference by this Court as the selection has been held in accordance with law and there is no illegality or error in the selection made by the UPSSSC. The writ petition is misconceived and lacks merit. It is liable to be dismissed.

9. I have considered the submissions of learned counsel for the parties and perused the record.

10. The select list has been challenged on the ground that the interview has been held in violation of terms of advertisement and Rule 8 (1) of the Rules of 2015 without fixing and disclosing the marks of interview.

11. In view of above challenge to the select list, Rule 8 (1) of Rules of 2015 needs to be examined by this Court, therefore the same is extracted here-in-below, for ready reference:-

"8. (1) The procedure for direct recruitment, the syllabus, marks of written examination/interview and the rules relating thereof shall be such as prescribed by the Commission from time to time with the approval of the Government."

12. The selection on the post of X-Ray Technician under the Directorate of Medical and Health, U.P., Lucknow has been held after holding interviews in pursuance of the advertisement no.14/15 dated 03.09.2015. It was provided in the advertisement that the marks of the interview would be fixed with the approval of the State Government in accordance with the provision made in the Uttar Pradesh Group-C Direct recruitment (Mode and Procedure) Rules-2015, notified on 11.05.2015. The UPSSSC decided to fix the marks of interview in its meeting held on 03.02.2016, a copy of which has been filed by the respondent no.3 as annexure no.2 to the counter affidavit. The aforesaid decision of the UPSSSC was communicated to the Government for required approval under Rule 8(1) of the Rules of 2015 by means of letter dated 05.02.2016, a copy of which is as annexure no.3 to the counter affidavit. In the meantime, the UPSSSC proceeded with the selection in view of the request of the Government, by means of the letter dated 19.08.2015, to hold the selection with utmost expedition, a copy of which is annexure no.4 to the counter affidavit. The interviews were held w.e.f. 06.05.2016 to 14.05.2016, for which the petitioners were also called and they participated without any protest. After holding the interviews, the respondent no.3 declared the result of the selection on 17.05.2016. In pursuance of the selection, the appointment letters were issued by the Government on 01.06.2016. The State Government, in pursuance of the letter dated 05.02.2016 of the UPSSSC, granted approval on the maximum marks of 20 of interview fixed by the UPSSSC, under Rule 8(1) of the Rules of 2015, by means of the letter dated 10.06.2016, a copy of which is annexed as annexure no.5 to the counter affidavit filed by the respondent no.3. Thus, the approval on the maximum marks fixed by the Commission for interview was granted by the State Government.

13. The action of the UPSSSC in holding the interviews without approval on the marks fixed by the Commission has been assailed in this petition on the ground that it is in violation of Rule 8(1) of the Rules of 2015. Sub-Rule (1) of Rule 8

provides that the marks of written examination / interview shall be such as prescribed by the Commission from time to time with the approval of the Government, meaning thereby the maximum marks of the interview are to be prescribed by the Commission i.e. UPSSSC, on which the approval of the Government is required, therefore on approval of maximum marks of interview, by the Government which have been fixed by the Commission before interviews, the condition of Rule 8 (1) stands fulfilled, even if it is after the selection has been held because the Rule does not prescribes prior approval or permission on the makrs fixed by the Commission.

14. The Hon'ble Supreme Court, in the case of **Ashok Kumar Das and Others Vs. University of Burdwan and Others (Supra),** in regard to an identical provision of determining the terms and conditions of service of non-teaching staff with the approval of the State Government held that since the words used are "with the approval of the State Government", the Executive Council of the University could determine the terms and conditions of service of the non-teaching staff and obtain the approval of the State Government subsequently and in case the State Government did not grant approval subsequently, any action taken on the basis of the decision of the Executive Council of the University would be invalid and not otherwise. The relevant paragraphs 11, 12, 13, 14 and 15 are extracted below:-

"11. In Black's Law Dictionary (Fifth Edition), the word "approval" has been explained thus:

"the act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another." Hence, approval to an act or decision can also be subsequent to the act or decision.

12. In U. P. Avas Evam Vikas Parishad (supra), this Court made the distinction between permission, prior approval and approval. Para 6 of the judgment is quoted hereinbelow:

"6. This Court in Life Insurance Corpn. of India v. Escorts Ltd. [(1986) 1 SCC 264], considering the distinction between "special permission" and "general permission", previous approval" or "prior approval" in para 63 held that: "We are conscious that the word `prior' or `previous' may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29(1) of the Act.

" Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous Act, it was stated in Lord Krishna Textiles Mills Ltd. v. Workmen [AIR 1961 SC 860], that the Management need not obtain the previous consent before taking any action. The requirement that the Management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in Section 33(1)."

13. Following the decision in U. P. Avas Evam Vikas Parishad (supra), this Court again held in High Court of Judicature for Rajasthan v. P. P. Singh & Ors. (supra) in para 40:

"40. When an approval is required, an action holds good and only if

it is disapproved it loses its force. Only when a permission is required, the decision does not become effective till permission is obtained. (See U.P. Avas Evam Vikas Parishad v. Friends Coop. Housing Society Ltd.)."

14. Section 21 (xiii) of the Burdwan University Act, 1981 is quoted herein below:-

"21. Subject to the provisions of this Act, the Executive Council shall exercise the following powers and perform the following functions:

(i) to (xii) .....

(xiii) to determine, with the approval of the State Government, the terms and conditions of service of Librarians and non-teaching staff."

15. The words used in Section 21 (xiii) are not "with the permission of the State Government" nor "with the approval of the State Government", but "with the approval of the State Government". If the words used were "with the permission of the State Government", then without the permission of the State Government the Executive Council of the University could not determine the terms and conditions of service of non-teaching staff. Similarly, if the words used were "with the prior approval of the State Government", the Executive Council of the University could not determine the terms and conditions of service of the non-teaching staff without first obtaining the approval of the State Government. But since the words used are "with the approval of the State Government", the Executive Council of the University could determine the terms and conditions of service of the non-teaching staff and obtain the approval of the State Government subsequently and in case the State Government did not grant approval subsequently, any action taken on the basis of the decision of the Executive Council of the University would be invalid and not otherwise."

15. The Hon'ble Supreme Court, in the case of **Bajaj Hindustan Ltd. Vs. State of Uttar Pradesh and Others (Supra)**, relying on the aforesaid judgment and order rendered in the case of Ashok Kumar Das and Others Vs. University of Burdwan and Others, held that the dictionary meaning of the word 'approval' includes ratifying of the action, ratification obviously can be given ex-post facto approval. It has further been observed that in the case of approval, the action holds until it is disapproved while in other case until permission is obtained. The relevant paragraph 7 is extracted here in below:-

"7. As is clear from the above, the dictionary meaning of the word "approval" includes ratifying of the action, ratification obviously can be given ex post facto approval. Another aspect which is highlighted is a difference between approval and permission by the assessing authority that in the case of approval, the action holds until it is disapproved while in other case until permission is obtained. In the instant case, the action was approved by the assessing authority. The Court also pointed out that if in those cases where prior approval is required, expression "prior" has to be in the particular provision. In the proviso to sub-section (1) of Section 3-A word "prior" is conspicuous. For all these reasons, it was not a case for levying any penalty upon the appellant. We, therefore, allow this appeal and set aside the impugned judgment [Bajaj Hindustan Ltd. v. State of U.P., Misc. Single No. 3088 of 1999, order dated 30-9-2004 (All)] of the High Court as well as the penalty. No order as to costs.."

16. A division bench of this Court, in the case of **Ms. Shaija Shah Vs. Executive Committee, Bharat Varshiya national Association and Another (Supra),** observed that expression prior approval and approval connotes different situation, where a statue uses the term prior approval anything done without the prior approval, is nullity. However, where a stature employs expression approval, in such cases subsequent rectification can make the act valid.

17. Another division bench of this Court, in the case **Joint Director of Education, Azamgarh Mandal and Another Vs. Udai Raj Vishwakarma and Another (Supra),** held that in case the act requires only approval the action holds the action holds good until it is disapproved. The relevant paragraphs 16 and 17 are extracted here-in-below:-

"16. On the contrary where the statute specifically provides "prior approval" before passing any order, what its effects would be has been considered in some other cases which we propose to refer as under. Rule 11 of U.P. Recognized Basic Schools (Recruitment and Conditions of Service of Teachers and other Conditions) Rules, 1975 provides that no service can be terminated without prior permission from the District Basic Officer. A Division Bench of this Court in Ms. Shilaja Shah v. Executive Committee, Bharat Varshiya National Association, 1995 (25) ALR 88 : (1995 All LJ 2033) held that expression "prior approval" and "approval" connotes different situation. Where a statute uses the term "prior approval" anything done without prior approval is nullity. Where a statute employs expression "approval", however, in such cases subsequent ratification can make the act valid.

17. Section 59(1)(a) of U.P. Urban Planning and Development Act, 1973 provides for "prior approval". The Apex Court in U.P. Avas Evam Vikas Parishad v. Friends Coop. Housing Society Ltd., 1995 Supp (3) SCC 456 : (1995 All LJ 2066) held that "prior approval" and "approval" are two different connotations and if the statute does not mention "prior approval" what is material would be only "approval". The earlier judgment in Life Insurance Corporation of India v. Escorts Ltd., (1986) 1 SCC 264 : (AIR 1986 SC 1370) was also referred where it was held that the word "prior' and "previous' may be implied if the contextual situation or circumstances justify such reading and the Act which requires only approval, the action holds good until it is disapproved."

18. Adverting to the facts of the present case, it is apparent that the 20 maximum marks of the interview prescribed by the UPSSSC on 03.02.2016 has been approved by the Government on 10.06.2016, therefore the condition of Rule 8(1) of Rules of 2015 stands fulfilled, therefore it can not be said that the selection has been held in violation of the said rule.

19. Learned counsel for the petitioner had also tried to argue that the selection has not been made in a fair and proper manner on the ground that in the interview a particular number of marks has been awarded to several candidates who have been selected, but neither there is any pleading in this regard in the petition nor any amendment has been made by the petitioners after coming to know about it. Therefore, this Court is of the view that in absence of any pleading, the contention raised at the time of argument can not be accepted. It goes without saying that in

such cases the career of a number of candidates is on stake who have participated in the selection after making preparation and have successfully cleared the selection and got the appointment, therefore a roving and fishing enquiry to fish out the discrepancies in the selection process without proper pleading at the instance of unsuccessful candidate, who participated without any demur is not permissible. Such contention is only liable to be repelled.

20. A coordinate Bench of this Court, in the case of **Pawan Kumar Vs. State of U.P. and Others; Writ-A No.50119 of 2006 (Supra),** has held that the examination of the record was not for the purpose to make a roving and fishing enquiry and fish out discrepancies in the selection process. The entire purpose of examining the record was limited to the extent of the allegations made by the petitioner in his writ petition and further fresh facts and grounds cannot be brought on record without the leave of the Court and such practice adopted in the present case is deprecated. The Court is of the opinion that fresh facts and new grounds of attack can only be taken on the record only upon an amendment application being filed and not otherwise through supplementary affidavits. The relevant paragraph is extracted here-in-below:-

"The Court is constrained to observe that the examination of the record was not for the purpose to make a roving and fishing enquiry and fish out discrepancies in the selection process. The entire purpose of examining the record was limited to the extent of the allegations made by the petitioner in his writ petition. Further, fresh facts and grounds cannot be brought on record without the leave of the Court. Such practise adopted in the present case is deprecated. The Court is of the opinion that fresh facts and new grounds of attack can only be taken on the record only upon an amendment application being filed and not otherwise through supplementary affidavits."

21. So far as the judgment and order dated 06.04.2017, passed in bunch of special appeals leading being **Special Appeal No.416 of 2016; Dharmendra Kumar and 2 Others Vs. Abhishek Kumar and Others**, relied by learned counsel for the petitioners, is concerned, the same is not applicable on the facts and circumstances of the present case and is of no assistance to the petitioners. In the said case the selection was assailed on the ground that it is contrary to service rules and the instructions, therefore it has been held to be in one the exceptions carved out by the Hon'ble Supreme Court, whereas in the present case the selection has been held in accordance with the rules as discussed above.

22. This Court also finds that the petitioners, having participated in the selection process without any demur or protest and having failed to get the place in the select list, have challenged the selection, whereas they can not turn around and challenge the selection process. This issue has been settled by a series of decisions of Hon'ble the Supreme Court, namely, ***Madan Lal Vs. State of Jammu and kashmir; 1995 (3) SCC 486, Marripati Nagraja Vs. State of Andhra Pradesh; 2007 (11) SCC 522, Dhananjay Malik Vs. State of Uttarakhand; 2008 (4) SCC 171, Amlan Jyoti Barooah Vs. State of Assam; 2009 (3) SCC 227, K.A. Nagamani Vs. Indian Airlines; 2009 (5) SCC 515, Manish Kr. Shahi Vs. State of Bihar and***

others; 2010 (12) SCC 576, Hc Pradeep Kumar Rai & Ors vs Dinesh Kumar Pandey & Ors; (2015) 11 SCC 493 and Madras Inst.Of Dev. Studies & Anr vs K. Sivasubramaniyan & Ors; (2016) 1 SCC 454.

23. There is another aspect of the matter, as argued by learned counsel for some of the private respondents also, that even if it is found that there is any discrepancy, the selection can not be quashed, unless it is shown by the petitioners that they have prejudiced in any manner by it. In the present case, the petitioners have failed to show that they have been prejudiced in any manner or suffered any harm, injury or they were at disadvantage by subsequent approval on the maximum marks by the Government, which were fixed by the Commission.

24. As per the Law Lexicon, "Prejudice" means injurious effect, injury to or impairment of a right, claim, statement etc. The Hon'ble Supreme Court, in the case of ***Manharibhai Muljibhai Kakadia and Another Vs. Shaileshbhai Mohanbhai Patel and Others, (2012) 10 SCC 517***, has held that "Prejudice" is generally defined as meaning "to the harm, to the injury, to the disadvantage of someone" and it also means injury or loss. The relevant paragraphs 47.1 to 47.4 are extracted here-in-below :-

"47.1. Black's Law Dictionary (8th Edn.) explains "prejudice" to mean damage or detriment to one's legal rights or claims. Concise Oxford English Dictionary [10th Edn., Revised] defines "prejudice" as under:

"Prejudice.-- n. (1) preconceived opinion that is not based on reason or actual experience. ≫ unjust behaviour formed on such a basis. (2) chiefly Law harm or injury that results or may result from some action or judgment. ≫ v. (1) give rise to prejudice in (someone); make biased. (2) cause harm to (a state of affairs)."

47.2. Webster Comprehensive Dictionary (International Edn.) explains "prejudice" to mean (i) a judgment or opinion, favourable or unfavourable, formed beforehand or without due examination ... detriment arising from a hasty and unfair judgment; injury; harm.

47.3. P. Ramanatha Aiyar; the Law Lexicon (The Encyclopaedic Law Dictionary) explains "prejudice" to mean injurious effect, injury to or impairment of a right, claim, statement, etc.

47.4. "Prejudice" is generally defined as meaning "to the harm, to the injury, to the disadvantage of someone". It also means injury or loss."

25. In view of above, this Court is of the view that there is no illegality or error and violation of Rule 8(1) of the Rules of 2015 in selection in question, therefore this Court is of the view that the writ petition has been filed on misconceived ground, which lacks merit and is liable to be dismissed.

26. The writ petition is, accordingly, **dismissed**. No order as to costs.

(2022) 9 ILRA 438
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.09.2022

BEFORE

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

Application U/S 482 No. 2958 of 2022

Sallahuddin ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Vivek Abhir

Counsel for the Opp. Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860-Sections 420, 120B, 153A, 153B, 295A, & 511 - Sections 3/5/8 U.P. Prohibition of Unlawful Conversion of Religion Act, 2021-Denial -default bail-accused was arrested from Gujrat, his judicial custody remand was granted time to time-the chargesheet filed on 48th day from the date of first remand-further, supplementary chargesheet filed in the court on 79th day and the learned court below took cognizance of the matter-Thus, no occasion for applicant arose to seek default bail under the proviso (a) of Section 167(2) Cr.P.C.-Special Court rightly rejected the application seeking default bail-More so, Special Court Order is an appealable order in view of the provisions contained in Section 21(4) of N.I.A. Act, 2008-Hence, the instant application is not maintainable.(Para 1 to 26)

B. The object behind the enactment of Section 167 Cr.P.C. is to see that the detention of the accused should not be permitted for any unreasonably longer period. The parliament has introduced the proviso to Section 167(2) Cr.P.C. prescribing the outer limit within which the investigation must be completed. If the investigation is not completed within the specified period the accused would acquire a right to be released on bail and if he is prepared to and does furnish the bail, the Magistrate shall release him on bail and such release shall be deemed to be grant of bail under Chapter XXXII of the Code.(Para 22)

The application is dismissed. (E-6)

List of Cases cited:

1. Fakhrey Alam Vs St. of U.P. (2021) SCC Online 532

2. Achpal @ Ramswroop & anr.. Vs St. of Raj. (2019) 14 SCC 599

3. Ved Kumar Seth & anr.. Vs The St. of Assam (1974) SCC Online Gau 44

4. Zakir Hussain Vs UT of Ladakh & ors. (2021) SCC Online J&K 64

5. S.M. Purtado & etc. Vs Dy. S.P. C.B.I. Cochin & etc (1996) Cri. L.J. 3042

6. Tarlok & ors. Vs St. of Haryana (2019) 3 RCR Crl. 348

7. Suresh Kumar Bhikamchand Jain Vs St. of Mah & ors. (2013) 3 SCC 77

8. Abdul Azeez Vs NIA (2014) 144 AIC 380

9. Hitendra Vishnu Thakur Vs .St. of Mah.(1994) AIR SC 2623

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

1. Counter affidavit filed by the State is taken on record.

2. Heard Sri Arsh R. Shaikh, learned counsel for the applicant, Sri Shiv Nath Tilhari, learned A.G.A. for the State and perused the entire record.

3. The instant application under Section 482 Cr.P.C. has been filed praying inter alia following reliefs:-

"1. Allow this application and quash and set aside the impugned order dated 27.04.2022 passed by the learned Additional District and Sessions Judge, ADJ-3, Lucknow, Uttar Pradesh in CMRA number 2823 of 2022;

2. Release the applicant on default bail in connection with Case Crime number 9 of 2021 registered with ATS Gomtinagar police station, Lucknow pending in the court of Learned Additional District and Sessions Judge, ADJ-3 in connection with sections 153A, 153B, 295A, 417, 298,

121A, 123 and 120B of the Indian Penal Code, 1860 and sections 3, 5 and 8 of The Prohibition of Unlawful Religious Conversion Act, 2021.

3. Release the applicant on ad-interim bail during pending admission, hearing and final disposal of the present application in the interest of justice."

4. The facts as culled out from the pleadings are that the applicant, Sallahuddin was arrested on 30.06.2021 from District Ahmedabad, Gujarat in connection with Crime No.9/2021 under Sections 420, 120B, 153A, 153B, 295A, 511 I.P.C. and 3/5 Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act 2021. His transit remand was allowed from 18:00 hours on 30.06.2021 upto 17:00 hours on 03.07.2021 by the learned Magistrate at Ahmedabad. The accused/ applicant was produced before the Special CJM Custom, Lucknow on 02.07.2021 and his judicial custody remand was granted for 14 days by an order passed by the learned Special CJM Custom, Lucknow. For a period from 06.07.2021 to 13.07.2021, his first police custody remand was allowed. For a period from 13.07.2021 to 15.07.2021, his second police custody remand was allowed. Thereafter, his judicial custody remand was granted from time to time i.e. from 15.07.2021 to 26.07.2021, from 26.07.2021 to 09.08.2021 and from 09.08.2021 to 18.08.2021. Charge sheet dated 13.08.2021, under Sections 471, 120-B, 153-A, 153-B, 295-A, 298-A I.P.C. and Sections 3/5/8 U.P. Prohibition of Unlawful Conversion of Religion Act, 2021 against the applicant came to be filed in the court below on 18.08.2021 keeping the investigation pending. This charge sheet against the accused/ applicant was filed on 48th day from the date of first remand, which was well within the prescribed period under proviso (a) to Section 167(2) Cr.P.C. During the course of further investigation, the offence under Sections 121-A and 123 I.P.C. were added on 31.08.2021 and the remand was obtained on 01.09.2021 for the offence under Sections 121-A and 123 I.P.C. As the offence under Sections 121-A and 123 I.P.C. are scheduled offences as mentioned in the Shedule to the National Investigating Agency Act, 2008 (hereinafter referred to as "N.I.A. Act'), the information to this effect was sent to the State Government on 02.09.2021 in compliance with the provision contained under Section 6 of N.I.A. Act. The State Government sent the information to the Central Government on 21.09.2021. The supplementary charge sheet dated 17.09.2021 for the offence under Sections 121-A and 123 I.P.C. came to be filed in the court on 18.09.2021 i.e. on 79th day from the date of first remand by competent court at Lucknow and 81st day, inclusive of the time of transit remand too. The sanction for prosecution for the offences under Section 121-A/ 123 I.P.C. appears to have been granted on 22.11.2021. The learned court below took cognizance of the matter on 18.12.2021.

5. It is submitted by learned counsel for the applicant that the applicant was taken into custody and transit remand for three days was granted by the court of Ahmedabad. However, he was produced before the court at Lucknow on 02.07.2021 and the Chief Judicial Magistrate granted seven days' remand from 06.07.2021 to 13.07.2021. The applicant is in judicial custody since 15.07.2021.

6. His further submission is that on 14.09.2021, the applicant applied for default bail under Section 167(2) Cr.P.C. which was disposed of by order dated

22.09.2021. The accused/ applicant again filed an application for default bail by challenging the earlier order dated 22.09.2021 and the learned Additional District & Sessions Judge ADJ-3 was pleased to reject the second application for default bail by the order dated 27.04.2022, both the orders as aforesaid, denying the applicant the benefit of default bail are illegal.

7. Learned counsel for the applicant has also submitted that the first charge sheet was filed on 18.08.2021 and thereafter the Investigating Officer filed an application dated 31.08.2021 for adding Sections 121-A and 123 I.P.C. Thereafter, the supplementary charge sheet came to be filed on 18.09.2021, without obtaining sanction as required by Section 196 Cr.P.C.

8. He then contended that the applicant was entitled to default bail as investigation was not concluded within sixty days. The investigating agency, only to deprive the applicant of his right of getting default bail, moved an application for adding Section 121A and 123 I.P.C. with a view to extend the time limit of investigation upto 90 days. There is no provision in the Code of Criminal Procedure, 1989 for addition/substraction/ alteration in the charge sheet once submitted and as such the application dated 31.08.2021 for adding Sections 121A and 123 I.P.C. was not liable to be allowed by the learned Magistrate.

9. In order to substantiate his aforesaid contentions, the learned counsel for the applicant has placed reliance on the law laid down by Hon'ble Supreme Court in the Case of Fakhrey Alam vs. State of Uttar Pradesh reported in 2021 SCC Online 532, Achpal @ Ramswroop & Another vs. State of Rajasthan reported in (2019) 14 SCC 599 as well as law laid down by Gauhati High Court in the case of Ved Kumar Seth and another vs. The State of Assam reported in 1974 SCC Online Gau 44. He has also placed reliance on the judgment passed by Jammu and Kashmir High Court in the case of Zakir Hussain vs. UT of Ladakh and others reported in 2021 SCC Online J&K 64, judgment passed by Kerala High Court in the case of S.M. Purtado and etc. vs. Dy. S.P. C.B.I. Cochin and etc. reported in 1996 Cri. L.J. 3042. and judgdment passed by Punjab and Haryana High Court in the case of Tarlok and others vs. State of Haryana, 2019 (3) R.C.R. (Criminal) 348.

10. Per contra, learned A.G.A. has opposed the prayer by submitting that the first charge sheet for the offence under Sections 471, 120B, 153A, 153B, 295A, 298A I.P.C. and Sections 3/5/8 of U.P. Prohibition of Unlawful Conversion of Religion Act, 2021 was filed in the court below on 18.08.2021 keeping the investigation pending and as such the first charge sheet was filed on the 48th day from the date of first remand and keeping the investigation pending in respect of alleged anti-national activities committed by the accused person. Thereafter, the supplementary charge sheet dated 17.09.2021 was filed in respect of the offence under Sections 121A and 123 I.P.C. on 79th day from the date of first remand.

11. His further submission is that both the charge sheets were filed well within the time prescribed under Section 167 Cr.P.C. and, therefore, the applicant has no right to claim default bail. The prayer for default bail itself is not maintainable as the charge sheet was filed well within time. The right of being enlarged on bail under Section 167

Cr.P.C., arises only when the charge sheet is not filed within time.

12. Learned A.G.A. for the State has also submitted that the contention of the applicant to the effect that the addition/ alteration of the other sections during investigation is not permissible under Cr.P.C., is neither acceptable nor tenable in the eyes of law as Section 173(8) Cr.P.C. permits the further investigation in respect of an offence even after the report under sub Section 2 of Section 173 Cr.P.C. has been forwarded to the Magistrate. Therefore, the filing of the first charge sheet and thereafter undertaking further investigation was legally sustainable and filing of supplementary charge sheet, well within ninety days from the date of first remand was within the domain of the investigating agencies. There is no illegality in filing the first charge sheet dated 13.08.2021 in the court below on 18.08.2021 and the supplementary charge sheet in court below on 17.09.2021 because the first charge sheet was filed on 48th day and supplementary charge sheet was filed on 79th day.

13. His further submission is that the first application for default bail filed by the applicant on 14.09.2021 was not pressed by the applicant before the court below. The order dated 22.09.2021, on the face of the application dated 14.09.2021, which is available at page No.58 to the instant application, goes to show that the default bail application was rejected because the same was not pressed. The applicant after getting his first application for default bail rejected after not pressing the same, filed another application for default bail on 13.04.2022 was not maintainable on two counts, first that the charge sheet was already filed well within ninety days and, therefore, the default bail application was not maintainable and second is that the application for default bail dated 13.04.2022 was filed much after filing of charge sheet and order of prosecution sanction dated 18.12.2021 and the order of cognizance dated 18.12.2021.

14. Learned A.G.A. for the State has contended that it would not be open to accused to claim that he is entitled to bail under proviso (a) to Section 167(2) Cr.P.C. even if charge sheet is filed within time or the charge sheet is filed before any time prior to filing of application for default bail and making any submission that accused is prepared to furnish bail. In the present case, both the conditions are not available. Charge sheet was filed within ninety days. Further, the application for default bail being moved on 13.04.2022 does not entitle the applicant in any manner to get the default bail.

15. He has concluded his submissions by stating that the law laid down by Hon'ble Supreme Court in the Case of Fakhrey Alam (supra), Achpal @ Ramswroop (supra) as well as law laid down by Gauhati High Court in the case of Ved Kumar Seth (supra), Jammu and Kashmir High Court in the case of Zakir Hussain (supra), judgment passed by Kerala High Court in the case of S.M. Purtado and etc. (supra) and judgment passed by Punjab and Haryana High Court in the case of Tarlok and others (supra), which have been relied by learned counsel for the applicant have no application in this case for the reason that the same are not applicable in the facts of the present case.

16. His further submission is that the other contentions of the applicant are that in want of sanction, order taking

cognizance was bad in law, is not sustainable as the learned court below took cognizance on 18.12.2021, only after the sanction for prosecution was granted on 22.11.2021 as is evident from Annexures No.14 and 15 to counter affidavit. Whether, the cognizance is taken or not is not material as far as grant of default bail under proviso (a) to Section 167(2) Cr.P.C. is concerned. Merely because sanction has not been obtained to prosecute the accused and to proceed to the stage of Section 309 Cr.P.C., it cannot be said that the accused is entitled to get default bail. Grant of sanction is nowhere contemplated under proviso (a) to Section 167(2) Cr.P.C. To buttress his aforesaid contention, reliance has been placed on the law laid down by Hon'ble Supreme Court in the case of Suresh Kumar Bhikamchand Jain vs. State of Maharashtra and others, 2013 (3) SCC 77.

17. Having heard the learned counsel for the applicant, learned A.G.A. for the State and upon perusal of record, it transpires that the applicant, Sallahuddin was arrested on 30.06.2021 from District Ahmedabad, Gujarat in connection with Crime No.9/2021 under Sections 420, 120B, 153A, 153B, 295A, 511 I.P.C. and 3/5 Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act 2021. His transit remand was allowed from 18:00 hours on 30.06.2021 upto 17:00 hours on 03.07.2021 by the learned Magistrate at Ahmedabad. The accused/ applicant was produced before the Special CJM Custom, Lucknow on 02.07.2021 and his judicial custody remand was granted for 14 days by an order passed by the learned Special CJM Custom, Lucknow. For a period from 06.07.2021 to 13.07.2021, his first police custody remand was allowed. For a period from 13.07.2021 to 15.07.2021, his second police custody remand was allowed. Thereafter, his judicial custody remand was granted from time to time i.e. from 15.07.2021 to 26.07.2021, from 26.07.2021 to 09.08.2021 and from 09.08.2021 to 18.08.2021. Charge sheet dated 13.08.2021, under Sections 471, 120-B, 153-A, 153-B, 295-A, 298-A I.P.C. and Sections 3/5/8 U.P. Prohibition of Unlawful Conversion of Religion Act, 2021 against the applicant came to be filed in the court below on 18.08.2021 keeping the investigation pending. This charge sheet against the accused/ applicant was filed on 48th day from the date of first remand, which was well within the prescribed period under proviso (a) to Section 167(2) Cr.P.C. During the course of further investigation, the offence under Sections 121-A and 123 I.P.C. were added on 31.08.2021 and the remand was obtained on 01.09.2021 for the offence under Sections 121-A and 123 I.P.C. As the offence under Sections 121-A and 123 I.P.C. are scheduled offences as mentioned in the Shedule to the National Investigating Agency Act, 2008 (hereinafter referred to as "N.I.A. Act'), the information to this effect was sent to the State Government on 02.09.2021 in compliance with the provision contained under Section 6 of N.I.A. Act. The State Government sent the information to the Central Government on 21.09.2021. The supplementary charge sheet dated 17.09.2021 for the offence under Sections 121-A and 123 I.P.C. came to be filed in the court on 18.09.2021 i.e. on 79th day from the date of first remand by competent court at Lucknow and 81st day, inclusive of the time of transit remand too. The sanction for prosecution for the offences under Section 121-A/ 123 I.P.C. appears to have been granted on 22.11.2021. The learned court below took cognizance of the matter on 18.12.2021.

18. Therefore, no occasion for accused/ applicant arose to seek default bail under the provision contained in proviso (a) to Section 167(2) Cr.P.C. Thus, the impugned order dated 27.04.2022, whereby the Special Court has rejected the application moved by the applicant seeking default bail does not suffer from any illegality.

19. A Division Bench of Kerala High Court in the case of Abdul Azeez vs. National Investigation Agency, (2014) 144 AIC 380, has held that in case, after further investigation under Section 173(8) Cr.P.C., any supplementary charge sheet is submitted, in such a case it cannot be said that filing of such supplementary charge sheet within statutorily stipulated period is designed to defeat the right of an accused to get default bail.

20. Be that as it may, the application seeking default bail came to be filed by the applicant on 13.04.2022 after filing of charge sheet/ supplementary charge sheet and even after cognizance of the matter was taken by the court below. Therefore, the application seeking default bail under proviso (a) to Section 167(2) Cr.P.C. was not maintainable. The question that whether sanction was necessary or not or whether sanction was obtained or not, does not appear to be material in view of admitted fact that the application seeking default bail by the applicant came to be filed after cognizance was taken by the learned trial court. The first charge sheet was filed on 13.08.2021 and the supplementary charge sheet was filed on 17.09.2021. Therefore, this Court does not find any substance in the submissions of learned counsel for the applicant to the effect that the applicant was wrongly denied default bail to which he was entitled to get in this matter.

21. From a bare perusal of provisions contained in proviso (a) to Section 167(2) Cr.P.C. makes it clear that any bail, purportedly granted in exercise of power vested by the aforesaid proviso, would have effect of the bail granted under Chapter XXXIII Cr.P.C., which pertains to grant or refusal of bail.

22. The Hon'ble Supreme Court in **Hitendra Vishnu Thakur vs State Of Maharashtra, AIR 1994 SC 2623** has held that the object behind the enactment of Section 167 Cr.P.C. is to see that the detention of the accused should not be permitted for any unreasonably longer period. The Parliament has introduced the proviso to Section 167(2) Cr.P.C. prescribing the outer limit within which the investigation must be completed. If the investigation is not completed within the specified period the accused would acquire a right to be released on bail and if he is prepared to and does furnish the bail, the Magistrate shall release him on bail and **such release shall be deemed to be grant of bail under Chapter XXXIII of the Code.**

23. In view of the above, this matter may be viewed from another perspective also. The impugned order rejecting the application seeking default bail was passed on 27.04.2022 by the learned Additional District & Sessions Judge-3/ Special Judge NIA/ATS, Lucknow. This Special Court was constituted under Section 22 of N.I.A. Act and as such the impugned order dated 27.04.2022 passed by the special court is appealable under Section 21(4) of N.I.A. Act which, for ready reference, is quoted herein below:-

"21 Appeals. -

(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

(2) Every appeal under sub-section (1) shall be heard by a Bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from: Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days: Provided further that no appeal shall be entertained after the expiry of period of ninety days."

24. Thus, on the basis of aforesaid, it can safely be said that rejection of application seeking default bail by Special Court vide order dated 27.04.2022 is an appealable order in view of the provisions contained in Section 21(4) N.I.A. Act.

25. In this view of matter also, this Court does not find the instant application to be maintainable.

26. In view of the aforesaid discussion, this Court does not see any illegality, impropriety and incorrectness in the impugned order. There is no abuse of court's process either. Therefore, the instant application lacks merit, which deserves to be dismissed.

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

(2022) 9 ILRA 445
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482 No. 23830 of 2021

Smt. Shalini Kashyap & Anr. ...Applicants
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicants:
Sri Awadhesh Kumar Singh, Sri Abhai Kumar Singh

Counsel for the Respondents:
G.A., Sri Sanjay Vikarm Singh, Sri Rakesh Kumar Singh

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860 - Sections 498-A, 504, 506, 120-B, 342, 377 & 376 - ¾ D.P. Act-challenge to-cognizance order- Magistrate cannot add or subtract section at the time of taking cognizance as the same would be permissible by the trial court only at the time of framing of charge-Ld. Magistrate committed error by adding sections at the time of taking cognizance as well as by the Revisional Court-Cognizance for offence u/s 406 by Ld. Magistrate against all the accused is

legally erroneous-At the stage of charge-sheet no offence could be added or deleted however, at the time of framing of charge, Ld. Magistrate is at liberty to consider the material available to take cognizance of other offence.(Para 1 to 18)

The application is partly allowed. (E-6)

List of Cases cited:

1. St. of Guj. Vs Girish Radhakrishnan Varde,(2014) 3 SCC 659

2. Dharam Pal & ors.. Vs St. of Har. & anr., (2014) 3 SCC 306

3. Nahar Singh Vs St. of U.P. & anr., (2022) 5 SCC 295

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Shri. Awadhesh Kumar Singh, learned counsel for applicants, Shri. Rakesh Kumar Singh, learned counsel for informant and Shri.Chandan Agarwal, learned A.G.A. Perused the records.

2. By means of this application, applicants have prayed for setting-aside the impugned judgment and order dated 29.9.2021 passed by Additional Sessions Judge, Court No.3, Hathras in Criminal Revision No.106 of 2020, (C.N.R. No.UPHT010030162020) Smt. Shalu Vs. State of U.P. & Ors.

3. Complainant/opposite party No.2, Shalu lodged an F.I.R. No.0333 dated 9.11.2019 at Police Station-Hathras Junction, district-Hathras against her husband Rohit Kashyap (applicant no.2), her Jeth Rishi, her father-in-law Amar Nath, her sister-in-law (wife of dewar and applicant no.1) and Arvind Kumar (Relative) for allegedly committing offence under Sections 498-A, 504, 506, 120-B, 342, 377, 376 I.P.C. and ¾ D.P.Act

4. After investigation, a charge-sheet No.188/2020 dated 1.9.2020 was filed only against Rohit, Rishi and Amar Nath for offence under Sections 498-A, 504, 506 I.P.C. and 3 / 4 D.P.Act.

5. At the stage of cognizance, complainant filed an application before Judicial Magistrate, Hathras, alleging unfair investigation.

6. The complainant being aggrieved filed a Criminal Revision No.106 of 2020 that charge-sheet was filed on lesser offence, whereas no charge-sheet was filed for offence of grievous nature despite sufficient evidence being on record.

7. The learned Magistrate partly allowed the Revision Petition by impugned order dated 29.9.2021 interalia that:

"there is prima-facie evidence to summon Rohit under Section 377 I.P.C."

and

"there is prima-facie evidence to summon accused Shalini under Sections 498-A, 406, 504, 506 I.P.C. and 3/4 D.P.Act."

and

"there is no prima-facie evidence to summon Shalini and Rishi under Sections 376, 342 and 120-B I.P.C."

and

"There is prima-facie evidence to summon Arvind under Sections 498-A, 406, 504, 506 I.P.C. and ¾ D.P.Act."

8. Learned counsel for applicants has submitted his argument in two folds.

9. Firstly, he submitted that the Magistrate cannot add or substract any offence other than the offence for which charge-sheet is filed.

10. Learned counsel for applicants submitted that in the present case, learned Magistrate took cognizance on offence other than the offence for which charge-sheet was filed and in this regard, he has placed reliance upon the judgment of Supreme Court in ***State of Gujarat Vs. Girish Radhakrishnan Varde, (2014) 3 SCC 659***. Relevant paragraph nos.14,15,16 and 17 thereof are extracted hereinafter:

"14. But if a case is registered by the police based on the FIR registered at the Police Station under Section 154 Cr.P.C. and not by way of a complaint under Section 190 (a) of the Cr.P.C. before the magistrate, obviously the magisterial enquiry cannot be held in regard to the FIR which had been registered as it is the investigating agency of the police which alone is legally entitled to conduct the investigation and, thereafter, submit the chargesheet unless of course a complaint before the magistrate is also lodged where the procedure prescribed for complaint cases would be applicable. In a police case, however after submission of the chargesheet, the matter goes to the magistrate for forming an opinion as to whether it is a fit case for taking cognizance and committing the matter for trial in a case which is lodged before the police by way of FIR and the magistrate cannot exclude or include any section into the chargesheet after investigation has been completed and chargesheet has been submitted by the police.

15. The question, therefore, emerges as to whether the complainant/informant/prosecution would be precluded from seeking a remedy if the investigating authorities have failed in their duty by not including all the sections of I.P.C. on which offence can be held to have been made out in spite of the facts disclosed in the FIR. The answer obviously has to be in the negative as the prosecution cannot be allowed to suffer prejudice by ignoring exclusion of the sections which constitute the offence if the investigating authorities for any reason whatsoever have failed to include all the offence into the chargesheet based on the FIR on which investigation had been conducted. But then a further question arises as to whether this lacunae can be allowed to be filled in by the magistrate before whom the matter comes up for taking cognizance after submission of the chargesheet and as already stated, the magistrate in a case which is based on a police report cannot add or substract sections at the time of taking cognizance as the same would be permissible by the trial court only at the time of framing of charge under section 216, 218 or under section 228 of the Cr.P.C. as the case may be which means that after submission of the chargesheet it will be open for the prosecution to contend before the appropriate trial court at the stage of framing of charge to establish that on the given state of facts the appropriate sections which according to the prosecution should be framed can be allowed to be framed. Simultaneously, the accused also has the liberty at this stage to submit whether the charge under a particular provision should be framed or not and this is the appropriate forum in a case based on police report to determine whether the charge can be framed and a particular section can be added or removed depending upon the material collected during investigation as also the facts disclosed in the FIR and the chargesheet.

16. In the alternative, if a case is based on a complaint lodged before the magistrate under Section 190 or 202 Cr.P.C., the magistrate has been conferred with full authority and jurisdiction to conduct an enquiry into the complaint and thereafter arrive at a conclusion whether cognizance is fit to be taken on the basis of the sections mentioned in the complaint or further sections were to be added or substracted. The Cr.P.C. has clearly engrafted the two channels delineating the powers of the magistrate to conduct an enquiry in a complaint case and police investigation based on the basis of a case registered at a police station where the investigating authorities of the police conducts investigation under Chapter XII and there is absolutely no ambiguity in regard to these procedures.

17. In spite of this unambiguous course of action to be adopted in a case based on police report under Chapter XII and a magisterial complaint under Chapter XIV and XV, when it comes to application of the provisions of the Cr.P.C. in a given case, the affected parties appear to be bogged down often into a confused state of affairs as it has happened in the instant matter since the magisterial powers which is to deal with a case based on a complaint before the magistrate and the police powers based on a police report/FIR has been allowed to overlap and the two separate course of actions are sought to be clubbed which is not the correct procedure as it is not in consonance with the provisions of the Cr.P.C. The affected parties have to apprise themselves that if a case is registered under Section 154 Cr.P.C. by the police based on the FIR and the chargesheet is submitted after investigation, obviously the correct stage as to which sections would apply on the basis of the FIR and the material collected during investigation culminating into the chargesheet, would be determined only at the time framing of charge before the appropriate trial court. In the alternative, if the case arises out of a complaint lodged before the Magistrate, then the procedure laid down under Sections 190 and 200 of the Cr. P.C. clearly shall have to be followed."

11. The second argument of counsel for applicants is that learned Revisional Court has summoned the accused persons against whom no charge-sheet was submitted and for that he has placed reliance upon ***Dharam Pal & Ors. Vs. State of Haryana & Anr, (2014) 3 SCC 306***, relevant paragraph 27 thereof is mentioned hereinafter:

"27. This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session

on finding from the police report that the case was triable by the Court of Session. Nor can there by any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Session Judge."

12. Learned A.G.A. as well as learned counsel for informant have opposed the above submission and supported the impugned orders that learned Magistrate has not committed any error and on the basis of material available in Case Diary, he summoned the applicants as well as took cognizance of the offence for which the charge-sheet was not submitted. They further submitted that Magistrate cannot act as a Post Master and he can apply its mind on the basis of material available not only to summon the accused persons against whom charge-sheet was not filed but can also take cognizance of other than offence in event there was a material for commission of the said offence, therefore, Revisional Court has also not committed any error.

13. The first argument of learned counsel for applicants that addition or substraction of charge for any offence any section is not permissible at the stage of cognizance and it is permissible by the Trial Court only at the time of framing of charge under Sections 216, 218 or Section 228 Cr.P.C. as the case may be.

14. The above submissions have a support of the judgment passed by Supreme Court in State of Gujarat (supra), wherein the Supreme Court has specifically held that Magistrate in a case which is based on a police report cannot add or substract section at the time of taking cognizance as the same would be permissible by the trial court only at the time of framing of charge, therefore, I find merit in the first argument of counsel for the applicants, that learned Magistrate has committed error by adding sections at the time of taking cognizanace as well as by the Revisional Court.

15. So far as second argument of counsel for applicants is concerned that Magistrate cannot summon other accused persons at the time of taking cognizance even though the material exists has no force and it has been reiterated by the Supreme Court in a recent case of ***Nahar Singh Vs. State of U.P. & Anr, (2022) 5 SCC 295***. Relevant paragraphs 15,16,17,18,19,20,21,22,23,24,25,26,27 and 28 thereof are reproduced below:

"15. There was divergence of views of different Benches of this Court on this point and ultimately the issue has been settled by a Constitution Bench in Dharam Pal Vs. State of Haryana, (2014) 3 SCC 306. Before dealing with the ratio of this decision, we shall narrate the journey of the legal dispute to that stage, which has been recorded in the judgment of Dharam Pal (supra) itself by the Constitution Bench:-(SCC pp 310-11, paras 1-5)

"1. This matter was initially directed to be heard by a Bench of three Judges in view of the conflict of opinion in the decisions of two two-Judge Benches, in Kishori Singh v. State of Bihar, (2004) 13 SCC 11, Rajinder Prasad v. Bashir, (2001) 8 SCC 522 and SWIL Ltd. v. State of Delhi, (2001) 6 SCC 670. When the matter was taken up for consideration by the three-Judge Bench on 1-12-2004, Dharam Pal v. State of Haryana, (2004) 13 SCC 9, it was brought to the notice of the Court that two other decisions had a direct bearing on the question sought to be determined. The first is Kishun Singh v. State of Bihar, (1993) 2 SCC 16 and the other is a decision of a

three-Judge Bench in Ranjit Singh v. State of Punjab, (1998) 7 SCC 149.

2. Ranjit Singh v. State of Punjab, (1998) 7 SCC 149 disapproved the observations made in Kishun Singh v. State of Bihar, (1993) 2 SCC 16 which was to the effect that the Sessions Court has power under Section 193 of the Code of Criminal Procedure, 1973, hereinafter referred to as "the Code", to take cognizance of an offence and summon other persons whose complicity in the commission of the trial could prima facie be gathered from the materials available on record.

3. According to the decision in Kishun Singh v. State of Bihar, (1993) 2 SCC 16, the Sessions Court has such power under Section 193 of the Code. On the other hand, in Ranjit Singh v. State of Punjab, (1998) 7 SCC 149, it was held that from the stage of committal till the Sessions Court reached the stage indicated in Section 230 of the Code, that Court could deal only with the accused referred to in Section 209 of the Code and there is no intermediary stage till then enabling the Sessions Court to add any other person to the array of the accused.

4. The three-Judge Bench Dharam Pal v. State of Haryana, (2004) 13 SCC 9, took note of the fact that the effect of such a conclusion is that the accused named in column 2 of the charge-sheet and not put up for trial could not be tried by exercise of power by the Sessions Judge under Section 193 read with Section 228 of the Code. In other words, even when the Sessions Court applied its mind at the time of framing of charge and came to the conclusion from the materials available on record that, in fact, an offence is made out against even those who are shown in column 2, it has no power to proceed against them and has to wait till the stage under Section 319 of the Code is reached to include such persons as the accused in the trial if from the evidence adduced, their complicity was also established. The further effect as noted by the three-Judge Bench was that in less serious offences triable by the Magistrate, he would have the power to proceed against those mentioned in column 2, in case he disagreed with the police report, but in regard to serious offences triable by the Court of Session, the Court would have to wait till the stage of Section 319 of the Code was reached.

5. The three-Judge Bench disagreed with the views expressed in Ranjit Singh v. State of Punjab, (1998) 7 SCC 149, but since the contrary view expressed in Ranjit Singh v. State of Punjab, (1998) 7 SCC 149, had been taken by a three-Judge Bench, the three- Judge Bench hearing this matter, by its order dated 1-12- 2004, Dharam Pal v. State of Haryana, (2004) 13 SCC 9 , directed the matter to be placed before the Chief Justice for placing the same before a larger Bench."

16. The questions which were formulated for answer by the Constitution Bench in the case of Dharam Pal (supra) were:-

"7.1. Does the Committing Magistrate have any other role to play after committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session?

7.2. If the Magistrate disagrees with the police report and is convinced that a case had also been made out for trial against the persons who had been placed in column 2 of the report, does he have the jurisdiction to issue summons against them also in order to include their names, along with Nafe Singh, to stand trial in connection with the case made out in the police report?

7.3. Having decided to issue summons against the appellants, was the Magistrate

required to follow the procedure of a complaint case and to take evidence before committing them to the Court of Session to stand trial or whether he was justified in issuing summons against them without following such procedure?

7.4. Can the Sessions Judge issue summons under Section 193 CrPC as a court of original jurisdiction?

7.5. Upon the case being committed to the Court of Session, could the Sessions Judge issue summons separately under Section 193 of the Code or would he have to wait till the stage under Section 319 of the Code was reached in order to take recourse thereto? 7.6. Was Ranjit Singh v. State of Punjab, (1998) 7 SCC 149, which set aside the decision in Kishun Singh v. State of Bihar, (1993) 2 SCC 16, rightly decided or not?"

17. As regards scope of jurisdiction of the Magistrate in a situation of this nature, it was held by the Constitution Bench in the case of Dharam Pal (supra): (SCC p. 319, paras 35-36)

"35. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) CrPC. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

36. This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Sessions Court."

18. Another Constitution Bench in the case of Hardeep Singh vs. State of Punjab (2014) 3 SCC 92 followed Dharam Pal (supra). It was opined by the Constitution Bench in the case of Hardeep Singh (supra):-

"111. Even the Constitution Bench in Dharam Pal (supra) has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the charge-sheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the main part of the charge-sheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193 CrPC can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled." (emphasis added)

19. Earlier, a Coordinate Bench in the case of Raj Kishore Prasad vs. State of Bihar (1996) 4 SCC 495 expressed the view that power under Section 209 of the Code to summon a new offender was not vested with a Magistrate. In this decision, the correctness of the view taken in the cases of Kishun Singh vs. State of Bihar (1993) 2 SCC 16] and Nisar and Another vs. State of

U.P. [(1995) 2 SCC 23] was doubted. The latter decision followed Kishun Singh (supra). The Constitution Bench in the case of Dharam Pal (supra) affirmed the view taken by this Court in the case of Kishun Singh (supra) and overruled Raj Kishore Prasad (supra). In fact, again a Coordinate Bench in the case of Balveer Singh vs. State of Rajasthan (2016) 6 SCC 680 has followed both Dharam Pal (supra) and Kishun Singh (supra). In the latter authority (i.e., Kishun Singh supra), it was, inter-alia, held:-

"13. The question then is whether de hors Section 319 of the Code, can similar power be traced to any other provision in the Code or can such power be implied from the scheme of the Code? We have already pointed out earlier the two alternative modes in which the Criminal Law can be set in motion; by the filing of information with the police under Section 154 of the Code or upon receipt of a complaint or information by a Magistrate. The former would lead to investigation by the police and may culminate in a police report under Section 173 of the Code on the basis whereof cognizance may be taken by the Magistrate under Section 190(1)(b) of the Code. In the latter case, the Magistrate may either order investigation by the police under Section 156(3) of the Code or himself hold an inquiry under Section 202 before taking cognizance of the offence under Section 190(1)(a) or (c), as the case may be, read with Section 204 of the Code. Once the Magistrate takes cognizance of the offence he may proceed to try the offender (except where the case is transferred under Section 191) or commit him for trial under Section 209 of the Code if the offence is triable exclusively by a Court of Session. As pointed out earlier cognizance is taken of the offence and not the offender.This Court in Raghubans Dubey v. State of Bihar, AIR 1967 SC 1167 stated that once cognizance of an offence is taken it becomes the Court's duty "to find out who the offenders really are' and if the Court finds "that apart from the persons sent up by the police some other persons are involved, it is its duty to proceed against those persons' by summoning them because "the summoning of the additional accused is part of the proceeding initiated by its taking cognizance of an offence'. Even after the present Code came into force, the legal position has not undergone a change; on the contrary the ratio of Raghubans Dubey (supra) was affirmed in Hareram Satpathy v. Tikaram Agarwala (1978) 4 SCC 58. Thus far there is no difficulty."

20. There is a difference so far as the position of law on which the opinions of the two Constitution Benches were delivered in relation to the facts of the present case. In the cases of Dharam Pal (supra) and Hardeep Singh (supra), summons were issued against the persons whose names had figured in column (2) of the chargesheet. Both these authorities also dealt with exercise of jurisdiction of the Court of Session under Section 193 of the Code. This provision reads:-

***"193. Cognizance of offences by Courts of Session**-Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."*

21. It would appear from the Code that the jurisdiction to take cognizance has been vested in the Magistrate (under Section 190 thereof) as also Court of Session under Section 193, which we have quoted above. This question has been examined in the

case of Dharam Pal (supra) and on this point it has been held:- (SCC pp.319-20, para 39)

"39. This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge." (emphasis added)

22. The scope of jurisdiction of the Magistrate in taking cognizance of an offence was earlier examined by a three-judge Bench of this court in the case of Raghubans Dubey vs. State of Bihar AIR 1965 SC 1167. This authority was relied upon by the Coordinate Bench in the case of Kishun Singh (supra). Dealing with broadly similar provisions of the old Code, of 1898, it was observed by this Court:- (AIR pp.1169-70, para9)

"9. .....In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence. As pointed out by this Court in Pravin Chandra Mody v. State of Andhra Pradesh (1965) 1 SCR 269 the term "complaint" would include allegations made against persons unknown. If a Magistrate takes cognizance under Section 190(1)(a) on the basis of a complaint of facts he would take cognizance and a proceeding would be instituted even though persons who had committed the offence were not known at that time. The same position prevails, in our view, under Section 190(1)(b)."

23. In the case of Kishun Singh (supra), the scope of jurisdiction of the Court of Session under Section 193 of the Code was explained, relying on an authority dealing with similar provision under the 1898 Code (P.C. Gulati vs. Lajya Ram and Others, AIR 1966 SC 595. The phrase used to explain the implication of taking cognizance by a Court of Session in the judgment of Kishun Singh (supra) was "cognizance in the limited sense."

24. In paragraph 8 of the report (in Kishun Singh's case (supra), it has been held observed:- (SCC pp.24-25)

"8. Section 193 of the old Code placed an embargo on the Court of Session from taking cognizance of any offence as a court of original jurisdiction unless the accused was committed to it by a Magistrate or there was express provision in the Code or

any other law to the contrary. In the context of the said provision this Court in P.C. Gulati v. Lajya Ram, 1966 Cri LJ 465, SCR p 568, AIR p.599, Cri.LJ p.469 observed as under: (AIR p.599 para 21)

" 21. When a case is committed to the Court of Session, the Court of Session has first to determine whether the commitment of the case is proper. If it be of opinion that the commitment is bad on a point of law, it has to refer the case to the High Court which is competent to quash the proceeding under of the Code. It is only when the Sessions Court considers the commitment to be good in law that it proceeds with the trial of the case. It is in this context that the Sessions Court has to take cognizance of the offence as a court of original jurisdiction and it is such a cognizance which is referred to in Section 193 of the Code.""

25. Jurisdiction of the Magistrate to take cognizance of an offence triable by a Court of Session is not in controversy before us. The course open to a Magistrate on submission of a police report has been discussed in the case of Dharam Pal (supra). In paragraph 39 of the report in Dharam Pal's case, such power or jurisdiction of the Magistrate has been spelt out. We have quoted this passage earlier in this judgment.

26. The other difference so far as this case is concerned in relation to the factual basis on which the decision of the Constitution Bench in Dharam Pal (supra) as also the judgment in the case of Raghubans Dubey (supra) were delivered is that in both these cases, the names of the persons arraigned as accused had figured in column (2) of the charge sheet. This column, as it appears from the judgment in the case of Raghubans Dubey (supra), records the name of a person under the heading "not sent up". In that case, the person concerned was named in the F.I.R. But that factor, by itself, in our opinion ought not to be considered as a reason for the Court in not summoning an accused not named in the F.I.R. and whose name also does not feature in chargesheet at all. These judgments were delivered in cases where the names of the persons sought to be arraigned as accused appeared in column (2) of the police report. In our opinion the legal proposition laid down while dealing with this point was not confined to the power to summon those persons only, whose names featured in column (2) of the chargesheet.

27. In Dharam Pal (supra), the second point formulated (para 7.2) related to persons named in column (2), but the issue before the Constitution Bench related to that category of persons only. This is the position of law enunciated in the cases of Hardeep Singh (supra) and Raghubans Dubey (supra). In the latter authority, the duty of the Court taking cognizance of an offence has been held "to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons". Such duty to proceed against other persons cannot be held to be confined to only those whose names figure in column (2) of the chargesheet.

28. As we have already observed that in the aforesaid authorities, the question of summoning the persons named in column (2) of the chargesheet was involved, in our opinion inclusion in column (2) was not held to be the determinant factor for summoning persons other than those named as accused in the police report or chargesheet. The principle of law enunciated in Raghubans Dubey (supra), Dharam Pal (supra) and Hardeep Singh

(supra) does not constrict exercise of such power of the Court taking cognizance in respect of this category of persons [i.e., whose names feature in column (2) of the chargesheet]."

16. In view of the above, learned Magistrate has not committed any error in summoning other accused not being named in charge-sheet on the basis of material available with case diary. There is no dispute that material was available in regard to said accused persons for summoning.

17. The outcome of the above discussion is that cognizance for offence under Section 406 I.P.C. by learned Magistrate against all the accused persons is legally erroneous, therefore, cognizance order is set-aside qua to taking cognizance for the offence under Section 406 I.P.C. as well as order passed in the revision petition is interfered to the extent of observation that there is prima-facie evidence against Rohit Kashyap (applicant no.2) to summon him under Section 377 I.P.C., as at this stage of charge-sheet no offence could be added or deleted and further that there is prima-facie evidence to summon Arvind under Sections 498-A, 406, 504, 506 I.P.C. and 3/4 D. P. Act only to the extent to summon him under Section 406 I.P.C. also. However, the learned Magistrate is at liberty to consider the material available to take cognizance of other offence, if any, against any accused, at the time of framing of charge.

18. With the above mentioned direction, this application is allowed partly.

(2022) 9 ILRA 455
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.09.2022

BEFORE

THE HON'BLE IRSHAD ALI, J.

Crl. Misc. Bail Cancellation Appl. No. 1 of 2022

Prem Shanker Dixit ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Alok Saxena

Counsel for the Opp. Parties:
G.A., Divya Tripathi

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 439(2) - Cancellation of Bail - Indian Penal Code, 1860 - Sections 394, 397 and 411- considerations and relevant aspects by a Court while granting a bail are different than those when an application for cancellation of bail has come up before the Court - Rejection of bail stands on one footing but cancellation of bail is a harsh order since it interferes with liberty of individual and must not be lightly resorted to - where a bail is granted considering irrelevant materials or keeping out of consideration relevant material, the order becomes vulnerable and warrants annulment. (Para - 12,16,30)

Respondent-2 initially granted bail - breach of conditions - misused liberty of bail - breached conditions of bail order - while enlargement on bail involved himself into two criminal cases . **(Para - 4,36)**

HELD:-Accused-respondent No.2 has misused the bail granted to him and, therefore, it is justified to cancel the bail. **(Para -37)**

Bail cancellation application allowed. (E-7)

List of Cases cited:-

1. St. (Delhi Administration) Vs Sanjay Gandhi, (1978) 2 SCC 411

2. Madhukar Purshottam Jondkar Vs Talab Haji Hussain, 60 Bombay Law Reporter 465

3. Raghubir Singh Vs St. of Bihar, (1986) 4 SCC 481

4. Manjit Prakash & Ors. Vs Shobha Devi & Anr., (2009) 13 SCC 785

5. Pooja Bhatia Vs Vishnu Narain Shivpuri & Ors., (2014)13 SCC 492

6. Dolat Ram & Ors. Vs St. of Haryana, (1995) 1 SCC 349

7. Prahlad Singh Bhati Vs NCT, Delhi, (2001) 4 SCC 280

8. Ram Govind Upadhyay Vs Sudarshan Singh, (2002) 3 SCC 598

9. CBI, Hyderabad Vs Subramani Gopalakrishnan & Ors., (2011) 5 SCC 296

10. C.B.I. Vs Anil Sharma, (1997) 7 SCC 187

11. Padmakar tukaram Bhavnagare & Ors. Vs The St. of Maharashtra & Ors., (2012) 13 SCC 720

12. Dinesh M.N. (S.P.) Vs St. of Guj., (2008) 5 SCC 66

13. St. of Maharashtra & Ors. Vs Pappu, (2014) 11 SCC 244

14. Neeru Yadav Vs St. of U.P., (2014)16 SCC 508

15. Virupakshappa Gouda & Ors. Vs The St. of Karnataka & Ors., (2017) 5 SCC 406

16. Prasanta Kumar Sarkar Vs Ashis Chatterjee & Anr., (2010) 14 SCC 496

17. Dataram Singh Vs St. of U.P. & Ors., (2018) 3 SCC 22

18. St. of Orissa & Ors. Vs Mahimananda Mishra & Ors., (2018) 10 SCC 516

19. X Vs The St. of Telangana & Ors., (2018)16 SCC 511

20. Seema Singh Vs C.B.I. & Ors., (2018) 16 SCC 10

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Alok Saxena, learned counsel for the applicant, learned A.G.A. for respondent - State and Ms. Divya Tripathi, learned counsel for respondent No.2.

2. The present application for cancellation of bail has been filed under Section 439(2) Cr.P.C. seeking cancellation of bail granted order dated 18.08.2021 in Bail No.8763 of 2021.

3. It is contended that respondent No.2 is being tried under Sections 394, 397 and 411 IPC in Case Crime No.158 of 2017 and was granted bail vide this Court's order dated 18.08.2021 passed in Criminal Misc. Bail Application No.8763 of 2021.

4. It is submitted by learned counsel for applicant that respondent-2 was initially granted bail by coordinate bench of this Court vide order dated 02.01.2019 in Bail No.10865 of 2017 with a condition that in case of breach of conditions mentioned in the bail order, the bail granted to him shall be cancelled. He further submitted that, after being released, the accused - respondent No.2 has misused the liberty of bail and breached the conditions of the bail order, as he indulged himself in case crime No.0118 of 2020 under Sections 457, 497, 407 IPC on 25.11.2020 and in case crime No.0119 of 2020 under Sections 3/25 Arms Act (as mentioned in paragraph-11 of application) was registered at police station Jafarganj, District Fatehpur and has also not co-operated in trial and absconded from the same, therefore, learned trial court

issued process against him under Section 82 Cr.P.C.

5. He further submitted that learned trial court has rejected the bail application of accused-respondent No.2 on 03.03.2021 in case crime No.158 of 2017 under Sections 394, 397, 411 IPC registered at police station Asoha, District Unnao. Thereafter, he approached to this Court by way of Bail Application No.8763 of 2021 taking shelter of medical ground only and by concealing material fact regarding misuse of bail granted to him. The said bail application was allowed by this Court, however, fact regarding breach of conditions of earlier bail granted to the accused, has been suppressed from this Court.

6. On the other hand, learned counsel for respondent No.2 - accused submitted that due to ill health, respondent No.2 could not appear before the trial Court and thereafter, non bailable warrant has been issued against him.

7. Learned A.G.A. submitted that in case the accused- respondent No.2 has breached the conditions of bail and is not co-operating in conclusion of trial, it is a fit case for cancellation of bail.

8. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

9. The earlier bail application of respondent No.2 - accused was allowed by co-ordinate bench of this Court in between respondent No.2 breached the conditions of the bail granted to him and indulged himself in case crime Nos.0118 & 0119 of 2020, therefore, learned Additional Sessions Judge / FTC, Unnao has rejected his application for bail on 03.03.2021, however, taking shelter of medical grounds, he obtained the bail from this court on 18.08.2021. This material fact has also not been disclosed by learned counsel representing accused - respondent No.2.

10. On perusal, it is also evident that the FIR No.0118 of 2020 has been lodged against the accused - respondent No.2 under Sections 307, 380 & 457 IPC on 25.11.2020 and another FIR No.0119 of 2020 was registered under Sections 3/25 Arms Act against respondent No.2 on 25.11.2020.

11. The ground for cancellation of bail is misuse of the liberty provided by respondent No.2. In the matter of cancellation of bail, the court has to examine the matter in a totally different context and such matter cannot be scrutinized on the principles which are normally taken note when the bail application is considered.

12. It is now well settled that considerations and relevant aspects by a Court while granting a bail are different than those when an application for cancellation of bail has come up before the Court.

13. A three-Judges Bench of Hon'ble Supreme Court in the case of **State (Delhi Administration) vs. Sanjay Gandhi (1978) 2 SCC 411** had an occasion to consider an order dated 11.04.1978 passed by Delhi High Court rejecting Delhi Administration's application for cancellation of bail of respondent Sanjay Gandhi. The Court observed that rejection of bail, when bail applied is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail

application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves review of a decision already made and can, by and large, be permitted only, if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow accused to retain his freedom during the trial.

14. While considering degree of burden of prove lie upon prosecution or complainant/Informant, when an application for cancellation of bail moved, is not to the extent of proving by a mathematical certainty or beyond reasonable doubt but it must establish its case by showing on a preponderance of probabilities that accused has attempted or may attempt to or tamper or has tampered with witnesses. It may also be proved by test of balance of probabilities that accused has abused his liberty or it may show that there is reasonable apprehension that he will interfere with course of justice. The court approved Bombay High Court's decision in **Madhukar Purshottam Jondkar vs. Talab Haji Hussain; 60 Bombay Law Reporter 465**, that test adopted by the Court would be, whether material placed before it is such as to lead to the conclusion that there is a strong prima facie case that accused if allowed to be at large, he would tamper with prosecution witnesses and impede course of justice. Mere unfounded apprehension or self imagined threat by prosecution or Informant-Complainant would not justify cancellation of bail, granted to accused.

15. In the case of **Raghubir Singh vs. State of Bihar; (1986) 4 SCC 481**, the court said that grounds for cancellation of bail under Sections 437(5) and 439(2) are identical, namely, bail granted under Section 437(1) or (2) or Section 439(1) can be cancelled where (i) accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc.

16. It was also held that above grounds are illustrative and not exhaustive. Rejection of bail stands on one footing but cancellation of bail is a harsh order since it interferes with liberty of individual and must not be lightly resorted to.

17. Above decision was followed in the case of **Manjit Prakash and Ors. vs. Shobha Devi and Anr.; (2009) 13 SCC 785** as also in the case of **Pooja Bhatia vs. Vishnu Narain Shivpuri and others; (2014)13 SCC 492**.

18. In the case of **Pooja Bhatia (supra)**, considering the conduct of accused i.e. charge of throwing acid on complainant, Court held that it was a serious aspect and therefore, accused is not entitled to continue with the benefit of bail.

19. In the case of **Dolat Ram and others vs. State of Haryana; (1995) 1 SCC 349**, the court said that rejection of bail in a non-bailable case at initial stage and cancellation of bail so granted, has to be dealt with and considered on different basis. Very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail, already

granted. The court further said that generally speaking grounds of cancellation of bail, broadly i.e. illustrative and not exhaustive are : (i) interference or attempt to interfere with the due course of administration of justice; (ii) evasion or attempt to evade due course of justice; (iii) abuse of the concession granted to the accused in any manner; (iv) Satisfaction of Court, on the basis of material placed on record of possibility of accused absconding.

20. The court also reminded that bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying concession of bail during trial.

21. In the case of **Prahlad Singh Bhati vs. NCT, Delhi; (2001) 4 SCC 280**, the court said that while granting bail, nature of accusations, severity of punishment, if accusation entails a conviction, nature of evidence in support of the accusations should be kept in mind. Further, reasonable apprehensions of witnesses being tampered with or apprehension of there being a threat for complainant also need be weighed by Court. No discussion of entire evidence to form an opinion whether evidence would established guilt beyond reasonable doubt is expected at the stage of considering matter of bail but prima facie satisfaction of Court in support of charge must be there. Lastly, the court should also consider whether prosecution has element of genuineness or there is some fragility. In case of any doubt as to genuineness, normal course is to grant bail. To the same effect are the observation made in the case of **Chaman Lal vs. State of U.P.; (2004) 7 SCC 525.**

22. In the case of **Ram Govind Upadhyay vs. Sudarshan Singh; (2002) 3 SCC 598**, it was held that grant of bail though discretionary in nature, yet such exercise cannot be arbitrary, capricious and injudicious. Heinous nature of crime warrants more caution.

23. In the case of **CBI, Hyderabad vs. Subramani Gopalakrishnan and others; (2011) 5 SCC 296**, in para 23, the court held as under :

"....that there is difference between yardstick for cancellation of bail and appeal against the order granting bail. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. Generally speaking, the grounds for cancellation of bail are, interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concessions granted to the accused in any manner. These are all only few illustrative materials. The satisfaction of the Court on the basis of the materials placed on record of the possibility of the accused absconding is another reason justifying the cancellation of bail. In other words, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial."

19. Position, influence and resources of accused have also been held relevant

factors to adjudge whether accused is likely to interfere with administration of justice, trial or tamper with witness or evidence."

24. In the case of **C.B.I. vs. Anil Sharma; (1997) 7 SCC 187**, anticipatory bail was granted by Himachal Pradesh High Court and C.B.I. approached for cancellation of bail stating that accused was a former Minister of Himachal Pradesh and being a high authority in power is likely to disrupt even investigation but High Court did not accept application for cancellation of bail. On appeal, Supreme Court accepted C.B.I. contention and observed that in case of such highly influenced political person, the very interrogation and investigation may become a mere ritual hence Court cancelled order of anticipatory bail.

25. In the case of **Padmakar tukaram Bhavnagare and Ors. vs. The State of Maharashtra and Ors.; (2012) 13 SCC 720**, Hon'ble Supreme Court while confirming the order of anticipatory bail took into accunt that accused are aged and rustic, not influential persons holding high office who can bring pressure upon investigating agency and it is unlikely that Police would find it difficult to interrogate them because they are protected by an order granting anticipatory bail. That is how judgment in State Represented by the C.B.I. vs. Anil Sharma (supra) was also distinguished. However, Court also clarified that grounds for cancellation of bail, broadly, are interference or attempt to interfere with due course of justice or abuse of concession granted to the accused in any manner but an order of bail can also be cancelled where it is found to be perverse, passed ignoring evidence on record or taking into considering irrelevant material. Relying on the case of **Dinesh M.N. (S.P.) vs. State of Gujarat; (2008) 5 SCC 66,** the court said that such vulnerable bail order must be quashed in the interest of justice.

26. In the case of **State of Maharashtra and Ors. vs. Pappu; (2014) 11 SCC 244**, the accused was convicted under Section 302 read with 120-B IPC for hatching criminal conspiracy in killing of deceased Inder Bhatija. In appeal, High Court while admitting appeal, enlarged accused on bail and this order of bail was challenged in Supreme Court by the State on the ground that accused was involved in as many as 52 cases, out of which 20 cases offences were registered against him before going to jail and while he was in jail; and 32 cases were registered when he was released by Court on conditional bail. The defence taken on behalf of accused, besides other, was that he has already spent 9 years in jail during pendency of trial and no witness has supported prosecution case and that it was a political rivalry in which he was falsely implicated. Supreme Court said that reason given by High Court that father and wife of deceased have turned hostile, cannot be a ground to grant bail since there were other witnesses and material available. High Court should not have ignored the fact that accused was involved in as many as 52 cases out of which 20 were registered before going to jail and during stay in jail, and whenever he was on bail or conditional bail, 32 cases were registered. Court also found that in some cases accused was acquitted but still 15 trials were pending in which two cases were under Section 302 read with 120B IPC. Having said so, Court observed that since accused was in jail for 9 years and as per pendency, High Court would have

taken a large number of years in deciding appeal, therefore, Court should decide appeal expeditiously and with the above direction, appeal was allowed and order of bail granted by High Court was set aside.

27. In the case of **Neeru Yadav vs. State of U.P.; (2014)16 SCC 508**, this Court had granted bail to accused for offences punishable under Sections 147, 148, 149, 302, 307, 394, 411, 454, 506, 120B and 34 IPC on the ground of parity as another accused Ashok was already enlarged on bail. The wife of deceased filed appeal for setting aside order of bail granted by this Court. The court considered various earlier authorities and said in para 13 of judgment as under :

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

28. Thereafter, referring to 15 cases registered again accused showing that he was a history-sheeter and mostly under Section 302 IPC, order of bail was set aside. The court observed that there has to be a balance between personal liberty of an individual and peace and harmony of Society. No individual interest can be allowed to create a concavity in the stem of social stream otherwise it would bring chaos and anarchy in the Society. Relevant observations made in this regard are reproduced as under :

"....We are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bed rock of constitutional right and accentuated further on human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilized society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilized. Deprivation of liberty of a person has enormous impact on his mind as well as body.

A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and

accountability from the member, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the Court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law." (emphasis added)

29. In the case of **Virupakshappa Gouda and Ors. Vs. The State of Karnataka and Ors.; (2017) 5 SCC 406**, the application for bail was rejected by Sessions Judge as also High Court. Even second bail application was rejected by Sessions Judge as also High Court. This time accused went to Supreme Court also but Special Leave Petition was also rejected. Then a third application was filed before Additional Sessions Judge, Raichur, which was allowed and accused were enlarged on bail. Informant brought the mater to High Court under Section 439(2) Cr.P.C. seeking cancellation of bail. He succeeded and High Court cancelled bail. Thereafter accused brought the matter to Supreme Court. Court made serious observations in respect of approach of Trial Court in granting bail by treating filing of charge-sheet as a change of circumstance but ignoring that already two bail applications were rejected and one has attained finality up to Supreme Court. Court said that bail application cannot be allowed solely or exclusively on the ground that in criminal jurisprudence accused is presumed to be innocent till found guilty by the Court. Trial Court has relied on Supreme Court judgment in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40 wherein it was observed that object of bail is to secure appearance of accused at trial and not punitive or preventive. Deprivation of liberty should be considered a punishment. Court should appreciate that punishment begins after conviction and every man is deemed to be innocent until duly tried and found guilty. Supreme Court said that above observations in Sanjay Chandra (supra) have their relevance but cannot be made applicable in each and every case for grant of bail. It all depends upon factual matrix of each case, nature of crime and manner in which it was committed. A bail application is not to be entertained on the basis of certain observations made in a different context. There has to be application of mind and appreciation of factual score and understanding of pronouncements in the field. The court relied upon a judgment in the case of **Prasanta Kumar Sarkar vs. Ashis Chatterjee and Anr.; (2010) 14 SCC 496**, where it was opined that while exercising power for grant of bail, Court must to keep in mind certain circumstances and factors as under :

"(i) whether there is any prima facie or reasonable ground to be believed that the Accused had committed the offence.

(ii) nature and gravity of the accusation;

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

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

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

(vi) likelihood of the offence being repeated;

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

(viii) danger, of course, of justice being thwarted by grant of bail." (emphasis added)

30. It was also held that where a bail is granted considering irrelevant materials or keeping out of consideration relevant material, the order becomes vulnerable and warrants annulment. The order of High Court setting aside bail granted by Trial Court was upheld by Supreme Court.

31. In the case of **Dataram Singh vs. State of Uttar Pradesh and Ors.; (2018) 3 SCC 22**, the court enlarged to certain more aspects for granting bail, whether accused was arrested during investigation when he had best opportunity to tamper with evidence and influence witness or Investigating Officer found it not necessary to arrest accused during investigation and this factor would go in favour of accused. Similarly, whether accused was participating in investigation regularly and not absconding or avoiding investigation. Further, whether accused is a first-time offender or is accused of other offences and if yes, nature of such offences and his general conduct. Poverty or deemed indigent status of an accused, Court held, is also an important factor to be taken note. It observed that grant of bail is a rule and refusal is an exception. Finding that accused was not said to be a person of shady character and there was no history of his involvement in any unacceptable activity etc., accused was granted bail, though it was rejected by Trial Court as well as High Court.

32. In the case of **State of Orissa and Ors. Vs. Mahimananda Mishra and Ors.; (2018) 10 SCC 516**, the accused was granted bail by High Court and it was set aside by Supreme Court. The court observed that accused was a powerful and influential person in his locality and even Investigating Officer apprehends that he may influence witnesses by intimidating them and this may influence trial by creating fear in the minds of witnesses. Court also looked into past attempt of accused to evade process of law and then found that order of grant of bail was not proper and it was set aside.

33. In the case of **X vs. The State of Telangana and Ors.; (2018)16 SCC 511**, the accused, a Film Producer, based in Mumbai, was charged of offences under Sections 376, 342, 493, 506, 354(C) of IPC. Accused got anticipatory bail from Sessions Judge on 13.01.2017 and had advantage of that order for about eight months. The said order was cancelled by Sessions Judge on the ground that accused has not disclosed that he was also accused in 2G Spectrum case. This cancellation order was affirmed by High Court and also by Supreme Court. Thereafter accused moved a bail application under Section 439 Cr.P.C., which was allowed by High Court and accused was released on bail. This order was challenged in appeal before Supreme Court. Upholding the said order, Court said that bail once granted should not be cancelled unless a cogent case, based on supervening event has been made out.

34. In the case of **Seema Singh vs. Central Bureau of Investigation and Ors.; (2018) 16 SCC 10**, the bail granted to accused by High Court in the case registered under Sections 498-A, 302, 120-B IPC was challenged in appeal before Supreme Court. Court noticed that accused-2's bail application was rejected by Special Judicial Magistrate, CBI, Ghaziabad and thereafter bail was granted by High Court. Court said that gravity of offence is a relevant factor but not the sole ground to deny bail if there are other overwhelming

circumstances justifying grant of bail. Noticing special feature, Court upheld order of High Court granting bail.

35. Thus, the broad principles, which are to be considered by this Court while granting bail and when bail is already granted but an application for cancellation has come up for consideration, as discussed above, show that there is no thumb rule in both the situations. However, it is true that factors relevant for grant of bail are different and approach required to be adopted while considering application for cancellation of bail is different.

36. Liberty granted to accused - respondent No.2 by enlarging him on bail has been misused in view of the facts stated on oath by the applicant, which are uncontroverted since respondent No.2 has chosen to opt for grant of bail by concealing material fact that while enlargement on bail he involved himself into two criminal cases and to contest this application. The conduct and nature of violations on the part of respondent No.2, has already been discussed above.

37. Looking into all the facts and circumstances, this court is of the view that here is a case in which it has clearly substantiated that accused-respondent No.2 has misused the bail granted to him and, therefore, it is justified to cancel the bail.

38. In the result, the application for cancellation of bail is **allowed**.

39. The bail granted to accused - respondent No.2, namely, Pinku @ Mustakeem @ Irfan Ahmad vide order of this Court dated 18.08.2021 passed in Criminal Misc. Bail Application No.8763 of 2021 in Case Crime No.157 of 2017, under Sections 394, 397 and 411 IPC registered at Police Station Asoha, District Unnao, is hereby cancelled.

40. However, it is stated by learned counsel for the parties that the accused - respondent No.2 is in jail, however, if that be not so, he shall surrender before concerned Chief Judicial Magistrate positively by 19.09.2022, failing which, the Chief Judicial Magistrate concerned shall ensure his arrest and send him to jail.

(2022) 9 ILRA 464
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2022

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Crl. Misc. Anticipatory Bail Application No. 1345 of 2022

Sujay Uday Desai ...Applicant
Versus
C.B.I. ...Respondent

Counsel for the Applicant:
Nadeem Murtaza, Aditya Vikram Singh, Sheeran Mohiuddin Alvi

Counsel for the Respondent:
Anurag Kumar Singh

(A) Criminal Law - Anticipatory Bail - issue of economic offence - Indian Penal Code, 1860 - Sections 120B, 420, 467, 468, 471 - Category B/D - on appearance of the accused in the court pursuant to process issued bail application to be decided on merit. (Satender Kumar Antil Vs. Central Bureau of Investigation & another) - case of economic offences stand on a different footing which affect the economic fabric of the society and poses a serious threat to the nation's economy and financial integrity (P. Chidambaram Vs. Directorate of Enforcement).(Para - 24,34)

Matter pertaining to defrauded huge amount of Rs.10.01 crores - specific allegation levelled against applicant - looking after overall trade and financial activities - company through its directors in criminal conspiracy - accepted bogus document presented before Indian Overseas Bank (IOB).**(Para - 34)**

HELD:-In economic offences, the accused is not entitled to anticipatory bail.**(Para -24,35)**

Anticipatory bail application rejected. (E-7)

List of Cases cited:-

1. Bharat Chaudhary & anr. Vs St. of Bihar & anr., (2003) 8 SCC 77

2. Siddharth Vs St. of U.P. & anr. , (2022) 1 SCC 676

3. Aman Preet Singh Vs C.B.I. through Director (Criminal Appeal No.929 of 2021)

4. Satender Kumar Antil Vs C.B.I. & anr., (AIR 2022 SC 3386)

5. Satender Kumar Antil Vs C.B.I. & anr.; (2021 10 SCC 773)

6. Y.S. Jagan Mohan Reddy Vs CBI , (2013) 7 SCC 439

(Delivered by Hon'ble Brij Raj Singh, J.)

1. Supplementary affidavit filed today is taken on record.

2. The present anticipatory bail application has been filed on behalf of the applicant in Criminal Case No.87600 of 2021 (CBI V. Globiz Exim Pvt. Ltd. & Ors.) pending in the Court of Special Judicial Magistrate - CBI, Lucknow arising out of F.I.R. No.RC0532020E0004 of 2020, under Sections 120-B, 420, 467, 468, 471 I.P.C. registered at Police Station CBI-SCB Lucknow, District Lucknow with a prayer to enlarge him on anticipatory bail.

3. The F.I.R. was lodged on 11.06.2020 bearing F.I.R. No.RC0532020E0004 of 2020, registered by complainant, Sri Niranjan Panda, Chief Regional Manager, Indian Overseas Bank, Regional Office, Lucknow, under Sections 120B, 420, 467, 468, 471 I.P.C. at Central Burau of Investigation, Special Crime Branch, Lucknow (hereinafter referred to as "CBI").

4. As per F.I.R., it is stated that M/s Globiz Exim Private Limited had entered into criminal conspiracy and the verbatim of FiR is quoted below:-

"A complaint No.RO/CRM/2019-2020 dated 05.06.2020 have been received from Sh. Niranjan Panda, Chief Regional Manager, Indian Overseas Bank, Regional Office, Lucknow requesting therein to register FIR against M/s Globiz Exim Pvt. Ltd, 402-403, Kalpana Plaza, 24/147B, Birhana Road, Kanpur, Shri Arvind Srivastava, Independent Director , M/s Globiz Exim Pvt. Ltd., R/o BM 783, Malviya Nagar-1st Floor, New Delhi; Sri Saral Verma, Director, M/s Globiz Exim Pvt. Ltd., R/o 3a/2017, Azad Nagar, Kanpur and other unknown third parties which is enclosed as Annexure of FIR Gist of the allegations are that M/s Globiz Exim Pvt. Ltd., Kanpur and it's Promoters/Directors entered into a criminal conspiracy among themselves and cheated the Indian Overseas Bank to the tune of Rs.10.01 Crores by way of misrepresenting the facts and diverting the funds extended by the Bank in the form of loans/Letter of Credits.

Information discloses that M/s Globiz Exim Pvt. Ltd. Having its registered office at Kalpna Plaza, 24/147 B, Birhana Road, Kanpur (UP) was enjoying various credit facilities with Indian Overseas Bank under multiple banking arrangements viz. Letter

of Credit (foreign) to the tune of Rs.2,000 crores; Letter of Credit on DP/180 days comes for purchase of goods for trading to the tune of Rs.128 crores etc. All the said facitilites were sanctioned by the Indian Overseas Bank, MCB, Central Office in the year 2014 and 2016. M/s Globiz Exim Pvt. Ltd. was incorporated as S.N.V. Trading Pvt. Ltd. On 14 July, 2005, however, the company later changed its name to M/s Globiz Exim Pvt. Ltd. On 2.9.2009. Initially, the company was engaged in manufacturing of leather items from its manufacturing plant at Jajmau at Kanpur but later on, it concentrated in trading of pluses and other commodities like Laptop/Computers, Coal, Copper Cathode etc.

M/s. Globiz Exim Pvt Ltd. and it's Promoters/Directors with intent to cheat the Bank, while availing the credit facilities from the IOB, had fraudulently siphoned off its funds through unsecured loans and advances to as many as 34 parties without any loan agreements or entering into any formal contract with such parties. The company duped the Bank by showing false Merchanting Trade Transactions amongst known companies/customers. The documents purportedly issued by different purchasers/suppliers were prepared by one and the same person related to the suspicious Merchanting Trade Transactions. The borrower company has further shown bogus local trades without support of related documents to falsify its Balance Sheet and mislead the Bank by way of showing false inflated stock. The account of the Company was classified Non Performing Asset (NPA) on 30.9.2018 and as on the date of NPA the total loss to the Bank was Rs.10.01 crores.

The contents of the complaint dated 05.06.2020 prima facie discloses commission of cognizable offences u/s 120-B, 420, 467, 468, 471 I.P.C. and substantive offences thereof against the aforesaid accused persons. Hence, a Regular Case is registered and investigation entrusted to Sh. Sanjay Sharma, ASP, CBI, SCB, Lucknow."

5. Learned counsel for the applicant has submitted that though the charge sheet has been filed in the present case but the anticipatory bail application filed by the applicant is maintainable in view of the decision of the Hon'ble Supreme Court in the case of **Bharat Chaudhary and another Vs. State of Bihar and another, (2003) 8 SCC 77**.

6. It has been further submitted that the applicant is innocent and has not committed the offence and he is not named in the FIR. It has been next submitted by learned counsel for the applicant that the applicant was not arrested during investigation, therefore, after filing of the charge sheet, the applicant should not be remanded to judicial custody and there is no purpose to remand him because he had cooperated in the investigation.

7. It has been further submitted on behalf of the applicant that the goods was transferred between the foreign seller, Globiz and foreign buyer in that sequence of the transaction of the business. The transfer of title in goods was done by way of endorsement in the bill of lading which is the prevaling practice. On the import of the transactions the bill of lading was provided to Globiz by the foreign supplier.

8. Learned counsel for the applicant has further submitted that in same subject matter in respect of Flagship Company of the Frost Group i.e. Frost International Limited (FIL), SFIO and ED had initiated

proceedings and the applicant was arrested by both SFIO and ED. In both cases, applicant had been granted regular bail by the Hon'ble Supreme Court and by this High Court respectively. It has been further submitted that the applicant did not play any role in preparation of document relating to merchanting trade and allegation of forgery cannot be attributed to the applicant. It has been further submitted that the merchanting documents were prepared by the foreign parties and sent to Globiz in India through the banks on acceptance. After acceptance by Globiz, these documents were then forwarded by the banks to the foreign buyer for their acceptance. Merchanting trade documents were approved by multiple banks once on the import leg of transaction and again on the export leg of transaction but the applicant did not prepare the document.

9. It has been further submitted that the bank officials are not named as accused in the present case. It has been submitted that bank officials have checked and verified the documents but they are not made accused. It has been submitted that there is no possibility of tampering with evidence or influencing witnesses because the documents have already been collected. There is no question to influence the witnesses in any manner, therefore, the applicant may be enlarged on bail. Learned counsel for the applicant has submitted that the business was carried out as per RBI guidelines. The transaction was done after approving the multiple level cheques done by the bank. In this regard, paragraph 44 of the submission of the bail application is quoted below:-

"44. That it is also submitted that the MT business was carried out in line with the extant RBI guidelines. As mentioned earlier, these guidelines are issued under FEMA, and banks, being authorized persons under such law, are required to ensure compliance. Once the entire business details and documentation required for obtaining the credit facilities were submitted to the banks, and the banks, approved of the same and granted sanction, it would be accurate to presume that the RBI guidelines were satisfied. Further, no show cause notice was ever issued by RBI to the company regarding any non-compliance with the RBI guidelinses."

10. It has been further submitted that there is no common directorship or any shareholding between Globiz and the foreign buyers ans sellers and merely because the foreign parties were known to each other as they worked with each, therefore, it cannot be the basis of alleging connivance.

11. Learned counsel for the applicant has further submitted that the multiple levels of scrutiny is not done through the Foreign Bank and then Indian AD Bank and as per the guidelines of the R.B.I. documents were verified and then the transaction has been completed. In this regard, Paragraphs 48 and 49 of the bail application are quoted below:-

"48. That it is also noteworthy that all documents pertaining to MT transactions undergo multiple levels of scrutiny, first through the Foreign Bank and then through the Indian AD Bank. While executing the MT transactions, the Indian AD banks are required to ensure that the terms and conditions for LCs have been satisfied and the MT documents presented by the contracting parties are in compliance with the said terms and conditions. As per the guidelines of RBI, the Authorized Dealer

("AD') Banks have to satisfy itself on the genuineness of the trade (provided under RBI Guidelines bearing reference "Master Circular on Import of Goods and Services (RBI/2013-14/13)" dated 01 July 2013 under instruction C.15). In case of MT transactions of Globiz as well, the Complaint Bank had duly verified the documents and only upon being satisfied that the documents are proper, processed the payments to the foreign suppliers.

49. Thus, it is submitted that the MT business of Globiz was perfectly legal, bona fide and had commercial substance. As explained above, the MT business involved the buying and selling of goods from genuine foreign parties without the goods entering India. Over the years, Globiz made substantial profits from such business and paid substantial amounts towards income-tax. In light of the above, it is submitted that the allegations raised in the FIR that the MT business of Globiz was not genuine are completely erroneous and baseless."

12. Learned counsel for the applicant has further submitted that the discrepencies, if any, were merely technical and procedural in nature, therefore, it is no ground to doubt the genuineness and veracity of the transaction of the Globiz. In this regard learned counsel for the applicant has made averment in paragraph 80 of the bail application.

13. Learned counsel for the applicant has submitted that the contents of the certificate of origin were correct. Regarding the origin of the goods, it has been further submitted that the certificate of origin was issued by the foreign supplier and the same was accepted by the banks and this discrepancy was never considered a major one. Once the certificate of origin was issued by the foreign supplier can at best be treated as a technical non-compliance and cannot be veracity of transaction.

14. Learned counsel for the applicant has further submitted that no offence under Sections 120B, 420, 467, 468, 471 I.P.C. is made out in the present case. It has been further submitted that the business of Globiz was a genuine and profitable business which involved movement of goods and transfer of title in the goods between the goods and contracting parties. It has been further submitted that funds were utilized solely for the business transaction and for the purpose for which they were sanctioned by the banks. It has been submitted by learned counsel for the applicant that there is no evidence which indicate that the bank funds were siphoned or diverted.

15. It has been further submitted by learned counsel for the applicant that the business was regulated and the documents were thoroughly scrutinized by the multiple banks, hence, it can be concluded that the transactions were executed with the approval of all banks.

16. Learned counsel for the applicant has relied upon the judgment of **Siddharth Vs. State of Uttar Pradesh and another** reported in **(2022) 1 SCC 676; Aman Preet Singh Vs. C.B.I. through Director (Criminal Appeal No.929 of 2021); Satender Kumar Antil Vs. Central Bureau of Investigation & another, (AIR 2022 SC 3386); Satender Kumar Antil Vs. Central Bureau of Investigation & another; (2021 10 SCC 773).**

17. He has also relied some judgments in paragraph nos.92, 93, 94 &

96 in the bail application which are pertaining to different sections of the Indian Penal Code, which has been invoked against the applicant and as per his argument the offence under Sections 120B, 420, 467, 468, 471 I.P.C. is not made out in view of the aforementioned law by the applicant.

18. On the other hand, Sri Anurag Kumar Singh, learned counsel for the C.B.I. has made following submissions on the basis of instructions:-

19. It has been submitted that the applicant is the Director and CEO of Frost International Ltd. M/s Globiz Exim Pvt. Ltd. is a company of the Frost Group wherein the applicnat is a Shareholder, Promoter and Incharge of the day-to-day operations of company at Kanpur. The Frost Group of companies are:-

(i) M/s Frost International Pvt. Ltd.
(ii) M/s Frost Infrastructure Pvt. Ltd.
(iii) M/s Globiz Exim Pvt. Ltd.
(iv) M/s Olympic Oil Industries Pvt. Ltd.
(v) M/s Viva Merchant Pvt. Ltd.

20. The F.I.R. has been lodged in the present case on the basis of the complaint of Indian Overseas Bank.

21. It has been submitted that the allegation in the FIR is that M/s Globiz Exim Pvt. Ltd. was enjoying credit facilities including an arrangement known as Letter of Credit (hereinafter referred to as "LC").

22. It has been further submitted that it is admitted case of the applicant that the total amount of defrauded by the Frost Group of Companies is approximately Rs.4000 crores. In the present case, M/s Globiz Exim Pvt. Ltd. Rs.10.01 Crores and M/s Olympic Oil Industries Pvt. Ltd. Rs.6.67 Crores. It has been submitted that investigation by CBI in respect of the fraudulent activities done by other two companies involving the credit facilities availed are in progress.

23. Learned counsel for the CBI has further made submission that as to how Letter of Credit (LC) works:-

A. For availing LC, bank takes securities from companies to the extent of 85-90% of the amount of which LC is applied.

B. For merchanting business, there has to be an exporter situated in a foreign country from which the Indian Company purchases the goods and there also has to be an importer situated in a foreign country that purchases the goods from the Indian merchanting company.

C. After LC is established, the information is given by the bank of the applicant company to the bank of the exporter company.

D. There is a facility called as SWIFT messaging by means of which the banks communicate.

E. For the release of the payment of LC, the foreign bank has to sent certain documents pertaining to the shipment to the Indian Bank, i.e. Indian Overseas Bank (IOB) in this case.

F. These documents certify the genuineness of the transaction and in case there is some discrepancy, the documents are provided to the Indian party.

G. Documents contain Container No., Name of the Shipping Co., Name of the Ship, Name of Port of Dispatch, Description of goods, etc.

H. When the exporter dispatches consignment, he provided the documents to his own bank to be sent to the Indian Bank.

I. The Indian bank examines the documents and if they are in order, LC is released and if there is some discrepancy, they are provied to the Indian party for verification.

Submissions of Counsel for C.B.I.:-

24. Sri Anurag Kumar Singh, learned counsel for CBI has explained as to how the transaction has been done in the present case:-

A. Documents were found discrepant by Indian Overseas Bank.

B. The applicant's party accepted the discrepancy/forged documents and asked the bank to release the payment to the Foreign Bank which in turn would release it to the alleged exporter based at Singapore. This is despite the fact that the documents on the face of it are forged. (page 135 of bail application)

C. The goods were directly shipped to Hong Kong.

D. Ironically, M/s Fareast Distribution based at Singapore and M/s Gulf Distribution Ltd. based in Hong Kong are both controlled by one person named Rajesh Bothra.

E. So, the same person cannot sell the goods at a lower rate and purchase the same goods at a higher rate through the company of the applicant.

F. In the present case, there was no transaction, and no goods were exported or imported. .

G. Therefore, no payment was made from M/s Gulf Distribution Pvt. Ltd. to the applicant as in fact no export or import took place.

H. Since, the bank takes only 85-90% securities against LC, therefore, loss of 15-10% has been caused to the bank because of the false transaction and forgery of the documents.

I. Shiphoning of public money has been done in systematic manner by all the member companies of the Frost Group controlled by the applicant, causing a planned theft of public money.

J. The offences committed by:

(i) M/s Frost International Pvt. Ltd. are being investigated by Delhi Banking Securities and Fraud Branch);

(ii) M/s Frost Infrastructure Pvt. Ltd. are being investigated by CBI/ACB, Lucknow; and

(iii) M/s Globiz Exim Pvt. Ltd.; M/s Olympic Oil Pvt. Ltd. and M/s Viva Merchant Pvt. Ltd. are being investigated by CBI/SCB, Lucknow.

K. It is the admitted case of the applicant that he was looking after the financial affairs of the company.

L. PMLA case has also been registered against the applicant in which he has been granted regular bail. (order page 95 of bail application).

M. SFIO also registered a case against the applicant for offences committed under Companies Act in which he has been granted regular bail. (order page 117 of bail application).

N. Payment adjustment window is 180 days, that has been exploited by the applicant for making huge amount of loss by making several transactions one after the other.

O. The offence is grave and such offenders have fled the country in the past, as such the applicant is not entitled to bail.

P. The applicant has been charge-sheeted under Sections 120-B, 420, 467, 468 and 471 I.P.C. in the present case.

Q. The Hon'ble Supreme Court in the case of Satender Kumar Antil Vs. Central Bureau of Investigation and another, reported in 2022 SCC online 825 has issued some guidelines for granting bail in cases where charge sheet has already been filed and accused was not arrested during investigation. According to these guidelines, the present case falls under category B/D. For the category B/D which involves the offences punishable with imprisonment for life, the Hon'ble Supreme Court has directed that "on appearance of the accused in court pursuant to process issud bail application to be decided on merits".

R. It is well settled that economic offences stand as a different class as they affect the economic fabric of the society and poses a serious threat to the nation's economy and financial integrity, and therefore in economic offences, the accused is not entitled to anticipatory bail, as observed by the Hon'ble Supreme Court in P. Chidambaram Vs. Directorate of Enforcement reported as (2019) 9 SCC 24.

25. The charge sheet filed by C.B.I. has been annexed by the applicant as Annexure no.7 to the bail application. The relevant portion of the charge sheet regarding Letter of Credit no.148/18 is extracted here-in-below:-

"*After establishment of LC, the IOB Mall Road Branch, Kanpur had received documents viz. Bill of Lading; Certificate of Origin; Packing List; Beneficiary Certificate and Pre Shipment Certificate from Bank of India, Singapore. The Branch on receipt of documents had scanned the copies of the said document and transmitted the same to the CFEPC Chennai on 24.11.2017 for import lodgement under LC 148/2017. Since the Bill of Lading and Certificate of Origin were discrepant in terms of the conditions of the LC, the CFEPC Chennai issued an Advise of Refusal (SWIFT 734) dated 27.11.2017 and refused to honour the documents on the grounds that the BL was issued prior to LC and the Certificate of Origin was issued by the Beneficiary iteself instead of Chamber of Commerce. The CFEPC had further observed that they were holding the documents until it receive waiver from the applicant or receives further instructions from the Bank of India, Singapore.*

In the meantime, the Branch had supplied a set of documents to the company, received from Bank of India, Singapore. The company vide letter dated 24.11.2017 accepted the documents despite of discrepancies and given an undertaking to make the payment under the said LC by its due date. After accpetance of documents by the Company, the CFEPC had accepted the import under LC No.148/2017 vide SWIFT 754 ON 29.11.2017.

Before the due date of payment, the company vide letter dated 21.05.2018 had requested the Branch to make payment of USD 3232174 to M/s Fareast Distribution & Logistics Pte. Ltd., Singapore by way of creating a Temporary Over Draft (TOD) as there was a short fall in its current account. The company had also given an undertaking that the TOD would be cleared by the next 10 days.

After creating a TOD, a payment of USD 3232174 (equivalent Rs.21.15 Crores) was made to the Bank of India, Singapore for crediting the account of M/s Fareast Distribution & Logistics Pte. Ltd., Singapore as per the terms and conditions of the LC. However, the company as per its undertaking did not adjust the TOD.

Facts emerged during the course of investigation

1. As per IOB circular No. FX/96/2014-15 dated 20.02.2015, an insurance policy should not be later than the date of issuance of Bill of Lading. However in the present case, the Insurance Certificate dated 21.11.2017 was issued after the issuance of Bill of Lading dated 18.11.2017 which is contrary to the guidelines of the Bank.

2. As per the terms and conditions of the Letter of Credit No.148/2017 as mentioned in SWIFT 700 (Issueance of a Documentary Credit) bearing Sequence No.288796 dated 21.11.2017 (Page No.44-48 MR No. 17/20 SL No.15), at Additional conditions No.47-A' transport documents must not be dated prior to the date of this Credit". Further, as per the guidelines as well as procedure laid down by the bank, a Bill of Lading under an LC, is issued after execution of a Contract between the Seller and the Buyer as well as establishment of an LC by the concerned bank. In the instance case, the Bill of Lading dated 18.11.2017 was issued earlier than the Contract No. FEGE2111/17487 dated 21.11.2017. It is pertinent to mention here that as per the Bill of Lading dated 18.11.2017, the freight was "shipped on board" on 13.11.2017 meaning thereby that the goods under the said Contract were dispatched on 13.11.2017 i.e. much before the commencement of the Contract dated 21.11.2017 as well as establishment of LC No.148/2017 dated 21.11.2017. It is therefore apparent that the freight dated 13.11.2017 under Bill of Lading dated 18.11.2017 was not covered under the contract No. FEGE2111/17487 dated 21.11.2017 and LC No.148/2017 dated 21.11.2017.

3. The Bill of Lading No. SZAELM11221394/1F dated 18.11.2017 issued by the Landmark Clearing & Forwarding LLC, Dubai in favour of M/s Globiz Exim Pvt. Ltd., Kanpur is having a reference of Sales Contract No.FAGE2111/17487 (IOB) dated 21.11.2017 and also the documentary credit No.047860117000148 dated 21.11.2017. Thus, the BL issued on 18.11.2017 was having references of such documents i.e. sales contract and documentary credit which were not in existeance as on 18.11.2017. Therefore, the bill of lading dated 18.11.2017 issued by the Landmark Clearing & Forwarding LLC in favor of M/s Globiz Exim Pvt. Ltd., Kanpur is a bogus document.

4. Likewise, a Pre Shipment Certificate dated 13.11.2017 shown to have been issued by M/s Enlight Corporation Ltd., Hong Kong, received by the IOB, Mall Road Branch, Kanpur alngwith the transport documents is having reference of Contract No. FEGE2111/17487 dated 21.11.2017 (not in existence as on 13.11.2017). Therefore, the said document cannot be termed as a genuine document rather the same was bogus document.

5. As per the terms & conditions of the Letter of Credit No.148/2017 as mentioned in SWIFT 700 (Issue of a Documentary Credit) bearing Sequence No.288796 dated 21.11.2017 (Page No.44-48 MR No.17/20 SL No.15), at Additional Conditions No.46-A "Certificate of Origin in duplicate issued by a Chamber of Commerce or Attested by a Chamber of Commerce" was to be forwarded by Bank of India, Singapore to the IOB, Mall Road Branch, Kanpur. In the instant case, a Certificate of Origin dated 21.11.2017 (Page No.27 MR No.17/20 SL No.15) was not issued by a Chamber of Commerce or Attested by a Chamber of Commerce rather the same was issued by the Seller M/s Fareast Distribution & Logistic Pte Ltd. Singapore itself.

6. As per the Bill of Lading No. SZAELM11221394/1F dated 18.11.2017,

the Shipment was shipped on board on 13.11.2017 in a Vessel "Cape Artemisio/004W" at Shekou port, China in a container bearing No. NYKU9819056. The said Bill of Lading was shown to have been issued by M/s Landmark Clearing & Forwarding LLC on behalf of the carrier "NYK". During the course of investigation, a copy of the said Bill of Lading was sent to M/s NYK Line (India) Pvt. Ltd., Mumbai to confirm whether the said Bill of Lading was issued by it or M/s Landmark Clearing & Forwarding LLC on behalf of M/s NYK Line (India) Pvt. Ltd. With reference to the letter No.1832 dated 21.09.2020 of the CBI, SCB, Lucknow, M/S NYK Line (India) Pvt. Ltd., Mumbai vide letter dated 06.10.2020 has informed that the Bill of Lading No. SZAELM11221394/1F dated 18.11.2017 covering container NYKU9819056 was not an NYK document. This fact further establish that the bill of lading No.SZAELM11221394/1F dated 18.11.2017 shown to have been issued on behalf of M/s NYK was not a genuine document.

7. As per the documents submitted by the company with the IOB, Mall Road Branch, Kanpur for establishment of a Letter of Credit, the company had to import the goods viz computer accessories from M/s Fareast Distrbution & Logistic Pte Ltd., Singapore and to export the same consignment to M/s Gulf Distribution Ltd., Hong Kong at Dubai.

Investigation in respect of M/s Fareast Distribution & Logistic Pte Ltd., Singapore has revealsed that the said company was incorporated under the Territory of the British Virgin Islands on 31.08.2012 by Ms. Ooi Ai Ling. The said company has been maintaining an account No.JPY7111000197 with Punjab National Bank, Des Voeux Road, Central, Hong Kong since December, 2012. Since, opening of the said account, the authorized signatory to the said bank account was Shri Rajesh Bothra, General Manager having Passport Number E0614726E. By virtue of being General Mangar having Passport Number E0614726E. By virtue of being General Manager and single Authorized Signatory of the said company Shri Rajesh Bothra was looking after the overall activities of M/s Fareast Distribution & Logistic Pte Ltd Singapore. As per the bank records, M/s Fareast Distribution & Logistic Pte Ltd was having a correspondence address at 13/F, Block-A, Wah Kit Commercial Centre, 302, Des Voeux Road, Central Hong Kong.

Investigation in respect of M/s Gulf Distribution Ltd, Hong Kong has revealed that the company was maintaining a JPY account no.7111000198 with Punjab National Bank, Des Voeux Road, Central, Hong Kong. The Charirman of the said company as well as Authorized Signatory to the account no.JPY7111000198 of PNB, Hong Kong was Shri Rajesh Bothra. He was holding a Singapore passport No.E0614726E. The said account was opened on 03.05.2011. As per the Bank records, M/s Gulf Distribution Ltd, Hong Kong was having a correspondence address at 13/F, Block-A, Wah Kit Commercial Centre, 302, Des Voeux Road, Central Hong Kong.

In view of the facts mentioned above it is established that M/s Fareast Distribution & Logistic Pte Ltd, Singapore and M/s Gulf Distribution Ltd, Hong Kong are not only the sister concern companies but also owned by the same person namely Shri Rajesh Bothra. Further both the companies were having the same common address i.e. 13/F, Block-A, Wah Kit Commercial Centre, 302, Des Voeux Road, Central Hong Kong. Therefore, the claim of the company that it had purchased/imported the goods from

M/s Fareast Distribution & Logistic Pte. Ltd, Singapore and sold/exported the same to M/s Gulf Distribution Ltd, Hong Kong was just an adjustment of the entries/funds."

26. The fact which has emerged during the course of investigation and which is part of charge sheet is also important which is quoted below:-

"As per the terms and conditions of the Letter of Credit No.05/2018 as mentioned in SWIFT 700 (Issue of a Documentary Credit) bearing Sequence No.304176 dated 08.01.2018 (Page No.48-53 MR No.17/20 SL No.16), at Additional Conditions No.46-A "Certificate of Origin in duplicate issued by a Chamber of Commerce or Attested by a Chamber of Commerce" was to be forwarded by Canara Bank, Hong Cong to IOB, Mall Road Branch, Kanpur. In the instant case, a Certificate of Origin dated 21.11.2017 (Page No.44 MR No.17/20 SL No.16) was not issued by a Chamber of Commerce or Attested by a Chamber of Commerce rather the same was issued by the Seller M/s Fareast Distribution & Logistic Pte Ltd., Singapore itself.

A Packing List for export of a consignment is always issued before the shipment of that particular consignment. Whereas, in the instant case, a Packing List was issued on 09.01.2018 (Page No.31 MR No.17/20 SL No.16) i.e. after the issuance of a Bill of Lading dated 08.01.2018.

As per the documents submitted by the company with the IOB, Mall Road Branch, Kanpur for establishment of a Letter of Credit, the company had to import the goods viz computer accessories from M/s Fareast Distribution & Logistic Pte Ltd, Singapore and to export the same consignment to M/s Gulf Distribution Ltd, Hong Kong at Dubai.

Investigation in respect of M/s Fareast Distribution & Logistic Pte Ltd, Singapore has revealed that the said company was incorporated under the Territory of the British Virgin Islands on 31.08.2012 by Ms. Ooi Ai Ling. The said company have been maintaining an account No.JPY7111000197 with the Punjab National Bank, Des Voeus Road, Central, Hong Kong since December, 2012. Since, opening of the said account, the authorized signatory to the said bank account was Shri Rajesh Bothra, General Manager having Passport Number E0614726E. By virtue of General Manager, Shri Rajesh Bothra being single authorize signatory was looking after the overall activities of M/s Fareast Distribution & Logistic Pte Ltd, Singapore. As per the Bank records, M/s Fareast Distribution & Logistic Pte Ltd was having a correspondence address at 13/F, Block-A, Wah Kit Commercial Centre, 302, Des Voeus Road, Central Hong Kong.

Investigation in respect of M/s Gulf Distribution Ltd, Hong Kong has revealed that the company was maintaining a JPY account no.71110001998 with Punjab National Bank, Des Voeux Road, Central Hong Kong. The Chairman of the said company as well as authorized signatory to the account no.JPY7111000198 of PNB, Hong Kong was Shri Rajesh Bothra. He was holding a Singapore passport No.E0614726E. The said account was opened on 03.05.2011. As per the Bank records, M/s Gulf Distribution Ltd, Hong Kong was having a correspondence address at 13/F, Block-A, Wah Kit Commercial Centre, 302, Des Voeus Road, Central Hong Kong.

It is therefore established that M/s Fareast Distribution & Logistic Pte Ltd, Singapore and M/s Gulf Distribution Ltd, Hong Kong are sister concerns companies owned by Shri Rajesh Bothra. Further both

the companies were having the same common address i.e. 13/F, Block-A, Wah Kit Commerical Centre, 302, Des Voeus Road, Central Hong Kong. Therefore, the claim of the company that it had purchased/imported the goods from M/s Fareast Distribution Logistic Pte Ltd, Singapore and sold/exported to M/s Gulf Distribution Ltd, Hong Kong was just an adjustment of the entries/funds.

In view of the facts and circumstances of the case, it is established that M/s Globiz Exim Pvt. Ltd and its directors namely Arvind Srivastava and Saral Verma were the actual benericiary out of the defrauded amount of Rs.10.01 Crores. The company through its directors in criminal conspiracy with each other as well as Sujay Desai in order to cheat the IOB had accepted discrepant/bogus document knowing fully well that the same were bogus and that there was no movement of the goods as reflected in the documents presented before the IOB, Kanpur. Further , the company with malafide intention and with intent to cheat the bank had accepted that discrepant papers received under the alleged LCs despite of the facts that the same were not in accordance with terms of the contracts/LCs which is evident from the Bill of Lading; Certificate of Origin; Packing List; Pre Shipment Certificate etc. More so, the documents like Bill of lading and Pre Shipment Certificate were bearing the references of alleged LCs which were in existence as on the dates of issuance of such Bls/Pre Shipment Certificates.

As regard the role of Sujay Desai is concerned, he was looking after the overall trade and financial activities of the Frost Group of Companies including M/s Globiz Exim Pvt. Ltd. He used to contact Sujay Desai, a citizen of Singapore for imports of goods from M/s Fareast Distribution & Logistic Pte. Ltd, Singapore and export of the same goods to M/s Gulf Distribution Ltd. under alleged LCs. Sujay Desai in India and Rajesh Bothra in Hong Kong/Singapore used to play pivotal role in the questioned matter. He was also aware that LCs were got realized without any actual import/export business.

M/s Fareast Distribution & Logistic Pte. Ltd is based at Hong Kong and was responsible for procuring the alleged documents viz. Bill of lading, Packing List, Certificate of Origin, Invoice, Pre Shipment Certificate etc. under both the alleged Letters of Credit no.148/2017 and 05/2018, which were found to be bogus.

M/s Gulf Distribution Ltd. is based at Hong Kong. The export under the alleged Letters of Credit shown to have been made to this company. As per the investigation, both M/s Gulf Distribution Ltd. (Importer of goods under alleged LCs) and M/s Fareast Distribution & Logistic Pte. Ltd, Hong Kong (Exporter of goods under alleged LCs) were controlled by one and the same person namely Rajesh Bothra.

M/s Landmark Clearing & Forwarding LLC is based at Dubai. This company alleged to have issued Bills of Lading under the alleged Letters of Credit. As per the investigation, the Bills of Lading purportedly issued by the said company were bogus.

Further investigation is kept open u/s 173(8) Cr.P.C. to ascertain the role of overseas companies M/s Fareast Distribution & Logistic Pvt. Ltd.; M/s Gulf Distribution Ltd.; M/s Landmark Clearing & Forwarding LLC and Shri Rajesh Bothra.

Further investigation is also kept open u/s 173(8) Cr.P.C. to ascertain the role of Bank Officials, IOB, Mall Road, Kanpur and CFEPC Officials of IOB, Chennai who had processed and accepted the discrepant documents under the alleged LCs.

Therefore, M/s Globiz Exim Pvt. Ltd.; its directors namely Arvind Srivastava; Saral Verma and Sujay Desai had cheated the Indian Overseas Bank, Mall Road Branch to the tune of Rs.10.01 Crores in respect of both the alleged Letters of Credit. The above mentioned facts prima facie discloses commission of cognizable offences punishable u/s 120 B, 420, 467, 468 & 471 I.P.C. against M/s Globiz Exim Pvt. Ltd, Kanpur; Arvind Srivastava; Saral Verma and Sujay Desai."

27. Heard Sri Anurag Khanna, learned Senior Advocate assisted by Sri Nadeem Murtaza, Sri Raghav Deo Garg and Sri Amar Ghelot, learned counsel for the applicant and Sri Anurag Kumar Singh, learned counsel for the opposite party-C.B.I.

28. Learned counsel for the applicant has relied upon the judgment of **Siddharth (supra), Aman Preet Singh (supra), Satender Kumar Antil (supra).**

29. Satender Kumar Antil Vs. Central Bureau of Investigation & another decided on 11.07.2022 is landmark judgment which has categorized the type of offences. It is further relevant to mention here that the case of Siddharth (supra) has been considered by Hon'ble Supreme Court in the case of Satender Kumar Antil (supra) which is latest judgment decided on 11.07.2022. The relevant portion of the judgment is quoted below:-

"We are inclined to accept the guidelines and make them a part of the order of the Court for the benefit of the Courts below. The guidelines are as under:

<u>Categories/Types of Offences</u>

A) Offences punishable with imprisonment of 7 years or less not falling in category B & D.

B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S.37), PMLA (S.45), UAPA (S.43D(5), Companies Act, 212(6), etc.

D) Economic offences not covered by Special Acts.

<u>REQUISITE CONDITIONS</u>

1) Not arrested during investigation.

2) Cooperated throughout in the investigation including appearing before Investigating Officer whenever called.

(No need to forward such an accused along with the chargesheet (Siddharth v. State of UP, 2021 SCC Online SC615)

<u>CATEGORY A</u>

After filing of chargesheet/complaint taking of cognizance

a) Ordinary summons at the 1st instance/ including permitting appearance through Lawyer.

b) If such an accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued.

c) NBW on failure to failure to appear despite issuance of Bailable Warrant.

d) NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date/s of hearing.

e) Bail applications of such accused on appearance may be decided w/o the accused being taken in physical custody or

by granting interim bail till the bail application is decided.

CATEGORY B/D

On appearance of the accused in Court pursuant to process issued bail application to be decided on merits.

CATEGORY C

Same as Category B & D with the additional condition of compliance of the provisions of Bail under NDPS S.37, 45 PMLA, 212(6) Companies Act 43 d(5) of UAPA, POSCO etc."

Needless to say that the category A deals with both police cases and complaint cases.

The trial Courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by learned ASG is that where the accused have not cooperated in the investigation nor appeared before the Investigating Officers, nor answered summons when the Court feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.

We may aslo notice an aspect submitted by Mr. Luthra that while issuing notice to consider bail, the trial Court is not precluded from granting interim bail taking into consideration the conduct of the accused during the investigation which has not warranted arrest. On this aspect also we would give our imprimature and naturally the bail application to be ultimately considered, would be guided by the statutory provisions.

The suggestions of learned ASG which we have adopted have categorized a separate set of offences as "economic Offences" not covered by the special Acts. In this behalf, suffice to say on the submission of Mr. Luthra that this Court in Sanjay Chandra v. CBI, (2012) 1 SCC 40 has observed in para 39 that in determining whether to grant bail both aspects have to be taken into account:

a) seriousness of the charge and

b) severity of punishment

Thus, it is not as if economic offences are completely taken out of the aforesaid guidelines but do form different nature of offences and thus the seriousness of the charge has to be taken into account but simultaneously, the severity of the punishment imposed by the statute would also be a factor."

30. The case of economic offences stand on a different footing which affect the economic fabric of the society and poses a serious threat to the nation's economy and financial integrity, which has been upheld by the Hon'ble Supreme Court in the case of **P. Chidambaram (supra)** is quoted below:-

"78. Power under Section 438 CrPC being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offence. Economic offences stand as a different class as they affect the economic fabric of the society . In Directorate of Enforcement v. Ashok Kumar Jain [Directorate of Enforcement v. Ashok Kumar Jain, (1998) 2 SCC105 : 1998 SCC (Cri) 510], it was held that in economic offences, the accused is not entitled to anticipatory bail."

31. Again the matter of economic offence has been decided by Hon'ble

Suprement Court in the case of **Y.S. Jagan Mohan Reddy Vs. CBI reported in (2013) 7 SCC 439.** Paragraph nos.34 and 35 of the said judgment is quoted below:-

"34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."

32. In the case of **Aman Preet (supra)** the Hon'ble Supreme Court has observed that earlier direction in Criminal Appeal No.668 of 2021 was given on 06.05.2021 with observation which is quoted below:-

"A reading of the aforesaid thus makes it clear that custodial interrogation of the appellant was not required during investigation and charge sheet having been filed, there was really no occasion to arrest the appellant. We thus granted liberty to the appellant to appear before the trial Court and apply for regular bail while protecting him during the interregnum period. The present proceedings have arisen out of the requirement of the appellant to seek regular bail in terms aforesaid. Suffice to say that the special Chief Judicial Magistrate (CBI), Bhubaneshwar, vide order dated 22.07.2019 noticed that since the accused persons had been charge sheeted for Economic offences, it was appropriate to issue non-bailable warrants of arrest against the accused, including the appellant before us."

33. It is thus clear that in the said case, the Hon'ble Supreme Court had granted interim protection for the period of eight weeks and directed Aman Preet to apply for regular bail before the trial court.

34. In the judgment of **Satender Kumar Antil (supra)**, the guideline applicable in the present case is category B/D wherein it is provided that on appearance of the accused in the court pursuant to process issued bail application to be decided on merit. The present matter is pertaining to the defrauded huge amount of Rs.10.01 crores and specific allegation is levelled in the charge sheet against the applicant that he was looking after the overall trade and financial activities of the Frost Group of Companies including M/s Globiz Exim Private Limited and used to contact Rajesh Bothra and they were involved for imports of goods from M/s Fareast Distribution based at Singapore and export of the same goods of M/s Gulf Distribution Ltd. under the alleged (LC). M/s Globiz Exim Private Limited and its direcotr, namely, Arvind Srivastava and Saral Verma actually defrauded the amount of Rs.10.01 crores. The company through its directors in criminal conspiracy as well as Sujay Desai, had accepted the bogus

document knowing fully well that the same were bogus as reflected in the documents presented before IOB, Kanpur.

35. Looking into the overall facts and circumstances of the above discussion, on the issue of economic offence up to the tune of Rs.10.01 crores, and the role of the applicant who was looking after day to day affairs of the Company, I do not find that it is a fit case for anticipatory bail.

36. Accordingly, the anticipatory bail application is rejected.

37. However, the court below will not be influenced, in any manner, by the observations made by this Court.

(2022) 9 ILRA 479
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.09.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Anticipatory Bail Appl. No. 13956 of 2021

Ravi Shankar Pandey ...Applicant
Versus
State & Ors. ...Opp. Parties

Counsel for the Applicant:
Ashok Kumar Mishra Baled, Vimal Kumar

Counsel for the Opp. Parties:
Anurag Kumar Singh

(A) Criminal Law - Anticipatory Bail - Indian Penal Code, 1860 - Sections 120-B, 409, 420, 467, 468 & 471- Prevention of Corruption Act,1988 - Section 13 (2) R/W 13 (1) (C) & (D) -if any employee of the Government/ Corporation/ Instrumentality of the Government/ any Bank etc. co-operates with the investigation - does not flout the directions of the Investigating Agency - with his/her/ their co-operation the investigation is completed - charge-sheet is filed, his/ her/ their arrest may not be warranted only for the reason that the charge-sheet has been filed unless the learned trial court is having any cogent reason to take him/ her/ them into custody.(Para -12 13)

Issue relating to forgery and fraud - in respect of Kisan Credit Cards - given benefit to some fake borrowers - Applicant not named in F.I.R. - no allegation levelled against him - Bank employee of Clerical Job - co-operated with the investigation properly - charge-sheet has been filed. **(Para - 4,16)**

HELD:-Liberty of applicant protected. Applicant shall be released on anticipatory bail till conclusion of trial proceedings. **(Para -20,21)**

Anticipatory bail appliction allowed. (E-7)

List of Cases cited:-

1. Joginder Kumar Vs St. of U. P. , (1994) 4 SCC 260

2. Siddharth Vs St. of U.P. & anr. , (2021) 1 SCC 676

3. Aman Preet Singh Vs C.B.I. through Director, Criminal Appeal No.929 of 2021

4. Sushila Aggarwal Vs St. (NCT of Delhi)-2020 SCC online SC 98

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ashok Kumar Mishra, learned counsel for the applicant and Sri Anurag Kumar Singh, learned counsel for the opposite parties-C.B.I.

2. This anticipatory bail application has been preferred by the applicant (Ravi Shankar Pandey) apprehending his arrest in

R.C. No.2(A)/2020 (R.C. No.0062020A0002/2020), C.C. No.310/2021, C.B.I. vs. Prakash Chandra Vidhyarthi & Ors, under Sections 120-B, 409, 420, 467, 468 & 471 I.P.C. and Section 13 (2) R/W 13 (1) (C) & (D) of P.C. Act, 1988.

3. Learned counsel for the applicant has submitted that the present applicant has been falsely implicated in the aforementioned case as he has not committed any offence as alleged in the prosecution story so narrated in the First Information Report (in short F.I.R.).

4. Learned counsel for the applicant has further submitted that the present applicant was not named in the F.I.R. dated 09.01.2020 (Annexure No.1) and he has not committed any offence. The present applicant is serving on the post of Senior Customer Assistant (Level-II), State Bank of India, A.P. Sen Road Branch, Lucknow. The issue is relating to forgery and fraud from the year 2014 to 2017 in respect of Kisan Credit Cards. During investigation it has been found that some fake borrowers have been given benefit of Kisan Credit Card and the documents of those borrowers were found to be forged. The sanctioning authority of the said loan was one Sri K.K. Srivastava, Manager of the Branch whereas the duty attributed to the present applicant was to feed the data.

5. The attention has been drawn towards the appraisal/ assessment of such loan which has been annexed with the supplementary affidavit wherein the signatures of the Manager Sri K.K. Srivastava as well as the present applicant have been shown.

6. Learned counsel for the applicant has submitted that during investigation the present applicant has co-operated with the Investigating Authority and has followed the process of law. He always appeared before the Investigating Officer as and when he was called and submitted his explanation in respect of his bonafide. He has submitted that the applicant was not the sanctioning authority and he was not having any ulterior motive inasmuch as nothing incriminating has been recovered from possession of the present applicant.

7. The charge-sheet has been filed against the present applicant as well as the then Manager Sri K.K. Srivastava. Besides, as per learned counsel for the applicant, the investigation is going on against Sri Anshul Mehdi Ratta and Sri Awadhesh Kumar Srivastava the then Managers of the State Bank of India and some unknown persons.

8. Learned counsel for the applicant has further submitted that the present applicant is an employee within the category of Level-II. The C.B.I. has never issued any coercive steps against him since lodging of the F.I.R. on 09.01.2020 for the reason that he has co-operated in the investigation. Now, the charge-sheet has been filed.

9. Since he is an employee of State Bank of India, therefore, there is no likelihood of his absconding and he shall further co-operate with the proceedings. He has further submitted that any reasonable condition may be imposed against him but his liberty may be protected till conclusion of the proceedings.

10. Per contra, Sri Anurag Kumar Singh, learned counsel for the C.B.I. has submitted that this is the case wherein the

fraud and forgery has been committed by some fake persons with the collusion of some Bank Officers/ Officials. The investigation against the present applicant and the then Manager Sri K.K. Srivastava (since retired) has been completed and charge-sheet has been filed but against some other officers of the Bank it is still going on.

11. Sri Singh has however submitted that the present applicant has co-operated with the investigation, therefore, he has not been arrested till filing of the charge-sheet but he is duty bound to appear before the learned trial court to face the trial proceedings.

12. Having heard learned counsel for the parties and having perused the material available on the record, I am of the considered opinion that if any employee of the Government/ Corporation/ Instrumentality of the Government/ any Bank etc. co-operates with the investigation and does not flout the directions of the Investigating Agency and with his/her/ their co-operation the investigation is completed and the charge-sheet is filed, his/ her/ their arrest may not be warranted only for the reason that the charge-sheet has been filed unless the learned trial court is having any cogent reason to take him/ her/ them into custody.

13. In the judgment of Apex Court rendered in re: **Joginder Kumar vs. State of Utter Pradesh reported in (1994) 4 SCC 260** wherein it has been observed that arrest is not mandatory if an accused person co-operates with the investigation as well as in the trial proceedings unless there is any specific or cogent reason to arrest him. The issuance of direction regarding arrest is the prerogative of the learned trial court concerned but such discretion should not be unreasoned inasmuch as the liberty of any person, which is guaranteed under Article 21 of the Constitution of India, may not be compromised in a cursory manner. Therefore, before issuing such order to arrest such person the settled proposition of law and the parameters so fixed by the Apex Court should be considered.

14. The Apex Court in re: ***Siddharth vs. State of U.P. and another*** reported in ***(2021) 1 SCC 676*** has observed as under:

"We are in agreement with the aforesaid view of the High Courts and would like to give out imprimatur to the said judicial view. It has rightly been observed on consideration of Section 170 of the Cr.P.C. that it does not impose an obligation on the Officer-in-charge to arrest each and every accused at the time of filing of the charge-sheet. We have, in fact, some across cases where the accued has co-operated with the investigation throughout and yet on the charge-sheet being filed non-bailable warrants have been issued for his production premised on the requirement that there is an obligation to arrest the accused and produce him before the court. We are of the view that if the Investigating Officer does not believe that the accused will abscond or disobey summons he/ she is not required to be produced in custody. The word "custody" appearing in Section 170 of the Cr.P.C. does not contemplate either police or judicial custody but it merely connotes the presentation of the accused by the Investigating Officer before the court while filing the charge-sheet."

(emphasis supplied)

15. The Apex Court in re: ***Aman Preet Singh vs. C.B.I. through Director,***

Criminal Appeal No.929 of 2021 has observed as under:

"Insofar as the present case is concerned and the general principels under Section 170 Cr.P.C., the most apposite observations are in sub-para (v) of the High Court judgment in the context of an accused in a non-bailable offence whose custody was not required during the period of investigation. In such a scenario, it is appropriate that the accused is released on bail as the circumstances of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitled him to be released on bail. The rationale has been succinctly set out that if a person has been enlarged and free for many years and has bot even been arrested during investigation, to suddenly direct his arrest and to be incarcerated merely because charge-sheet has been filed would be contrary to the governing principles for grant of bail. We could not agree more with this."

(emphasis supplied)

16. In the present case, what has been demonstrated in the material available on record that initially in the F.I.R. the present applicant was not named as no allegation was levelled against him. He is a Bank employee of Clerical Job (which comes within the category of Levell-II) who has co-operated with the investigation properly and thereafter the charge-sheet has been filed.

17. As per learned counsel for the applicant, the present applicant is giving undertaking that he shall appear before the learned court below/ trial court and shall face the trial proceedings. He shall not seek any unnecessary adjournments and shall not adopt any delayed tactics.

18. It is made clear that at any time if the learned trial court finds it necessary for any cogent and obvious reason that custody of the present applicant would be warranted in the interest of justice, he can pass such order but that order should not be passed in a mechanical exercise and the directions so given by the Apex Court in re: ***Joginder Kumar*** (supra), ***Siddharth*** (supra) and ***Aman Preet Singh*** (supra) shall be abide by being the law of the land.

19. Since this case has been investigated by the C.B.I. and a regular presence of the applicant would be required by the learned trial court, therefore, I find it appropriate in the interest of justice that if the present applicant is having any pass-port, the same shall be surrendered by him before the learned trial court and such pass-port shall be kept by the learned trial court till conclusion of the trial and may be handed over to the present applicant earlier only after any order having been passed by the learned trial court or by the Superior Court.

20. In view of the aforesaid facts and circumstances and also in view of the dictum of Hon'ble Apex Court rendered in re: ***Sushila Aggarwal Vs. State (NCT of Delhi)-2020 SCC online SC 98***, I find it appropriate that liberty of the present applicant may be protected till conclusion of trial proceedings subject to the following conditions.

21. Therefore, without entering into merits of the issue, it is directed that in the event of arrest, applicant, Ravi Shankar Pandey, shall be released on anticipatory bail in the aforesaid case crime number, till conclusion of trial proceedings on his furnishing a personal bond of Rs.50,000/- with two sureties each in the like amount to

the satisfaction of the arresting authority/ court concerned with the following conditions:-

1. that the applicant shall make himself available for interrogation made by a police officer as and when required;

2. that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade his from disclosing such facts to the court or to any police officer or tamper with the evidence;

3. that the applicant shall not leave India without prior permission of the court;

4. that the applicant shall not pressurize/ intimidate the prosecution witness;

5. that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

6. that in case of breach of any of the above conditions the court below shall have the liberty to cancel the bail;

7. that in case the charge-sheet is submitted the applicant shall not tamper with evidence during trial;

8. that in default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant.

22. In view of the aforesaid terms, the instant anticipatory bail application is ***allowed***

(2022) 9 ILRA 483
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Bail Application No. 36197 of 2021

Anil Kumar Nanda ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Rajiv Lochan Shukla, Sri Arya Suman Pandey, Sri Mritunjay Dwivedi, Ms. Sufia Saba

Counsel for the Respondents:
G.A., Sri Ashok Kumar Lal, Sri Kundan Rai, Sri Uday Pratap Singh

(A) Criminal Law - Bail - economic offences - Indian Penal Code, 1860 - Sections 409, 420, 467, 468, 471, 477 A, 204, 120 B - The Information Technology Act, 2000 - Sections 66 C and 66 D - Jurisdictional Magistrate who otherwise has the jurisdiction to try a criminal case which provides for a maximum punishment of either life or death sentence, has got ample jurisdiction to consider the release on bail - there cannot be any parity in rejecting an application for grant of bail. (Para -15,24)

an embezzlement of an amount of Rs. 11,83,35,436.27/- - no criminal history - not arrested - surrendered - undergone more than 15 months' incarceration - offences triable by Magistrate - charge sheet submitted - services terminated through a resolution - not in a position to tamper with evidence - No material placed by informant Bank to doubt. **(Para - 3,27)**

(B) Criminal Law - basic jurisprudence relating to bail in economic offences - remains same - grant of bail is the rule and refusal is the exception - to ensure that accused has opportunity of securing fair trial - not advisable to categorize all the economic offences into one group and deny bail on that basis - Even if the allegation is one of grave economic offence - not a rule that bail should be denied in every case - no bar created in relevant enactment passed by legislature, nor does bail jurisprudence provide so - right to bail is not to be denied merely

because of the sentiments of the community against the accused. (Para - 19)

HELD:-Applicant entitled to be released on bail pending conclusion of the trial. **(Para -28)**

Bail application allowed. (E-7)

List of Cases cited:-

1. Harshad Purushottam Mehta Vs The St. of Maharashtra, 2020 (2) AIR Bombay R Criminal 785

2. Narendra Amratlal Dalal Vs St. of Guj., 1977 SCC OnLine Guj 61 = 1978 Cri LJ 1193

3. Satender Kumar Antil Vs C.B.I., 2022 Scc OnLine SC 825

4. Y. S. Jag Mohan Reddy Vs C.B.I., 2013 (7) SCC 439

5. Satender Kumar Antil Vs C.B.I., (2021) 10 SCC 773

6. 2022 Scc OnLine SC 825

7. St. B.O.I. Vs Bela Bagchi, (2005) 7 SCC 435

8. U.B.I. Vs Vishwa Mohan, (1998) 4 SCC 310

9. Sanjay Chandra Vs C.B.I., (2012) 1 SCC 40

10. Emperor Vs H. L. Hutchinson AIR 1931 All 356

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Ms. Sufia Saba, Mr. Rajiv Lochan Shukla and Mr. Mrityunjay Dwivedi, Advocates, the learned counsel for the applicant, Mr. D.K. Srivastava, Advocate, the learned A.G.A. for the State, Mr. Ashok Kumar Lal and Mr. Kundan Rai, Advocates, the learned counsel for the informant.

2. The presentapplication has been filed by the applicant seeking his release on bail in Case Crime No. 146 of 2019 under Sections 409, 420, 467, 468, 471, 477 A, 204, 120 B of I.P.C. and Sections 66 C and 66 D of the Information Technology Act, Police Station Jawan, District Aligarh.

3. The aforesaid case has been registered on the basis of a first information report dated 07.05.2019 lodged by a Junior Branch Manager of Zila Sahkari Bank Private Limited Aligarh against eight named accused persons, including the applicant, alleging that a three member committee had made an enquiry and submitted a report dated 15.07.2019, as per which the accused persons had made an embezzlement of an amount of Rs. 11,83,35,436.27/-.

4. It has been stated in the affidavit filed in support of the bail application that the applicant is innocent and he has been falsely implicated in the present case; that the applicant had been transferred from the concerned branch in September 2015 and the FIR has been lodged on 07.05.2019 after an inordinate delay whereas the bank's accounts are audited every year; that the FIR does not make any mention of the dates during which the alleged fraudulent transactions took place; that it has wrongly been mentioned in the enquiry report as also in the FIR that the amount of Rs. 11,83,35,000/- has been embezzled; that a committee constituted by the bank has re-examined the matter and had issued a report dated 24.02.2020 stating that the balance as on 30.08.2014 was Rs. 4.15 Crores only.

5. It has further been stated in the affidavit that during pendency of the criminal case, the bank has recovered a sum of Rs.2,18,00,000/- till 31.03.2019 from the members who had taken loans

from the bank and, therefore, it cannot be said that the entire amount of loan was embezzled. The affidavit further states that the bank does not give any loan to the farmers directly. It has also been stated in the affidavit that the services of the applicant have already been terminated by means of a resolution dated 15-06-2020 passed by the Board of Directors of the Bank.

6. The affidavit further asserts that the applicant has not done any embezzlement or tampering of documents; that the applicant belongs to a respectable family; that he has clean antecedents and he was not arrested by the police, rather he had surrendered in the Court on 22.06.2021 and since then he is languishing in jail and a charge sheet has been submitted on 13.07.2021. The affidavit contains an undertaking that if the applicant is enlarged on bail, he will not abscond and he will not tamper with the evidence.

7. The informant-bank has filed a counter affidavit stating that the applicant was posted as the Branch Manager in Kasimpur Branch during the period 26-07-2006 to 07-09-2012 and 28-09-2012 to 06-09-2015, along with two cashiers Sanjay Kumar Maurya and Brijesh Awasthi, who have also been made accused in the present case. During this period, loans of Rs.9,52,04,742/- were disbursed to fake persons. On 28.06.2018, a complaint was made to the Secretary / Chief Executive Officer of District Cooperative Bank, Aligarh that the applicant had caused a loss of Rupees 03 Crores to the bank by making forgeries in collusion with some employees of the bank and Cooperative Societies. Upon the aforesaid complaint, the Secretary / Chief Executive Officer of the bank had constituted a three member enquiry committee and on 27.02.2019, the three member committee submitted a report alleging embezzlement of an amount of Rs. 11,83,35,436.2 and that many of the farmers were not found to be residents of the villages mentioned in their respective applications and it appeared that the loans had been granted to fictitious persons.

8. Sri Rajiv Lochan Shukla, the learned counsel for the applicant has submitted that the applicant was transferred from the branch in question on 06.5.2015 and loans amounting to Rs. 4.57 Crores were disbursed during the period 2015 to 2019 and during the same period, an amount of Rs. 6.75 Crores was recovered by the bank, and the maximum share of the recovery amount belonged to old outstanding loans of Rs. 4.15 Crores. He has further submitted that the applicant has already been dismissed from service through a resolution passed by the Board of Directors in its meeting held on 15.06.2020. He has submitted that the bank does not grant any loan to any farmer directory. The loan accounts are maintained by primary Co-operative Societies and the particulars of the Societies are certified by the Secretary / Chief Executive Officer Society before the bank. In the present case also, the loan amounts had been disbursed to the individual farmers from the accounts of the societies, recovery of the loan amounts is also made through the primary Co-operative Societies and, therefore, the applicant, as the manager of the bank branch was not directly responsible either for disbursal or for recovery of the loans and the applicant cannot be held responsible for any irregularity committed by any of the Societies in disbursal / recovery of the loan amounts.

9. The learned counsel for the applicant has next submitted that the Branch Manager, who had taken over

charge after transfer of the applicant, did not find any irregularity during the period 2015 to 2019, although the bank's accounts were audited each year during this period.

10. The learned counsel for the applicant has submitted that a co-accused Rajendra Prasad Sharma (former CEO / primary Cooperative Societies) had been granted anticipatory bail by means of an order dated 19.12.2020 passed by this Court in Anticipatory Bail Application No. 8992 of 2020. He has submitted that none of the other co-accused persons have been arrested in the present case. The applicant had surrendered on 22.06.2021 and he is languishing in jail for the last about 15 months.

11. Shri Shukla has submitted that the offences alleged against the applicant are all triable by a Magistrate of First Class. Although, offence under Section 409 IPC carries a maximum punishment of imprisonment for life or imprisonment for ten years, as per Section 29 of Cr.P.C., a Magistrate of the First Class can impose a maximum punishment of three years imprisonment. Even a Chief Judicial Magistrate, to whom the matter can be referred by a Magistrate of the First Class under Section 325 Cr.P.C., cannot award a punishment exceeding imprisonment for seven years. The learned counsel for the applicant has submitted that in view of the aforesaid legal position and also keeping into consideration the facts that the applicant has already been dismissed from service and that he is languishing in jail for the past 15 months, the applicant is entitled to be released on bail.

12. Per Contra, Sri. Kundan Rai, the learned Counsel for the informant Bank has relied upon a decision of the Bombay high Court in the case of **Harshad Purushottam Mehta vs. The State of Maharashtra,** 2020 (2) AIR Bombay R Criminal 785, wherein the Bombay High Court has held that "the Magistrate is empowered to commit the case to the court of Sessions if he is of the opinion that the case "ought to be tried by it."

13. Replying to the aforesaid submission made by the learned counsel for the informant bank, Sri Rajiv Lochan Shukla has submitted that the law regarding power of referral contained in Section 325 Cr.P.C. has been discussed by the Gujarat High Court in **Narendra Amratlal Dalal v. State of Gujarat**, 1977 SCC OnLine Guj 61 = 1978 Cri LJ 1193, and the relevant portion of the aforesaid judgment is being reproduced below: -

"6.The first question which arises for consideration is, is it open to a Judicial. Magistrate or a Metropolitan Magistrate, in a case where he feels that the accused ought to receive a punishment different in kind from, or more severe than, that which he is empowered to inflict, to commit the case straightway to the Court of Session under Sec. 323 instead of exercising his powers in that connection under S. 325? A bare reading of the two sections will show that Section 323 is general in nature, whereas Section 325 provides for specific category of cases. In case of a Magistrate, therefore, where he feels that the accused ought to receive a punishment different in kind or more severe than that which he can impose, his only course is to resort to Sec. 325. That being a specific provision must govern the case. This is a well-known rule of interpretation. But then, it may well be said, though it has not been argued before this Court, that the Magistrate may feel that the given case before him deserves

punishment exceeding seven years, which the Chief Judicial Magistrate or, for the matter of that, the Chief Metropolitan Magistrate, cannot award. Therefore, in such a case, it may be said that the Magistrate or the Metropolitan Magistrate can exercise his powers to commit the case to the Court of Session under Sec. 323 of the Code. Of course, it must be re-emphasised that, in the present case, that contingency never arose, and still, the learned Magistrate committed the case to the Court of Session, without applying his mind to the provisions of Sec. 325 of the new Code. But this possible contention must also be dealt with by a process of interpretation, so that, there may not be any uncertainty left as to the scope of the powers of a Magistrate or a Metropolitan Magistrate who wants to act on the ground that the accused before him ought to receive a punishment different in kind from, or more severe than the one which he is competent to inflict. It is, at this stage, that we can refer to Section 29 of the Code, according to which a Magistrate of First Class or a Metropolitan Magistrate can award sentence, not exceeding three years, or fine not exceeding Rupees 5,000/-, or both. The approach that the Magistrate or Metropolitan Magistrate should adopt in such cases is, whether the accused before him ought to receive punishment of more than three years, or a fine of more than rupees five thousand. He is not required to consider whether the punishment called for in the case before him is seven years or more than seven years and, on that consideration, to send the case to the Chief Judicial Magistrate or Chief Metropolitan Magistrate in one case and to the Sessions Court in other. There is no indication of legislative intent giving such free play in the exercise of power to a Magistrate or Metropolitan Magistrate in a case which deserves sentence higher than the one he could inflict. In fact, Sub-sec. (1) of Sec. 325 itself gives an indication that the relevent factor for consideration is, whether the punishment which ought to be received by the accused in the case before him should be more severethan the punishment which he is competent to inflict. Therefore, this is the only criterion which he has to follow, without worrying himself on the question whether the punishment larger than that within the competence of the Chief Judicial Magistrate or Chief Metropolitan Magistrate is required to be inflicted. If this is the correct criterion which the Magistrate or Metropolitan Magistrate should consider in such a situation, it is obvious ***that he cannot commit the case to the Court of Session directly. He must hear the evidence for the prosecution and the accused, form an opinion that the accused is guilty, and then, also form an opinion that the accused should receive a punishment, different in kind, or more severe than that which he is competent to inflict Having formed and recorded those two opinions, he has to submit the proceedings to the Chief Judicial Magistrate or to the Chief Metropolitan Magistrate, as the case may be. to whom he is subordinate. Therefore, on a correct interpretation of the relevant provisions, no Magistrate can straightway commit a case to the Court of Session, under Sec. 323, on the ground that the punishment that the accused should receive ought to be different in kind and more severe than that which he is competent to inflict he has got to follow the procedure under Sec. 325 of the Code and there is no other alternative left for him in such a case. It follows as a necessary consequence that, after following the procedure under Sec. 325, if he comes to the opinion contemplated by***

sub-sec. (1) thereof, he has to submit the proceedings to the Chief Judicial Magistrate or the Chief Metropolitan Magistrate, as the case may be."

14. An offence may carry a maximum punishment beyond the powers of a Magistrate, yet the Magistrate has to proceed with the trial, record evidence, form an opinion that the accused is guilty and thereafter form an opinion that the accused should be given a punishment higher than that which he is empowered to inflict and it is only thereafter that he can submit the proceedings to the Chief Judicial Magistrate and the Magistrate cannot commit the proceedings directly to the Court of Sessions. Therefore, even though the offences under Sections 409, 420, 467, 468, 471 and 477 A I.P.C. may carry a punishment higher than the maximum punishment which a Magistrate is empowered to inflict, the offences would still remain triable by a Magistrate.

15. Hon'ble Supreme court in the case of **Satender Kumar Antil versus Central Bureau of Investigation**, 2022 Scc OnLine SC 825, reiterated that *"the jurisdictional Magistrate who otherwise has the jurisdiction to try a criminal case which provides for a maximum punishment of either life or death sentence, has got ample jurisdiction to consider the release on bail."*

16. Since the offences involved in the present case are all triable by a Magistrate, the Magistrate has power to grant bail to the accused in the present case.

17. Sri. Ashok Kumar Lal, the learned counsel for the informant has submitted that the present case involves allegations of grave economic offences and bail ought not to be granted in economic offences. He has relied upon the decision of Hon'ble Supreme Court in the Case of **Y. S. Jag Mohan Reddy vs. C.B.I.,** 2013 (7) SCC 439, wherein the Hon'ble Supreme Court has held as follows: -

"34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."

18. In **Satender Kumar Antil v. CBI**, (2021) 10 SCC 773, the Hon'ble Supreme Court was pleased to lay down the following guidelines for considering the bail applications: -

"3..... The guidelines are as under:

Categories/Types of Offences

A) Offences punishable with imprisonment of 7 years or less not falling in category B & D.

B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

C) Offences punishable under Special Acts containing stringent provisions for

bail like NDPS (S.37), PMLA (S.45), UAPA (S.43D(5), Companies Act, 212(6), etc.
D) Economic offences not covered by Special Acts.

REQUISITE CONDITIONS

1) Not arrested during investigation.

2) Cooperated throughout in the investigation including appearing before Investigating Officer whenever called.

(No need to forward such an accused along with the chargesheet (Siddharthv.State of UP,2021 SCC OnLine SC 615)

CATEGORY A

After filing of chargesheet/complaint taking of cognizance

a) Ordinary summons at the 1stinstance/including permitting appearance through Lawyer.

b) If such an accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued.

c) NBW on failure to failure to appear despite issuance of Bailable Warrant.

d) NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date/s of hearing.

e) Bail applications of such accused on appearance may be decided w/o the accused being taken in physical custody or by granting interim bail till the bail application is decided.

CATEGORY B/D

On appearance of the accused in Court pursuant to process issued bail application to be decided on merits.

CATEGORY C

Same as Category B & D with the additional condition of compli ance of the provisions of Bail under NDPS S.37, 45 PMLA, 212(6) Companies Act 43 d(5) of UAPA, POSCO etc."

Needless to say that the category A deals with both police cases and complaint cases.

The trial Courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by learned ASG is that where the accused have not co operated in the investigation nor appeared before the Investigating Officers, nor answered summons when the Court feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with."

19. Thus the economic offences do not form a class apart even in a case involving economic offences, the application for grant of bail has to be decided on its merits, in accordance with the settled principles. It has further been clarified in a subsequent order passed in the aforesaid case, which has been reported in **2022 Scc OnLine SC 825**, The relevant part of the aforesaid judgment is being reproduced below: -

"66.What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in the case ofP. Chidambaramv.Directorate of Enforcement,(2020) 13 SCC 791, after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of

the factors to be taken note of, along with the period of sentence. ***After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis.*** *Suffice it to state that law, as laid down in the following judgments, will govern the field:--*

Precedents

P. Chidambaramv.Directorate of Enforcement,(2020) 13 SCC 791:

23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that ***the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial.*** *However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. I****n that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so.*** *Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.*

Sanjay Chandrav.CBI,(2012) 1 SCC 40:

"39. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds : the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.

40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

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46. ***We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation****. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI."*

20. The learned Counsel for the Bank has relied upon the decision of the Hon'ble Supreme Court in the case of **State Bank of India versus Bela Bagchi**, (2005) 7 SCC 435, wherein it was held that "*A bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the bank is required to take all possible steps to protect the interests of the bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the bank."*

21. He has also relied upon **Union Bank of India v. Vishwa Mohan,** (1998) 4 SCC 310, wherein the Supreme Court observed that *"in the banking business absolute devotion, diligence, integrity and honesty needs to be preserved by every bank employee and in particular the bank officer. If this is not observed, the confidence of the public/depositors would be impaired."*

22. Both the aforesaid cases related to disciplinary action taken against the bank employees and the question of grant or refusal of bail was not adjudicated in the aforesaid cases. Therefore, these cases are not relevant for deciding the prayer for grant of bail to the applicant in the present case.

23. Sri. Lal has submitted that Criminal Miscellaneous Bail Application No. 12842 of 2022 filed by a co-accused Sanjay Kumar Maurya has been rejected by a co-ordinate Bench of this Court by means of an order dated 26-08-2022. The bail rejection order dated 26-08-2022 reads thus: -

"After hearing the rival contentions, considering the material on record, this Court does not finds that applicant is involved in economic offence and has conducted himself in a manner which is unbecoming of a bank employee who holds

public money in trust. No ground for enlarging the applicant on bail at this stage is made out."

24. It is settled law that there cannot be any parity in rejecting an application for grant of bail. Moreover, from a bare reading of the aforesaid order, I do not find that the Court has recorded any reason for rejection of bail which can be applied in the present case also for rejecting the bail application.

25. In Sanjay Chandra v. CBI, (2012) 1 SCC 40, the Hon'ble Supreme Court has observed that:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

26. In **Emperor v. H. L. Hutchinson** AIR 1931 All 356, this Court had held that an accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

27. Analysing the facts of the present case in light of the legal position discussed above, I find that the following facts are relevant for considering the applicant's prayer for grant of bail: -

(i) The applicant has no criminal history;

(ii) The applicant was not arrested by the Police, rather he had surrendered in the Court on 22.06.2021

(iii) The applicant has already undergone more than 15 months' incarceration;

(iv) The offences alleged in the present case are all triable by a Magistrate;

(v) A charge sheet has already been submitted on 13.07.2021;

(vi) The applicant's services have already been terminated through a resolution dated 15-06-2020 and he is not in a position to tamper with the evidence.

(vii) The affidavit filed in support of the bail application contains an undertaking that if the applicant is enlarged on bail, he will not abscond and he will not tamper with the evidence.

(viii) No material has been placed by the informant Bank to doubt the aforesaid undertaking given in the affidavit and to show that there is any circumstance necessitating continuance of the applicant's incarceration without his guilt being established in trial and without his conviction.

28. Keeping in view the aforesaid facts, I am of the view that the applicant is entitled to be released on bail pending conclusion of the trial. The bail application is accordingly allowed.

29. Let the applicant - **Anil Kumar Nanda**, be released on bail in Case Crime No. 146 of 2019 under Sections 409, 420, 467, 468, 471, 477 A, 204, 120 B of I.P.C. and Sections 66 C and 66 D of the Information Technology Act, 2000, Police Station Jawan, District Aligarh, on his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned subject to following conditions:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the dates fixed, unless personal presence is exempted.

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

30. In case of breach of any of the above condition, the prosecution shall be at liberty to move an application before this Court seeking cancellation of bail.

(2022) 9 ILRA 493
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2021

BEFORE

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

First Appeal From Order No. 79 of 1999

Reshmi & Ors. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Vidya Kant Shukla, Sri Vidya Sagar Shukla

Counsel for the Respondents:
Sri Anil Kumar Rai, Sri Satish Chaturvedi, Sri Shivendra Narayan Singh, Sri Rajiv Ojha

A. Civil Law - Motor Vehicle Act, 1988 - Section 176 - Enhancement of compensation-deceased was 25 years old and driving tempo on his own earning a sum of Rs. 2000/-per month-Tribunal awarded compensation of Rs. 92,000/- but not granted future loss of income-the deceased was survived by seven dependents- By applying the multiplier of 18, the total loss of dependency is assessed Rs. 4,03200/--Thus, the claimants held entitled for total compensation Rs. 4,73,400/- @ 6% per annum-Since deceased was not author or co-author of accident-Thus deduction of

50% form compensation, not permissible. (Paras 1 to 16)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Bajaj Allianz Gen. Ins. Co. Ltd. Vs Smt. Renu Singh & ors. FAFO No. 1818 of 2012

2. Khenyei Vs NIACL & ors. (2015) LawSuit SC 469

3. Malarvizhi & ors. Vs United India Ins. Co. Ltd & anr. (2020) 4 SCC 228

4. United India Ins. Co. Ltd. Vs Indira Devi & ors. (2018) 7 SCC 715

5. The OICL Vs Mangey Ram & ors. (2019) 0 Supreme (All) 1067

6. NIACL Vs Urmila Shukla MANU/ SCOR/ 24098/2021

7. Kirti & ors. Vs OICL (2021) 1 TAC 1

8. Smt. Hansagori P. Ladhani Vs OICL (2007) 2 GLH 291

9. Smt. Sudesna & ors. Vs Hari Singh & anr. FAFO No. 23 of 2001 Tej Kumari Sharma Vs Chola Mandlam M.S. Gen. Ins. Co. Ltd. FAFO No. 2871 of 2016

10. Shriram General Insurance Co. Ltd. Vs Asif & ors..

11. National Insurance Co. Ltd. Vs Pushpa & ors., Smt. Sarla Verma & ors.. Vs Delhi Transport Corp. & anr.. and Deepal Girishbha iSoni& ors.. Vs United India Insurance Company Ltd.

12. F.A.F.O No. 560 of 2012 Smt. Jagdish Kumari & ors. Vs Om Prakash & ors. and in Asif's case(supra)

13. Deepal Girishbhai Soni'scase(Supra), Smt. Sarla Verma's case(supra), National Insurance Company Ltd. Vs Pranay Sethi & ors.., United India Insurance Co. Ltd. Vs Sunil Kumar & anr..

14. New India Assurance Co. Ltd. Vs Shah Mahasukhlal Mafatlal

15. The Oriental Insurance Co. Ltd. & ors.. Vs Hansrajbhai Vs Kodala& ors..

16. National Insurance Company Ltd. Vs Curumallamma& ors..

17. United India Insurance Co. Ltd. Vs Sunil Kumar & ors..

18. Ramkhiladi& ors. Vs The United India Insurance Company & ors..

19. The New India Assurance Company Vs Jasmin Bibi

20. The Branch Manager, Shriram General Insurance Company Limited Vs Dilurai

21. Oriental Insurance Company Ltd. Vs Smt. Maya.

22. Hansrajbhai Vs Kodala'sDeepal Girishbhai Soni's Gurumallamma's and Sunil Kumar cases

23. K.S.Pandurange Vs St. of Karn.

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

1. Heard Sri Vidya Kant Shukla, learned counsel for the appellant and Sri Rajiv Ojha, learned counsel for the respondent-Insurance Company.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 23.11.1998 passed by IInd-Additional District Judge (Motor Accident Claims Tribunal) Azamgarh, (hereinafter referred to as 'Tribunal') in M.A.C. No. 87 of 1990.

3. Brief facts as culled out from the record are that on 07.05.1990 at 2:00 p.m in front of house of Madhuban Murari Kahar, Police Station Kandharpur, District

Azamgarh, driver of jeep bearing no. U.H.W.-5319 driving his jeep negligent and rashly hits Prabhuram's tempo and as a result of which Prabhuram sustained grievous injuries and succumbed to his injuries on the spot.

4. The deceased was 25 years of age at the time of accident. He was driving tempo and earning Rs. 1000/- p.m and maintaining agriculture field. He was survived by his mother, widow and three sons and two daughters. The Tribunal has considered his income to be Rs. 15,000/- p.a, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 17, granted Rs.5,000/- towards consortium, granted Rs.2,000/- towards funeral expenses and ultimately assessed the total compensation to be Rs. 92,000/-.

5. Learned counsel for the appellant has submitted that the witnesses have deposed that driver of the jeep was driving the vehicle rashly and negligently. The charge-sheet was laid against the driver of the jeep and not against the deceased. The ocular version is in favour of deceased. It is further submitted that therefore issue of negligence has been wrongly decided just because of vehicles had collided on the highway but on tempo side which can be said to be a non metal road. It is further submitted that income of Rs. 15,000/- p.a is on the lower side. No amount of future loss of income is granted. Multiplier of 18 should have been granted instead of 17 and Rs. 7,000/- was the only amount is granted for loss of consortium and towards funeral expenses. The Tribunal has not granted any amount under the head of interest. The undisputed facts are that accident occurred on 07.05.1990. The deceased was the driver and owner of the tempo, he was driving the vehicle and was maintaining agricultural field. He was young person of 25 years who had left behind him three sons and two daughters, a mother and a widow and therefore, the deductions should have been 1/5th as per the judgements of Sarla Verma and Sushma Thomas and was applicable to facts of those days and multiplier should have been given 18 and not 17.

6. As against this, Shri Rajiv Ojha, learned counsel for the respondent-Insurance Company contends that as far as issue of negligence is concerned it was the tempo vis-a-vis jeep and the deceased was driving tempo which is bigger vehicle then the jeep. It is further submitted that the finding of fact as far as negligence is concerned should not be disturbed. It is further submitted that the quantum of compensation awarded by the Tribunal is just and proper and does not call for any interference by this Court.

7. Having heard the learned counsel for the parties, as far as negligence is concerned I have perused the judgement, the fact that deceased was not having permanent license and his vehicle was overloaded is a factor which goes against the applicant. I am in agreement with Shri Rajiv Ojha, learned counsel for respondent-Insurance Company that the finding as far as negligence is concerned not to be interfered and the same not interfered.

8. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is

negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

9. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

10. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under: :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in Rylands V/s. Fletcher, (1868) 3 HL (LR) 330. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles,

highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."

emphasis added

11. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748] has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding

against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in Challa Bharathamma &Nanjappan (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to

determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

emphasis added

12. The latest decision of the Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 Law Suit (SC) 469** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident. Hence, the oral prayer that deduction of 50% from the compensation be made is rejected.

13. This takes this Court to the issue of compensation. The Apex court decision in **Malarvizhi & Ors Vs. United India Insurance Company Limited and Another, 2020 (4) SCC 228 and United India Insurance Co. Ltd. Vs. Indiro0 Devi & Ors, 2018 (7) SCC 715. and in The Oriental Insurance Company Ltd. Vs. Mangey Ram and others, 2019 0 Supreme (All) 1067** and the recent judgment of the Apex Court in **New India Assurance Company Vs. Urmila Shukla decided by the Apex Court on 6.8.2021 reported in MANU/SCOR/24098/2021 and Kirti and others vs oriental insurance company ltd reported in 2021(1) TAC 1It could not be culled out from record that** on what basis, the Tribunal has deducted the pecuniary benefits from the income cannot be fathomed. The income of the deceased in the year of accident and looking to his profession can be considered to be Rs.2,000/- per month as the deceased is below 50 years and driving tempo of his own but the accident took place in the year 1990, 40% as future loss of income requires to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. Deduction should be 1/3rd and not 1/4th as submitted by Shri Vidya Kant Shukla. As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/- as non-pecuniary damages. As far as multiplier is concerned, it is 18.

14. Hence, the total compensation payable to the appellants is computed herein below:

i. Income Rs 2,000/-p.m

ii. Percentage towards future prospects : 40% namely Rs.8,00/-

iii. Total income : Rs. 2,000 + 8,00 = Rs.28,00/-

iv. Income after deduction of 1/3rd : Rs. 1,867/- (rounded up)

v. Annual Income : 1,867 x 12 = 22,400/-

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs.22,400 x 18 = Rs.4,03,200/-

viii. Amount under non-pecuniary head : 70,000/-

ix. Total compensation : Rs. 4,73,400/-

15. As far as issue of rate of interest is concerned, it should be 6% from the date of filing of the petition till 1999 and 4% thereafter as without any fault of the Insurance Company, the matter remains pending .

16. In view of the above, the appeal is partly allowed. Oral cross are allowed and compensation is recalculated. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited. The Insurance Company will deposit the entire amount can have their right to recover the amount from owner and the Insurance Company of the other vehicle. As far as deceased is concerned, it is a case of composite negligence, hence, the amount cannot be deducted from the compensation awarded to the claimants who are the heirs of a non tort-feasor.

17. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291** and this High Court in, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (**Smt. Sudesna and others Vs. Hari Singh and another) and in First Appeal From Order No.2871 of 2016** (Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.) decided on 19.3.2021 while disbursing the amount.

18. Record be sent back to tribunal forthwith.

19. This Court is thankful to both the learned Advocates for ably assistting this Court.

(2022) 9 ILRA 500
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.09.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE JASPREET SINGH, J.

First Appeal From Order No. 614 of 2019

United India Insurance Co. Ltd.
...Appellant
Versus
Smt. Sawari & Ors. ...Respondents

Counsel for the Appellant:
Mr. Deepak Kumar Agarwal

Counsel for the Respondents:
Sri Ravindra Pratap Singh

A. Civil Law - Motor Vehicles Act, 1988 - Section 163-A- no fault liability-the issue involved was as to whether compensation payable under section 163A of the Act as per the structured formula is in addition or in alternative for determination of the compensation on the principle of fault liability-The issue was answered in negative-in view of the non-obstante clause contained in Section 163A of the Act, it excludes determination of compensation on the principle of fault liability-The idea for adding Section 163A in the Act was to give relief to the victims of the motor accident at the earliest in a long drawn litigation-It had to be on the basis of structured formula as provided in the Second Schedule attached to the Act-the same claim cannot be defeated nor can compensation for the same be reduced on the basis of the share of the claimant in his/her responsibility in causing the death/permanent disablement of the victim.(Para 1 to 23)

B. 'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. It is a settled rule that if a decision has been given per incuriam the court can ignore it.(Para 20) (E-6)

List of Cases cited:

1. Shriram Gen. Ins. Co. Ltd. Vs Asif & ors. FAFO No. 2434 of 2018

2. NICL Vs Pushpa & ors. (2015) 9 SCC 166

3. Smt. Sarla Verma & ors. Vs DTC & anr. (2009) 2 TAC 677 SC

4. Girishbhai Soni & ors. Vs United India Ins. Co. Ltd. (2004) 5 SCC 385

5. Smt. Jagdish Kumari & ors. Vs Om Prakash & ors. FAFO No. 560 of 2012

6. NICL Vs Pranay Sethi & ors. (2017) 16 SCC 680

7. United India Ins. Co. Ltd. Vs Sunil Kumar & anr. (2018) 1 TAC 3 SC

8. NIACL Vs Shah Mahasukhlal Mafatlal & ors. (2020) 4 TAC 59 Guj

9. OICL & ors. Vs Hansrajbhai V. Kodala & ors. (2001) 5 SCC 175

10. NICL Vs Gurumallama & ors. (2009) 16 SCC 43

11. United India Ins. Co. Ltd. Vs Sunil Kumar & ors. (2017) SCC Online SC 1443

12. Ramkhiladi & ors. Vs The United India Ins. Co. & ors. (2020) 2 SCC 550

13. NIACL Vs Jasmin Bibi FMAT No. 769 of 2015

14. The Branch Mgr. Shriram Gen. Ins. Co. Ltd. Vs Dilurai MAC No. 10 of 2018

15. OICL Vs Smt. Maya (2017) 8 ADJ 92

16. K.S. Panduranga Vs St. of Karn.(2013) 3 SCC 721

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

1. The matter has been placed before this Bench for consideration of the following question, referred to a larger Bench, by the learned Single Judge vide order dated February 8, 2021:

"Whether in the proceedings under Section 163-A of the Motor Vehicles Act, 1988 it is open for the Tribunal to exercise discretion for the assessment of compensation contrary to second schedule

appended to the Act, 1988 notwithstanding that a sum of rupees five lacs is the fixed amount w.e.f. 22.05.2018 in such a proceedings."

2. Brief facts of the case, as are found from the record of the case, are that on April 28, 2015 at about 9 O'clock Raj Bahadur, having a valid driving licence, while going to Lucknow from Tikait Nagar driving Bus bearing registration No.UP 41T 4269, met with an accident on Barabanki-Bahraich Road due to which he sustained grievous injuries. He succumbed to his injuries on April 30, 2015. The registered owner of the aforesaid vehicle was Shashi Bhushan and the vehicle was being operated by the U.P. Road Transport Corporation on contractual basis. At the time of accident, the vehicle was insured with United India Insurance Company Limited, which was valid. A claim petition was filed under Section 163A of the Act1 by the widow and three minor children of the deceased Raj Bahadur also impleading parents of the deceased as opposite party Nos.4 and 5 before the Tribunal2. The learned Tribunal allowed the claim petition vide order dated August 7, 2019 and awarded compensation of ₹9,97,200/- along with simple interest @ 7% per annum from the date of filing of the claim petition till the date of actual payment, which was to be paid by the appellant. The total awarded amount of compensation included the benefit of future prospect is to the tune of ₹2,59,200/-. Deduction of 1/4th was directed to be made towards personal expenses. A sum of ₹70,000/- was awarded towards conventional heads. Out of the total awarded compensation, ₹3,00,000/- along with interest were directed to be paid to the widow of the deceased and ₹5,00,000/- along with interest were directed to be divided amongst three minor children equally. Rest of the awarded compensation i.e. ₹1,97,200/- along with interest was directed to be paid to the parents of the deceased, who were opposite party Nos.4 and 5 in the claim petition.

3. The arguments raised by learned counsel for the appellant before the learned Single Judge was that in an application filed under Section 163A of the Act, only structured formula as contained in Second Schedule attached to the Act could be applied. In support, he referred to a judgment of this Court in **Shriram General Insurance Co. Ltd. v. Asif and others**3 and judgments of Hon'ble the Supreme Court in **National Insurance Company Limited v. Pushpa and others4, Smt. Sarla Verma and others v. Delhi Transport Corporation and another**5 and **Deepal Girishbhai Soni and others v. United India Insurance Company Ltd.**6. Whereas the stand taken by the learned counsel for the claimant was that the Court is not bound to apply the structured formula, hence assessment of the compensation was just and fair.

4. Considering two conflicting views of this Court in **F.A.F.O. No.560 of 2012 titled as Smt. Jagdish Kumari and others v. Om Prakash and others**7 and in **Asif's case (supra)**, the learned Single Judge found it appropriate to refer the matter to the larger Bench for consideration.

5. Mr. Deepak Kumar Agarwal, learned counsel for the Insurance Company/appellant submitted that the scope of Sections 163A and 166 of the Act is all together different. Section 163A of the Act provides for no fault liability while providing for assessment of compensation in terms of Second Schedule attached to the Act. Its' application is limited only to the

cases where the actual income claimed is or restricted up to ₹40,000/-. This Section does not have any application in the present case. A plain reading of the aforesaid Section shows that it starts with non-obstante clause. Meaning thereby, no other provisions of the Act providing for assessment or payment of compensation will be applicable.

6. Section 140 of the Act provides for payment of interim compensation but the same does not have any application in an application filed under Section 163A of the Act. However, interim compensation payable under Section 140 of the Act can be set off against final compensation assessed for which application can be filed under Section 166 of the Act. In such application just amount of compensation is required to be assessed by the Court. The onus to prove number of issues lies on the claimant. In support of his arguments, he placed reliance upon the judgments of Hon'ble the Supreme Court in **Deepal Girishbhai Soni's case (supra), Smt. Sarla Verma's case (supra), National Insurance Company Ltd. v. Pranay Sethi and others8, United India Insurance Co. Ltd. v. Sunil Kumar and another**9 and the Full Bench judgment of Gujarat High Court in **New India Assurance Co. Ltd. v. Shah Mahasukhlal Mafatlal and others**10. He further referred to the Rules11. In terms of Rule 204 of the Rules, separate forms have been prescribed to be filled up by a claimant while filing applications under Section 163A or 166 of the Act. Hence, the scope of both the sections are well defined.

7. On the other hand, Mr. Ravindra Pratap Singh, learned counsel for the claimants submitted that Hon'ble the Supreme Court in **Pranay Sethi's case (supra)** also considered the scope of Section 163A of the Act. His submission is that once just and fair compensation is to be assessed, the same cannot be restricted to structured formula.

8. Heard learned counsel for the parties and perused the paper book.

9. To appreciate the issue involved, it is necessary to examine the relevant provisions of the Act, which stood at the relevant time read as under:-

"**140. Liability to pay compensation in certain cases on the principle of no fault.**-- (1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.

(2) The amount of compensation which shall be payable under sub-section (1) in respect of the death of any person shall be a fixed sum of fifty thousand rupees and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of twenty-five thousand rupees.

(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-section (1) shall not be defeated by

reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.

(5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force:

Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under section 163A.

141. Provisions as to other right to claim compensation for death or permanent disablement.-- (1) The right to claim compensation under section 140 in respect of death or permanent disablement of any person shall be in addition to any other right, except the right to claim under the scheme referred to in section 163A such other right hereafter in this section referred to as the right on the principle of fault to claim compensation in respect thereof under any other provision of this Act or of any other law for the time being in force.

(2) A claim for compensation under section 140 in respect of death or permanent disablement of any person shall be disposed of as expeditiously as possible and where compensation is claimed in respect of such death or permanent disablement under section 140 and also in pursuance of any right on the principle of fault, the claim for compensation under section 140 shall be disposed of as aforesaid in the first place.

(3) Notwithstanding anything contained in sub-section (1), where in respect of the death or permanent disablement of any person, the person liable to pay compensation under section 140 is also liable to pay compensation in accordance with the right on the principle of fault, the person so liable shall pay the first-mentioned compensation and--

(a) if the amount of the first-mentioned compensation is less than the amount of the second-mentioned compensation, he shall be liable to pay (in addition to the first-mentioned compensation) only so much of the second-mentioned compensation as is equal to the amount by which it exceeds the first-mentioned compensation;

(b) if the amount of the first-mentioned compensation is equal to or more than the amount of the second-mentioned compensation, he shall not be liable to pay the second-mentioned compensation.

x x x x

161. Special provisions as to compensation in case of hit and run motor accident.--(1) For the purposes of this section, section 162 and section 163-

(a) "grievous hurt" shall have the same meaning as in the Indian Penal Code (45 of 1860);

(b) "hit and run motor accident" means an accident arising out of the use of a motor vehicle or motor vehicles the identity whereof cannot be ascertained in spite of reasonable efforts for the purpose;

(c) "scheme" means the scheme framed under section 163.

(2) Notwithstanding anything contained in the General Insurance Business (Nationalisation) Act, 1972 (57 of 1972) or any other law for the time being in

force or any instrument having the force of law, the General Insurance Corporation of India formed under section 9 of the said Act and the insurance companies for the time being carrying on general insurance business in India shall provide for paying in accordance with the provisions of this Act and the scheme, compensation in respect of the death of, or grievous hurt to, persons resulting from hit and run motor accidents.

(3) Subject to the provisions of this Act and the scheme, there shall be paid as compensation--

(a) in respect of the death of any person resulting from a hit and run motor accident, a fixed sum of 1 [twenty-five thousand rupees];

(b) in respect of grievous hurt to any person resulting from a hit and run motor accident, a fixed sum of 2 [twelve thousand and five hundred rupees].

(4) The provisions of sub-section (1) of section 166 shall apply for the purpose of making applications for compensation under this section as they apply for the purpose of making applications for compensation referred to in that sub-section.

162. Refund in certain cases of compensation paid under section 161.--(1) The payment of compensation in respect of the death of, or grievous hurt to, any person under section 161 shall be subject to the condition that if any compensation (hereafter in this sub-section referred to as the other compensation) or other amount in lieu of or by way of satisfaction of a claim for compensation is awarded or paid in respect of such death or grievous hurt under any other provision of this Act or any other law or otherwise so much of the other compensation or other amount aforesaid as is equal to the compensation paid under section 161 shall be refunded to the insurer.

(2) Before awarding compensation in respect of an accident involving the death of, or bodily injury to, any person arising out of the use of a motor vehicle or motor vehicles under any provision of this Act (other than section 161) or any other law, the tribunal, court or other authority awarding such compensation shall verify as to whether in respect of such death or bodily injury compensation has already been paid under section 161 or an application for payment of compensation is pending under that section, and such tribunal, court or other authority shall,--

(a) if compensation has already been paid under section 161, direct the person liable to pay the compensation awarded by it to refund to the insurer, so much thereof as is required to be refunded in accordance with the provisions of sub-section (1);

(b) if an application for payment of compensation is pending under section 161 forward the particulars as to the compensation awarded by it to the insurer.

Explanation.--For the purposes of this sub-section, an application for compensation under section 161 shall be deemed to be pending--

(i) if such application has been rejected, till the date of the rejection of the application, and

(ii) in any other case, till the date of payment of compensation in pursuance of the application.

163A. Special provisions as to payment of compensation on structured formula basis.-- (1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the

owner of the motor vehicle of the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation.--For the purposes of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.

163B. Option to file claim in certain cases.-- Where a person is entitled to claim compensation under section 140 and section 163A, he shall file the claim under either of the said sections and not under both.

x x x x

166. Application for compensation.-- (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made--

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

x x x x

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act."

10. The background in which Section 163A was added in the Act was considered by Hon'ble the Supreme Court in **The Oriental Insurance Co. Ltd. and others v. Hansrajbhai V. Kodala and others**12. The issue involved therein was as to whether compensation payable under Section 163A of the Act as per the

structured formula is in addition or in alternative for determination of the compensation on the principle of fault liability after following the procedure prescribed under the Act. The issue was answered in negative. It was opined that in view of the non-abstante clause contained in Section 163A of the Act, it excludes determination of compensation on the principle of fault liability. The idea for adding Section 163A in the Act was to give relief to the victims of the motor accident at the earliest in a long drawn litigation. It had to be on the basis of structured formula as provided in the Second Schedule attached to the Act. It also opined that in case the question of determination of compensation on fault liability is also permitted, it would result in additional litigation and applications. Relevant paragraphs thereof are extracted below:-

"8. From the provisions quoted above, it appears that no specific mention is made that remedy provided under Section 163A is in addition or in the alternative to the determination of compensation on the basis of fault liability. Section 163Awas not there in the original Act of 1988. It was inserted by Act No. 54 of 1994 w.e.f. 14.11.1994. Hence, for arriving at the proper conclusion, it would be necessary to cull out legislative intent by referring to the legislative history as well as Objects and Reasons for inserting the said provision.

x x x x

14. In this context if we refer to the Review Committees Report, the reason for enactingSection 163Ais to give earliest relief to the victims of the motor vehicle accidents. The Committee observed that determination of cases takes long time and, therefore, under a system of structural compensation, the compensation that is payable for different classes of cases depending upon the age of the deceased, the monthly income at the time of death, the earning potential in the case of minor, loss of income on account of loss of limb etc. can be notified and the affected party can then have option of their accepting lump sum compensation under the scheme of structural compensation or of pursuing his claim through the normal channels. The Report of the Review Committee was considered by the State Governments and comments were notified. Thereafter, the Transport Development Council made suggestions for providing adequate compensation to victims of road accidents without going into long drawn procedure. As per the objects and reasons, it is a new pre-determined formula for payment of compensation to road accidents victims on the basis of age/income which is more liberal and rational. On the basis of the said recommendation after considering the Report of the Transport Development Council, the Bill was introduced with a new pre-determined formula for payment of compensation to road accident victims on the basis of age/income which is more liberal and notional, i.e.Section 163A. ..... The purpose of this Section and the Second Schedule is to avoid long drawn litigation and delay in payment of compensation to the victims or his heirs who are in dire need of relief. If such affected claimant opts for accepting the lump-sum compensation based on structured formula, he would get relief at the earliest. It also gives vital advantage of not pleading or establishing any wrongful act or neglect or default of the owner of the offending vehicle or vehicles.

11. With reference to interpretation of Section 163A of the Act and its scope, paragraphs 19 to 21 of the aforesaid judgment can be gainfully referred to, which read as under:-

"19. Lastly, for interpretation and construction of Section 163A , we would refer to its heading and language. The heading is "Special provisions as to payment of compensation on structured formula basis". At the outset, we would make it clear that for interpretation of the words of Section the language of the heading cannot be used to control the operation of the Section, but at the same time being part of the statute it prima-facie furnishes some clue as to the meaning and purpose of Section. [Re: K.P. Varghese v. ITO (1982) 1 SCR p.629 at 647]. In case of ambiguity or doubt heading can be referred to as an aid in construing the provision. This heading indicates that the legislature has envisaged special provision for paying compensation on structural formula basis instead of paying the compensation by long drawn litigation after establishing fault liability. Section also begins with non-obstante clause notwithstanding anything contained in this Act or any law for the time being in force. This would mean that it is not subject to any adjudication of right to claim compensation as provided under the Act. The owner of the motor vehicle or the authorised insurer would be liable to pay compensation due to accident arising out of the use of motor vehicle. Section 163B further clarifies that claim petition can be filed either under Section 140 or under Section 163A but not under both sections.

20. The learned counsel for the claimants however submitted that if we compare the language used in Sections 163A and 140(1), it would be apparent that Section 140 contemplates payment of compensation by the owner of the vehicle. As against this, Section 163A contemplates payment of compensation by the owner of the vehicle or authorised insurer. It is submitted that even if we read the said phrase "owner of the motor vehicle of authorised insurer" as "owner of the motor vehicle or authorised insurer" on the assumption that "of" is wrongly used, then also it is their contention that Section 163A envisages payment either by the authorised insurer or by the owner of the motor vehicle. It has wider implication and, therefore, compensation beyond maximum of Rs.50000/- is provided in Second Schedule and hence the payment under Section 163A should not be considered as alternative to payment of compensation under the fault liability. In our view, it is true that Section 140 talks of payment of compensation by the owner of the vehicle, while Section 163A after reading of as or would mean that owner of the vehicle or the authorised insurer would be liable to pay compensation under Section 163A. But that would not make any difference because determination of compensation under Section 163A is final and not as an interim measure. As stated above, the legislature has deliberately not provided that it is in addition to the compensation payable on the principle of fault liability. There is no provision for adjusting the compensation payable under Section 163A with the other payment on fault liability under the Act.

21. In the result, the contention of the claimants that right to get compensation under Section 163A is additional to claim compensation on no fault liability is rejected for the following reasons: -

(1) There is no specific provision in the Act to the effect that such compensation is in addition to the compensation payable under the Act. Wherever the Legislature wanted to provide additional compensation, it has done so. [Sections 140 and 141]

(2) In case where compensation is paid on no fault liability under Sections 140 and

161 in case of hit and run motor accidents, the Legislature has provided adjustment or refund of the said compensation in case where compensation is determined and payable under the award on the basis of fault liability under Section 168 of the Act. There is no such procedure for refund or adjustment of compensation paid where the compensation is paid underSection 163A .

(3) The words under any other law for the time being in force would certainly have different meaning from the words under this Act or under any other provision of this Act.

(4) In view of the non-obstante clause notwithstanding anything contained in this Act the provisions of Section 163A would exclude determination of compensation on the principle of fault liability.

(5) The procedure of giving compensation under Section 163A is inconsistent with the procedure prescribed for awarding compensation on fault liability. Under Section 163A compensation is awarded without proof of any fault while for getting compensation on the basis of fault liability claimant is required to prove wrongful act, neglect or default of the owner of the vehicle or vehicles concerned.

(6) Award of compensation under Section 163A is on predetermined formula for payment of compensation to road accident victims and that formula itself is based on criteria similar to determining the compensation under Section 168. The object was to avoid delay in determination of compensation."

12. It was a case in which in the order of the High Court impugned before Hon'ble the Supreme it was held that award under Section 163A of the Act was an interim award and claimants were entitled to proceed further for determination of compensation under Section 168 of the Act. The Supreme Court allowed the appeal of Insurance Company and judgment of the High Court was set-aside.

13. Correctness of the aforesaid judgment of Hon'ble the Supreme Court was under consideration in a subsequent judgment of Hon'ble the Supreme Court in **Deepal Girishbhai Soni's case (supra)**. In the aforesaid case, Hon'ble the Supreme Court also considered the legislative history of Section 163A of the Act in paragraphs 18 to 23, which are extracted below:-

"18. A claim for damages owing to injuries suffered by reason of negligence on the part of the driver of a motor vehicle used to be governed only by law of tort. The Indian Motor Vehicles Act, 1914 is the first enactment relating to motor vehicles. The Indian Motor Vehicles Act, 1939 which replaced the 1914 Act consolidated and amended the law relating to motor vehicles in India. Under the 1939 Act as also the Fatal Accidents Act, 1855 compensation was solely based on law of tort. The civil courts had the jurisdiction to try a suit claiming compensation by the plaintiffs for injuries or damages suffered by them by a party whose action had inflicted the injury. In the year 1956, the Motor Vehicle Accidents Claims Tribunals were established to deal with such claims purported to be for providing speedy trial. However, proof of negligence was a condition precedent for grant of compensation under the 1939 Act.

19. The 85th Law Commission in its report submitted in May, 1980, proposed two new measures, i.e. (i) introduction of Section 92-A in the Motor Vehicles Act, 1939 by which the doctrine of liability without fault was to be introduced and, (ii) the imposition of strict liability as regard death or bodily injury caused by the

accident or nature specified in Section 110(1) thereof. Recommendations were also made by the Law Commission to the effect that claim on fault basis should be barred but the same had not been accepted by the Parliament.

20. While making the aforementioned recommendations, the Commission referred to the following observations made by this Court in Bishan Devi and others Vs. Sirbaksh Singh and Anr. [(1980) 1 SCC 273]:

"the law as it stands requires that the claimant should prove that the driver of the vehicle was guilty of rash and negligent driving."

21. By reason of Section 92-A, 92-B in Motor Vehicles Act, 1939 inserted in the year 1982, a sum of Rs. 15,000/- was to be provided in case of death and a sum of Rs. 7,500/- in respect of permanent disablement by introducing the concept of "no-fault liability". The amount of compensation, however, had been revised from time to time.

22. The Law Commission furthermore recommended for laying of a scheme in terms whereof the victims of 'hit and run accident' could claim compensation where the identity of the vehicle involved in the accident was unknown. Yet again, the 199th Law Commission in its report submitted in 1987 stated the law as it stood then in the following terms:

"the law as it stands present, save the provisions in chapter VIIA inserted by the Motor Vehicles (Amendment) Act, 1982, enables the victim or the dependants of the victim in the event of death to recover compensation on proof of fault of the person liable to pay the compensation and which fault caused the harm."

23. The present Act came into force thereafter in terms whereof inter alia Section 92-A to 92-E of the 1939 Act were replaced by Section 140 to 144 whereby and whereunder the amount of compensation in case of death was raised to Rs. 50,000/- and for permanent disablement to Rs.25,000/-. However, having regard to number of representations received from various quarters, a review committee was constituted by the Government of India in the year 1990 to examine the same and review such provisions of the said Act, as may be found necessary. In terms of the recommendations of the Review Committee as also the Transport Development Council, the Act was thereafter amended in the year 1994 in terms whereof a new pre-determined formula in the form of Section 163-A for payment of compensation to road accident victims on the basis of age and income on a no-fault basis was provided.

14. After considering the legislative history of Section 163A of the Act, Hon'ble the Supreme Court opined that determination of compensation under Sections 163A and 166 of the Act being final and independent of each other, the claimant cannot pursue his remedies thereunder simultaneously. One has to opt/elect to either proceed under Section 163A or Section 166 of the Act but not under both. The relevant paragraphs 42, 46 and 57 are extracted below:-

"42. Section 163A was, thus, enacted for grant of immediate relief to a section of people whose annual income is not more than Rs. 40,000/- having regard to the fact that in terms of Section 163-A of the Act read with the Second Schedule appended thereto; compensation is to be paid on a structured formula not only having regard to the age of the victim and his income but also the other factors relevant therefor. An award made thereunder, therefore, shall be

in full and final settlement of the claim as would appear from the different columns contained in the Second Schedule appended to the Act. The same is not interim in nature. The note appended to column 1 which deals with fatal accidents makes the position furthermore clear stating that from the total amount of compensation one-third thereof is to be reduced in consideration of the expenses which the victim would have incurred towards maintaining himself had he been alive. This together with the other heads of compensation as contained in column Nos. 2 to 6 thereof leaves no manner of doubt that the Parliament intended to lay a comprehensive scheme for the purpose of grant of adequate compensation to a section of victims who would require the amount of compensation without fighting any protracted litigation for proving that the accident occurred owing to negligence on the part of the driver of the motor vehicle or any other fault arising out of use of a motor vehicle.

x x x x

46. Section 163-A which has an overriding effect provides for special provisions as to payment of compensation on structured formula basis. Sub-Section (1) of Section 163-A contains non-obstante clause in terms whereof the owner of the motor vehicle or the authorised insurer is liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be. Sub-Section (2) of Section 163-A is in pari materia with Sub-Section (3) of Section 140 of the Act.

x x x x

57. We, therefore, are of the opinion that remedy for payment of compensation both under Section 163-A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. One, thus, must opt/elect to go either for a proceeding under Section 163-A or under Section 166 of the Act, but not under both." (emphasis supplied)

15. The issue was further examined by Hon'ble the Supreme Court in **National Insurance Company Limited v. Gurumallamma and others**13 wherein it was opined that in a proceeding under Section 163A of the Act the amount of compensation has to be assessed in terms of Second Schedule attached to the Act. Relevant paragraph 8 thereof is extracted below:-

"8. ..... As the Second Schedule provides for a structured formula, the question of determination of payment of compensation by application of judicial mind which is otherwise necessary for a proceeding arising out of a claim petition filed under Section 166 would not arise. The Tribunals in a proceeding under Section 163-A of the Act is required to determine the amount of compensation as specified in the Second Schedule. It is not required to apply the multiplier except in a case of injuries and disabilities." (emphasis supplied)

16. In **United India Insurance Co. Ltd. v. Sunil Kumar and others**14, Hon'ble the Supreme Court while considering the question whether in a claim proceeding under Section 163A of the Act, it is open for the Insurer to raise the defence/plea of negligence, held following in paragraphs 7 and 8 which read as under:-

7. As observed in Hansrajbhai V. Kodala (supra) one of the suggestions made by theTransport Development

Council was "to provide adequate compensation to victims of road accidents without going into long drawn procedure." As a sequel to the recommendations made by the Committee and the Council, Section 140 was enacted in the present Act in place of Section 92A to 92E of the Old Act. Compensation payable thereunder, as under the repealed provisions, continued to be on the basis of no fault liability though at an enhanced rate which was further enhanced by subsequent amendments. Sections 140 and 141 of the present Act makes it clear that compensation payable thereunder does not foreclose the liability to pay or the right to receive compensation under any other provision of the Act or any other law in force except compensation awarded under Section 163A of the Act. Compensation under Section 140 of the Act was thus understood to be in the nature of an interim payment pending the final award under Section 166 of the Act. Section 163-A, on the other hand, was introduced in the New Act for the first time to remedy the situation where determination of final compensation on fault basis under Section 166 of the Act was progressively getting protracted. The Legislative intent and purpose was to provide for payment of final compensation to a class of claimants (whose income was below Rs.40,000/- per annum) on the basis of a structured formula without any reference to fault liability. In fact, in Hansrajbhai V. Kodala (supra) the bench had occasion to observe that:

"Compensation amount is paid without pleading or proof of fault, on the principle of social justice as a social security measure because of ever-increasing motor vehicle accidents in a fast-moving society. Further, the law before insertion of Section 163-A was giving limited benefit to the extent provided under Section 140 for no-fault liability and determination of compensation amount on fault liability was taking a long time. That mischief is sought to be remedied by introducing Section 163-A and thedisease of delay is sought to be cured to a large extent by affording benefit to the victims on structured-formula basis. Further, if the question of determining compensation on fault liability is kept alive it would result in additional litigation and complications in case claimants fail to establish liability of the owner of the defaulting vehicles."

8. From the above discussion, it is clear that grant of compensation under Section 163-A of the Act on the basis of the structured formula is in the nature of a final award and the adjudication thereunder is required to be made without any requirement of any proof of negligence of the driver/owner of the vehicle(s) involved in the accident. This is made explicit by Section 163A(2). Though the aforesaid section of the Act does not specifically exclude a possible defence of the Insurer based on the negligence of the claimant as contemplated by Section 140(4), to permit such defence to be introduced by the Insurer and/or to understand the provisions of Section 163A of the Act to be contemplating any such situation would go contrary to the very legislative object behind introduction of Section 163A of the Act, namely, final compensation within a limited time frame on the basis of the structured formula to overcome situations where the claims of compensation on the basis of fault liability was taking an unduly long time. In fact, to understand Section 163A of the Act to permit the Insurer to raise the defence of negligence would be to bring a proceeding under Section 163-A of

the Act at par with the proceeding under Section 166 of the Act which would not only be self-contradictory but also defeat the very legislative intention.

17. Again Hon'ble the Supreme Court in **Ramkhiladi and others v. The United India Insurance Company and others**15 has in paragraph 5.8 held as under:-

"5.8. ..... However, it is the case on behalf of the original claimants that there is an amendment to the 2nd Schedule and a fixed amount of Rs.5 lakh has been specified in case of death and therefore the claimants shall be entitled to Rs.5 lakh. The same cannot be accepted. In the present case, the accident took place in the year 2006 and even the Judgment and Award was passed by the learned Tribunal in the year 2009, and the impugned Judgment and Order has been passed by the High Court in 10.05.2018, i.e. much prior to the amendment in the 2nd Schedule. In the facts and circumstance of the present case, the claimants shall not be entitled to the benefit of the amendment to the 2nd Schedule. ..."

18. Similar view was expressed by the Division Bench of Calcutta High Court in **The New India Assurance Company v. Jasmin Bibi**16 and Sikkim High Court in The **Branch Manager, Shriram General Insurance Company Limited v. Dilurai**17 and Division Bench of this Court in **Oriental Insurance Company Limited v. Smt. Maya**18.

19. A perusal of the judgment of learned Single Judge in **Smt. Jagdish Kumari's case (supra)**, which has taken a different view than what has been taken by Hon'ble the Supreme Court in **Hansrajbhai V. Kodala's, Deepal Girishbhai Soni's, Gurumallamma's and Sunil Kumar's cases (supra)**, shows that it had not considered the aforesaid judgments and held even for assessment of compensation under Section 163A, instead of structured formula, normal assessment is to be made. Whereas in **Asif's case (supra),** the learned Single Judge, after placing reliance on the aforesaid judgments of Hon'ble the Supreme Court, had granted compensation on the basis of structured formula as provided in Second Schedule attached to the Act.

20. As the issue, referred for consideration by a larger Bench, was already covered by judgments of Hon'ble the Supreme Court, even if there was different opinion expressed earlier by two Single Benches, the matter could be decided in the light of Supreme Court judgments ignoring the view expressed in the judgment taking a view contrary to the law laid down by Hon'ble the Supreme Court. Principles of per incuriam will be applicable in such cases. Reference can be made to judgment of Hon'ble the Supreme Court in **K.S. Panduranga v. State of Karnataka**19 where the Supreme Court had considered the law with respect to the concept of per incuriam in detail. Paragraphs 30, 31, 32, 33 and 35 of the said judgment are extracted as under:-

"30. Presently, we shall proceed to deal with the concept of per incuriam. In A.R. Antulay v. R.S. Nayak, while dealing with the said concept, had observed thus: -

"42. ... "Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases

some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

31. Again, in the said decision, at a later stage, the Court observed: -

"47. ... It is a settled rule that if a decision has been given per incuriam the court can ignore it."

32 In Punjab Land Development & Reclamation Corpn. Ltd. v. Labour Court, another Constitution Bench, while dealing with the issue of per incuriam, opined as under:

"40. The Latin expression "per incuriam' means through inadvertence. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court."

33. In State of U.P. v. Synthetics and Chemicals Ltd., a two-Judge Bench adverted in detail to the aspect of per incuriam and proceeded to highlight as follows:

"40. "Incuria' literally means "carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law' is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd. Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

x x x x

35. In Government of A.P. and another v. B. Satyanarayana Rao (dead) by LRs and others this Court has observed that the rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

21. In view of the above, the judgment of learned Single Judge rendered in **Smt. Jagdish Kumari's case (supra)**, being in ignorance of the law laid down by Hon'ble the Supreme Court on the subject, the same could be ignored being per incuriam. The issue being covered by various judgments of Hon'ble the Supreme Court on the issue, we find the reference itself to be uncalled for. The matter is accordingly returned back to the learned Single Judge for further proceedings. The judgment of **Smt. Jagdish Kumari's case (supra)** being per incuriam shall not be a precedent.

22. While dealing with the matter referred to the larger Bench under the Motor Vehicle Act, 1988, this Court was reading the clauses in the Bare Act published by Eastern Book Company and Professional Book Publishers and found that it has not been correctly printed and the contents thereof are quite misleading. Some of the provisions, which have not yet been deleted, as the date of their endorsement has not been notified, have been deleted from the Act whereas some of the provisions, which were existing in the Act such as Sections 163A and 163B, have not even been published/printed. In the Bare Acts published by LexisNexis and Professional Book Publishers, the date of notification/coming into effect of Chapters-X and XI has wrongly been mentioned. This cannot be expected from the publishers of repute.

23. Let notices be issued to the publishers, namely, Eastern Book Company, 34-A, Lalbagh, Lucknow-

226001, LexisNexis, 14th Floor, Building No.10, Tower-B, DLF Cyber City, Phase-II, Gurgaon-122002, Haryana and Professional Book Publishers, 3520/2, Chotani Manzil, Nicholson Road, Mori Gate, Delhi-110006 for October 20, 2022 to explain as to why appropriate action be not taken against them for misleading the counsel as well as the Court and wasting their precious time. Wrong publication of bare Acts can lead to wrong decisions.

(2022) 9 ILRA 515
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ Tax No. 147 of 2022

M/S Chandra Sain, Lucknow ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sanjieva Shankhdhar, Durga Prasad Dueby

Counsel for the Respondents:
A.S.G., C.S.C.

A. Tax Law – Violation of principles of natural justice – Constitution of India,1950 - Article 14, 19 - GST Act, 2017 - Section 29 - Every administrative authority or a quasi judicial authority should necessarily indicate reasons as reasons are heart and soul of any judicial or administrative order. (Para 7)

In the present case from the perusal of the order dated 13.02.2020, clearly there is no reason ascribed to take such a harsh action of cancellation of registration. In view of the order being without any application of mind, the same does not satisfy the test of Article 14 of the Constitution of India, as such, the impugned order dated 13.02.2020 is set aside. The petition is accordingly allowed. (Para 8)

It is, however, directed that the petitioner shall file reply to the show-cause notice within a period of three weeks from today. The Adjudicating Authority i.e. Assistant Commissioner, Lucknow shall proceed to pass fresh order after giving an opportunity of hearing to the petitioner and after considering whatever defence he may take. (Para 9)

Writ petition allowed. (E-4)

Precedent followed:

1. Whirlpool Corp. Vs Registrar of Trademarks, Mumbai & ors., (1998) 8 SCC 1 (Para 6)

2. Om Prakash Mishra Vs St. of U.P. & ors., Writ Tax No. 100 of 2022, decided on 06.09.2022 (Para 7)

Present petition assails order dated 13.02.2020, whereby the registration of the petitioner was cancelled as well as the appellate order dated 06.09.2022, whereby the appeal was dismissed as being beyond the prescribed period of limitation.

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard learned counsel for the petitioner; Shri Shiv P. Shukla, learned counsel for respondent nos.1 & 2 and learned Standing Counsel for respondent nos.3 to 6.

2. Present petition has been filed challenging the order dated 13.02.2020 whereby the registration of the petitioner was cancelled as well as the appellate order dated 06.09.2022 whereby the appeal was dismissed as being beyond the prescribed period of limitation.

3. The facts, in brief, are that the petitioner is a proprietorship concern

engaged in civil contractual works and was registered under the GST Act. It appears that as the GST returns was not filed by the counsel, a show-cause notice dated 04.02.2020 was served. In the said show-cause notice, the reasons as prescribed were as under:

"Whereas on the basis of information which has come to my notice, it appears that your registration is liable to be cancelled for the following reasons:

1. Any Taxpayer other than composition taxpayer has not filed returns for a continuous period of six months

You are hereby directed to furnish a reply to the notice within seven working days from the date of service of this notice.

You are hereby direted to appear before the undersigned on 12/02/2020 at 11:24."

4. The case of the petitioner is that the E-mail address in the registration was that of the Accountant of the petitioner, as such, the petitioner did not have knowledge of the show-cause notice, thus, the reply could not be filed and an order came to be passed on 13.02.2020 (Annexure - 2) whereby registration was cancelled. The gist of the cancellation order is reproduced herein below:

"***Reference Number***: ZA0902200654020 ***Date***: 13/02/2020

To

CHANDRA SAIN

8438, RAJNI KHAND SHARDA NAGAR, Uttar Pradesh,226025 GSTIN/UIN :09CCBPS2158G2ZG

Application Reference No. (ARN): AA090220006361Y ***Dated***: 04/02/2020

Order for Cancellation of Registration

This has reference to your reply dated 13/02/2020 in response to the notice to show cause dated 04/02/2020 Whereas no reply to notice to show cause has been submitted;

The effective date of cancellation of your registration is 13/02/2020

Determination of amount payable pursuant to cancellation:

Accordingly, the amount payable by you and the computation and basis thereof is as follows:

The amounts determined as being payable above are without prejudice to any amount that may be found to be payable you on submission of final return fumished by you. You are required to pay the following amounts on or before 23/02/2020 failing which the amount will be recovered in accordance with the provisions of the Act and rules made thereunder.

Head	Central Tax	State Tax/UT Tax	Integrated Tax	Cess
Tax	0	0	0	0
Interest	0	0	0	0
Penalty	0	0	0	0
Others	0	0	0	0
Total	0.0	0.0	0.0	0.0

Place: Uttar Pradesh
Date: 13/02/2020

VARUN KUMAR TRIPATHI
Assistant Commissioner
Lucknow Sector - 9"

5. The petitioner could not prefer an appeal, which is prescribed under the Act, on account of Covid - 19 situation and the fact that the petitioner fell ill for which

medical certificates were granted, as such, the petitioner preferred a delay condonation application alongwith the appeal. The Appellate Authority was of the view that in view of the Bar created under Section 107(4) of the GST Act, the delay cannot be condoned, as such, he proceeded to dismiss the appeal holding that no power of condonation of delay exists in the statutory scheme of Section 107 of GST Act.

6. Learned counsel for the petitioner argues that although no fault can be found with the appellate order dismissing the appeal as Aappellate Authority does not have the power to condone the delay in terms of the scheme of the Act, however, he argues that the order cancelling the registration is without application of mind; he draws my attention to the impugned order dated 13.02.2020, which does not disclose any application of mind. He, thus, argues that the quasi judicial order which has an adverse effect on the right of the petitioner to run business as guaranteed under Article 19 of the Constitution of India, the same has been done without any application of mind which is neither the intent of the Act nor can it be held to be in compliance of the mandate of Article 14 of the Constitution of India. He further argues that as the appeal has not been decided on merit, the doctrine of merger will have no application and it is only the order dated 13.02.2020 which affects the petitioner and as the same is devoid of any reasons, the same can be challenged before this Court as decided by the Hon'ble Supreme Court in the case of ***Whirlpool Corporation v. Registrar of Trademarks, Mumbai and Ors. - (1998) 8 SCC 1.***

7. He further places reliance on the judgment of this Court in the case of ***Om Prakash Mishra v. State of U.P. & Ors.; Writ Tax No.100 of 2022 decided on 06.09.2022*** wherein this Court had recorded that every administrative authority or a quasi judicial authority should necessarily indicate reasons as reasons are heart and soul of any judicial or administrative order.

8. In the present case from the perusal of the order dated 13.02.2020, clearly there is no reason ascribed to take such a harsh action of cancellation of registration. In view of the order being without any application of mind, the same does not satisfy the test of Article 14 of the Constitution of India, as such, the impugned order dated 13.02.2020 (Annexure - 2) is set aside. The petition is accordingly ***allowed.***

9. It is, however, directed that the petitioner shall file reply to the show-cause notice within a period of three weeks from today. The Adjudicating Authority i.e. Assistant Commissioner, Lucknow shall proceed to pass fresh order after giving an opportunity of hearing to the petitioner and after considering whatever defence he may take.

10. As the order dated 13.02.2020 is set aside, the further action shall prevail in accordance with law as prescribed under Section 29 of the GST Act.

(2022) 9 ILRA 517
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 9500 of 1980

Smt. Khummani ...Petitioner
Versus
D.D.C., Jalaun & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kamal Mehrotra, Sri Randhir Jain, Sri Pradeep Chandra, Sri Pramod Kumar Yadav, Sri Pratik Chandra, Sri Pritam Das, Sri Shri Prakash, Sri Shri Prakash Saroj

Counsel for the Respondents:
C.S.C., Sri Babu Lal Ram, Sri R. Singh, Sri Sushil Kumar, Sri V.K.S. Chaudhary, Sri Sushil Kumar Rathore

Civil Law - U.P. Consolidation of Holdings Act (5 of 1954) - Section 48 – Revisional power of Director of Consolidation - Scope - may examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order passed by such authority - prior to 10.11.1980, Revisional court had limited jurisdiction (Para 12, 13)

Consolidation Officer considered oral as well as documentary evidence as well as provisions of Hindu Minority and Guardianship Act -recorded finding of fact that adoption deed set up by respondent no. 2 was not proved and cannot be believed - but DDC held that adoption deed is proved and respondent no.2 is to be recorded over disputed plot in place of petitioner, without considering the oral as well as documentary evidences - DDC failed to consider the reasoning and findings recorded by the Consolidation Officer and Settlement Officer (Consolidation) on the question who is heir of Mathuri - revisional order quashed.

Allowed. (E-5)

List of Cases cited:

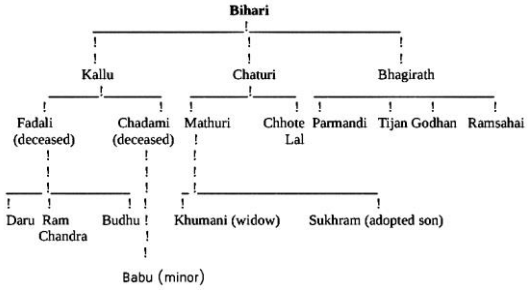
1. Sher Singh (dead) by legal representatives Vs Jt. Director of Consolidation & ors., 1978 R.D. 170

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Kamal Mehrotra and Sri Randhir Jain, learned counsel for the petitioner and Sri Babu Lal Ram, learned counsel for the contesting respondents.

2. Brief facts of the case are that in the Basic Year of the consolidation operation, Mathuri (husband of the petitioner) along with other co-sharer was recorded over plots of Khata Nos.343, 219 & 276, situated in village - Kursara, Pargana- Jalaun, District Jalaun.

3. Against the Basic Year entry, several objections were filed under Section 9-A(2) of the U.P. C.H. Act, one set of objection was filed by respondent no.2 / Sukh Ram on the basis of adoption deed alleged to be executed by Sri Mathuri in his favour on 13.6.1973 and another set of objection was filed by petitioner - Smt. Khumani, being daughter of deceased Shri Mathuri, so both claimed that their name be recorded on the place of deceased Shri Mathuri. In order to appreciate the controversy, family pedigree will be relevant which is as follows:-



4. Before Consolidation Officer, 4 issues were framed in which issue no. 2 was, who is legal heir of deceased Mathuri and issue no. 3 was whether Sukh Ram is adopted son of Mathuri?

5. Oral and documentary evidences were adduced before Consolidation Officer by petitioner as well as respondent no.2.

While deciding the issues nos. 2 & 3, Consolidation Officer considered the oral and documentary evidence, the provision of Hindu Adoption and Maintenance Act as well as Hindu Minority and Guardianship Act were also taken into consideration. Consolidation Officer recorded finding of fact that formalities of adoption as provided under Section 9 of the Hindu Adoption and Maintenance Act is not proved so Sukh Ram cannot be held as heir of Mathuri rather petitioner Khummani is the legal heir of deceased Mathuri, being his daughter, accordingly, Consolidation Officer by his order dated 30.4.1974 directed that name of Smt. Khummani - petitioner be recorded as legal heir of Mathuri, in respect of plots of Khata Nos.323, 276 & 219 and the objection of Sukh Ram - respondent no.2 on the basis of adoption deed was rejected. Respondent no.2 challenged the order dated 30.4.1974 through appeal under Section 11(1) of the U.P. C.H. Act which was dismissed by the Settlement Officer (Consolidation) by order dated 20.11.1974. Respondent no.2 challenged the appellate order dated 20.11.1974 through revision under Section 48 of the U.P. C.H. Act and the Deputy Director of Consolidation by order dated 24.09.1980, allowed the revision filed by respondent no.2, setting aside the orders of Consolidation Officer and Settlement Officer (Consolidation) and ordered to record the name of respondent no.2 over disputed Khata Nos. 343, 219 & 276 after expunging the name of petitioner-Mathuri, hence, this writ petition on behalf of the petitioner.

6. The writ petition was admitted on 8.1.1981 and the interim order was also granted staying the operation of the impugned order dated 24.9.1980. In the meanwhile, on 3.8.1982, interim order dated 8.1.1981 was modified to the extent that if the order dated 24.9.1980 has already not been implemented, then the operation of the order shall remain suspended till further orders.

7. Learned counsel for the petitioner submitted that revisional court while passing the impugned order dated 24.9.1980 has exceeded his revisional jurisidiction as that time revisional court was having limited jurisdiction. He placed upon Section 48 of the U.P. C.H. Act as on prior to 10.11.1980 and subsequent with effect from 10.11.1980 which are as follows:-

Section 48 of the U.P. C.H. Act before 10.11.1980 was as follows:-

48(1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order passed by such authority in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

Explanation- For the purposes of this section, Settlement Officers, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and

Consolidation Lekhpals shall be subordinate to the Director of Consolidation.

Section 48 of the U.P. C.H. Act with effect from 10.11.1980 as amended by U.P. Act No.3 of 2002 which is as follows:

48(1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order other than an interlocutory order passed by such authority in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

Explanation (1)- For the purposes of this section, Settlement Officers, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.

Explanation (2)- For the purposes of this section the expression 'interlocutory order' in relation to a case or proceeding, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceeding.

Explanation (3)- The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence."

(Explanation (3) has been inserted by Legislature by U.P. Act No.3 of 2002 w.e.f. 10.11.1980)

8. Accordingly, learned counsel for the petitioner submitted that Deputy Director of Consolidation illegally allowed the revision, setting aside the order of Consolidation Officer and Settlement Officer (Consolidation) who recorded finding of fact on the issue of execution of adoption deed.

He next submitted that revisional court has failed to consider the school certificate of the respondent no.2 in which name of his natural father was mentioned rather name of adopted father. He also submitted that revisional court has failed to notice that tenure holder Mathuri died on 10.8.1973 and petitioner applied for mutation on 4.8.1973. He further submitted that revisional court failed to notice the provisions of Section 9 of Hindu Adoption and Maintenance Act and which was discussed in detail by Consolidation Officer and recorded finding that adoption deed set up by respondent no.2 is not proved. He further submitted that oral evidence adduced and documentary evidences adduced by both parties were fully taken into consideration by Consolidation Officer but Deputy Directory of Consolidation without considering the evidences on record, in accordance with law, arbitrarily allowed the revision which is illegal and liable to be quashed and the order of

Consolidation Officer and Settlement Officer (Consolidation) be maintained.

9. On the other hand, counsel for the respondent no.2 submitted that revisional court has rightly allowed the revision while exercising revisional power under Section 48 of the U.P. C.H. Act. He further submitted that adoption was duly proved by respondent no.2 but Consolidation Officer has recorded wrong finding that adoption deed was not proved, the Deputy Directory of Consolidation has rightly allowed the revision, holding that adoption deed has been proved, as such, no interference is required against the impugned orders.

10. I have considered the argument advanced by learned counsel for the parties and perused the record.

11. There is no dispute about the fact that petitioner was claiming right under Section 9A(2) of the U.P. C.H. Act, being widow of recorded tenure holder Mathuri and respondent no.2 was claiming on the basis of adoption deed alleged to be executed on 13.6.1973 by Mathuri in favour of respondent no.2. Consolidation Officer allowed the objection of the petitioner in respect to Khata No.343, 276 & 219 and claim of respondent no.2 on the basis of alleged adoption deed was not accepted. Settlement Officer (Consolidation) maintained the order of Consolidation Officer by dismissing the appeal of respondent no.2. In revision, Deputy Director of Consolidation allowed the revision, set aside the orders of Consolidation Officer and Settlement Officer (Consolidation) and ordered to record the name of respondent no.2 on the basis of adoption deed.

12. The Apex Court in **Sher Singh (dead) by legal representatives vs. Jt. Director of Consolidation and Others, 1978 R.D. 170** held as under:-

"**The principal question that falls for our determination in this case is whether in passing the impugned order, the Joint Director of Consolidation, exceeded the limits of the jurisdiction conferred on him under section 48 of the 1953 Act. For a proper decision of this question, it is necessary to advert to section 48 of the 1953 Act is it stood on the relevant date before its amendment by Act No. VIII of 1963 "Section 48 of the U.P. Consolidation of Holdings Act: The Director of Consolidation may call for the record of any case if the Officer (other than the Arbitrator) by whom the case was decided appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the case as it thinks fit."**

As the above section is pari materia with section 115 of the Code of Civil Procedure, it will be profitable to ascertain the scope of the revisional jurisdiction of the High Court. It is now well settled that the revisional jurisdiction of the High Court is confined to cases of illegal or irregular exercise or non-exercise or illegal assumption of the jurisdiction by the subordinate courts. If a subordinate court is found to possess the jurisdiction to decide a matter, it cannot be said to exercise it illegally or with material irregularity even if it decides the matter wrongly. In other words, it is not open to the High Court while exer- cising its jurisdiction under section 115 of the Code of Civil Procedure to correct errors

of fact howsoever gross or even errors of law unless the errors have relation to the jurisdiction of the- court to try the dispute itself.

13. Since the order passed by revisional court, was of 24.9.1980 when revisional court was having limited jurisdiction under Section 48 of the U.P. C.H. Act as quoted above, as such, impugned revisional order is without jurisdiction. Consolidation Officer after considering each and every oral as well as documentary evidence on record as well as provisions of Hindu Minority and Guardianship Act has recorded finding of fact that adoption deed dated 13.6.1973 set up by respondent no.2 is not proved and cannot be believed but Deputy Director of Consolidation has arbitrarily held without considering the oral evidence as well as documentary evidences adduced by the parties that adoption deed is proved and respondent no.2 is to be recorded over disputed plot in place of petitioner which is wholly without jurisdiction, order as Deputy Director of Consolidation while exercising revisional power on 24.9.1980 was having limited jurisdiction. Deputy Director of Consolidation further failed to consider the reasoning and findings recorded by the Consolidation Officer and Settlement Officer (Consolidation) on the question who is heir of Mathuri and whether Sukhram is adopted son of Mathuri, as such, impugned revisional order cannot be sustained.

14. In view of the facts and circumstances mentioned above as well as ratio of law laid down in **Sher Singh (supra)**, the impugned revisional order dated 24.9.1980 passed by Deputy Director of Consolidation, Jalaun, Urai in Revision No.258, under Section 48 of the U.P. C.H. Act is liable to be quashed and the same is hereby quashed.

15. **Writ petition is allowed**. Order passed by the Consolidation Officer dated 30.4.1974 and Settlement Officer (Consolidation) dated 20.11.1974 are hereby maintained. No order as to costs.

(2022) 9 ILRA 522
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.09.2022

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-C No. 279 of 2002

Smt. Sheela Srivastava ...Petitioner
Versus
Housing Commissioner U.P. Housing & Dev. Board & Ors. ...Respondents

Counsel for the Petitioner:
B R Singh, Ishan Baghel, Mukesh Kumar

Counsel for the Respondents:
Mahesh Chandra, Km. Vishwa Mohini, Ratnesh Chandra, Vimal Kumar

A. Constitution of India – Article 226 – Writ – Maintainability – Title of property – Question of fact – Scope of interference – Held, adjudication of disputed question of fact is a matter of discretion and not a bar to the exercise of jurisdiction under Article 226, but it is well known that one of the grounds against the exercise of discretionary power vested in the High Court under Article 226 is where disputed facts have to be investigated – When such dispute exists between the parties, the right claimed by the petitioner is not capable of being adjudicated in the summary proceedings under Article 226 of the Constitution, because, it requires a detailed examination of evidence as may be had in a suit. (Para 18)

B. Constitution of India – Article 226 – Writ – Object – Primary object of Article 226 is enforcement of an established right and not the establishment of a right or title itself – This Court cannot be converted into a trial court in exercising its power under Article 226 of the Constitution of India. (Para 19)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Sohan Lal Vs U.O.I.; (1957) SCR 738

2. New Satgram Engineering Works Vs U.O.I.; (1980) 4 SCC 570

3. Parvatibai Subhanaro Nalwade (Smt.) Vs Anawarli Hasanali Makani; (1992) 1 SCC 414

4. Mohan Pandey & anr. Vs Usharani Rajgaria (Smt.) & ors.; (1992) 4 SCC 61

5. St. of Rajasthan Vs Bhawani Singh; 1193 (Suppl.) 1 SCC 306

6. P.R. Murlidharan & ors. Vs Swami Dharamananda Theertha Padar & ors.; (2006) 4 SC 501

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

1. Heard Sri I.B. Singh, learned Senior Advocate assisted by Sri Avinash Singh Baghel, learned counsel for the petitioner and Sri Ratnesh Chandra, learned counsel for respondent no.1. None appeared on behalf of respondent no.2 and 3.

2. Before, this Court embarks into the narration of the facts of the present case, it is implicit to enunciate that this writ petition raises an interesting aspect, wherein the old adage "a stitch in time saves nine", is squarely applicable to all the four corners of the present case. Essentially a dispute of demarcation between the U.P. Housing & Development Board and Navneet Sahkari Grih Nirman Samiti Limited has metamorphosed into a never ending dispute of right, title, entitlement and possession over a piece of land/plot between two warring private individuals. Alas!, even during pendency of the present issue before this Court for nearly two decades, neither the private individuals nor the public authority and not to speak of the Navneet Sahkari Grih Nirman Samiti Limited have taken any steps which would have resolved the issue of demarcation and made the disputed land/plot readily identifiable with the ownership right of either of the parties.

3. Briefly stating, the petitioner as being aggrieved against alleged inaction on the part of the U.P. Housing and Development Board for selling/allotting her Plot No.-17, Sector-12, Indira Nagar, Lucknow falling in khasra No.131 to private respondent no.2 and 3, has filed the present petition under Article 226 of the Constitution of India for the following reliefs:-

"(a) to issue a writ order or direction in the nature of mandamus commanding the Opp. Parties not to interfere in the peaceful possession of the Plot in question of the petitioner situated at Khasra 131 Sector 12 Indiranagar Lucknow.

(b) to issue a writ order or direction in the nature of mandamus commanding the Opp. Party No. 2 & 3 not to takeover possession of the piece of land of Plot No.17 of the petitioner/

(c) to issue a writ order or direction in the nature of mandamus commanding the Opp. Party No.1 not to allot the plot of petitioner in question without being acquired to anyone else and to pay compensation thereof of mental agony and loss incurred to the petitioner.

4. It is the case of the petitioner that one Navneet Sahkari Grih Nirman Samiti Limited, a society registered under the provisions of the Society Registration Act

(hereinafter to be referred as "Samiti") had purchased two plots of land, including khasra No.131, Sector-12 Indiranagar ad-measuring about 2 bighas, which was demarcated by the society into 18 plots. The petitioner claims to have purchased one such plot being Plot No.17, ad-measuring about 2275 sq. feet vide a sale deed dated 19.05.1980. The petitioner has averred in her writ petition that the respondent no.1 permitted constructions on these plots in the year 1982 subject to deposit of development charges with respect to the said khasra by the persons who had been allotted these plots. Admittedly, construction had been made in all the aforesaid 18 plots, except for Plot No.17 belonging to petitioner, which could not be constructed due to bona fide reasons and as such the plot was lying vacant.

5. It is the contention of the petitioner that Plot No.17 allotted to her by the Samiti in the year 1980 was again allotted/sold by respondent no.1 to the private respondents no.2 and 3 without any notice either to her or the Samiti. She alleges that the respondent no.1 has allotted her plot to respondents no.2 and 3 under some wrong perception and she came to knowledge of the same, when respondent no.2 and 3 tried to take possession and construct over the said plot. Thus, the fulcrum of the argument of the petitioner is three-fold:-

(i) Plot No.17 (new number-12/678) was allotted to her by Nanveet Sahkari Grih Nirman Samiti in the year 1980 and ever since then the plot had been lying vacant under her possession;

(ii) Plot No.17 was never acquired by respondent no.1 under the scheme known as Grihsthan Yozna and it was left as it belonged to the housing society and it is for this reason that even the lay out plan of Sector-12 of Indiranagar does not include the plot of the petitioner;

(iii) In any case, there was no notice of acquiring the said plot given by the respondent no.1 to her or to the housing society from whom she has purchased the said plot.

6. Notice were issued by this Court to respondents on 16.01.2002 and a direction was issued to maintain status-quo with regard to the plot in question.

7. The respondent no.2 and 3 have filed a joint counter affidavit on 08.04.2002 and have stated that khasra no.131 is about 2 bighas, which translates into about 54450 sq. feet, however, the Samiti has occupied an area more than 2 bighas in an unauthorized and illegal manner, as it has submitted a lay out plan for an area of 55309 sq. feet land. It is their case that the Samiti has illegally occupied the excess area of 859 sq. feet, which actually belongs to the respondent no.1. Thus, it is their case that the sale deed dated 29.05.1980 executed in favour of the petitioner is a void document and does not confer any right or title on the petitioner. They went on to dispute the total area in possession of the petitioner and claimed that the respondent no.1 has prepared the lay out plan for the land acquired. It was pursuant to the said acquisition that auction for allotment was held on 01.04.2001 as advertised in Daily Dainik Jagran. It is the case of the respondent no.2 and 3, they have participated in the said auction and as such Plot No.12/678 ad-measuring about 152.23 sq. meter (1621.24 sq. feet) was allotted and registered in their favour vide sale deed dated 22.11.2001 and armed with the said sale deed they have taken possession of the said land and started construction. They say that the four walls of the house have

already been constructed as per photographs filed by them and only the roof was to be constructed and the same was within the knowledge of the Samiti. According to them khasra no.131 adjacent to khasra no.127 is situated in Village-Ismailganj, District-Lucknow and the said Plot No.17 has been illegally carved out in the lay out plan of khasra no.131, which is actually not on the land purchased by the Samiti. They say that in fact the said Plot No.17 is situated on the land of khasra no.127 which had been acquired by the U.P. Awas Evam Vikas Parishad, Lucknow under Section 28 of the U.P. Awas Evam Vikas Parishad Act. The sum and substance of their argument is:-

(i) The Samiti has got no right to illegally occupy and to submit the lay out plan on the land of the area more than what has been purchased by them from agriculturists;

(ii) The said Samiti has got no right to sell said Plot No.17 of its own scheme, which does not belong to it and which is a part of land of khasra no.127;

(iii) The land of Plot No.17 is not situated on khasra no.131 of Village-Ismailganj, District-Lucknow, rather it is situated on khasra no.127 of Village-Ismailganj, District-Lucknow which has been acquired by Awas Evam Vikas Parishad;

(iv) U.P. Awas Evam Vikas Parishad had developed Sector-12 in Village-Ismailganj, District-Lucknow after acquisition of the said land as aforesaid;

(v) The entire khasra no. 127 was allotted to respected allottees but some of the plots carved out were left vacant as such auction of Plot Nos.714, 677, 678 of Sector-12 was conducted by the Parishad, wherein respondent no. 2 and 3 were allotted Plot No.678 in Sector-12, Indiranagar, Lucknow;

(vi) The respondent no.2 and 3 are rightful owners of Plot No.12/678 purchased from U.P. Awas Evam Vikas Parishad and in total they have spent Rs. 9 lakhs on the said plot;

(vii) They further say that the plot in question was never in actual possession of the petitioner, whereas they have been in actual physical possession of the plot and had started constructing their house on the plot;

(viii) The respondent no.1 was functus-officio after the sale of the said land to them as they are main affected parties who are holding title of the plot in question;

(ix) Thus, according to them the matter is a purely civil dispute involving ascertaining of boundaries of the property in dispute as well as for possession for which only civil court is competent and writ was not maintainable.

8. The respondent no.1 filed their counter affidavit on 12.01.2011 primarily premised on the ground that the petitioner has to establish the rights of the society as well as her rights over the ownership of the plot in question. The petitioner was called upon to show the sanctioned or approved lay out plan of the plots of the Samiti as it was stated by respondent no.1 that the lay out plan of the Samiti was not sanctioned by the Parishad and in any case the petitioner ought to have impleaded the Samiti in the present writ petition. It is their submission that the issue relating to possession of the petitioner should be taken up with the Samiti and non-joinder of Samiti in the present petition is fatal. The respondent no.1 has further stated that the petitioner cannot take advantage of the illegal acts of the Samiti and the Parishad is the owner of the plot in question from much before and as such their cannot be two numbers of the same plot in same scheme. As per their averments in the counter affidavit, Plot No.12/678 was allotted in favour of respondent no.2 and 3 and if according to the petitioner any dispute relating to plot in question arose

she should have raised the dispute before the proper forum, against the co-operative society from whom possession was allegedly taken by her. According to them the illegal plot had been sold to the petitioner by the Samiti and not by them and as such there is no cause against them for filing the present writ petition.

9. In rejoinder affidavit filed on 11.10.2004, the petitioner has stated that the contention of respondent no. 2 and 3 are based on surmises & conjectures. They reiterate that they are owner of the plot in question and the claim that the plot had been sold illegally to the respondent no.2 and 3 by respondent no.1 without acquiring the same. No records have been filed by respondent no.1 to show that the plot in question is falling in khasra no.127. She says that the Samiti has taken possession of the land which was left by the Awas Evam Vikas Parishad and not included while the land was acquired. They reiterate that the plot falls in khasra no.131 for which sale deed had been executed in her favour by the Samiti by total area of 2275 sq. feet. As regards filing of the lay out plan of the plot in question, she says that she is owner of the plot by virtue of a registered sale deed and filing of the lay out plan is not her duty. She also reiterates that till 21.04.2001 the land in question was vacant and it was not developed by Awas Evam Vikas Parishad, which says that the land was in possession of the petitioner and it belongs to khasra no.131 as land belonged to Sector-12 of Awas Evam Vikas Parishad, Indiranagar was sold during the decade of 1980. They say that the respondents are not rightful owner of Plot No.12/678 to the extent to which they have illegally taken the possession of the petitioner's land.

10. The respondent no.2 and 3 have filed supplementary counter affidavit dated 09.11.2004, in response to the rejoinder affidavit of the petitioner. Besides reiteration of earlier stand taken by them in their counter affidavit, they have also stated that the disputed land was developed by the Awas Evam Vikas Parishad much earlier in 1985 before the execution of the sale deed in favour of respondent no.2 & 3 and 9 meters wide road has been developed by the Awas Evam Vikas Parishad. They state that the plots developed by the Samiti having narrow road about 25 sq. feet wide is a stark difference and there is no confusion between the plot of the respondent no.2 and 3 which is existing near Nandini Montessori School and park on the other hand is situated on 9 meters wide road of Awas Evam Vikas Parishad from two sides of the plot and there is no question as to how can the disputed plot be termed to belong to the Samiti.

11. In the interregnum, the petitioner left for her heavenly abode on 04.11.2013 and as per the application preferred she was survived by five legal heirs namely:- (i) Ravindra Nath Srivastava, (ii) Anurag Srivastava ,(iii) Nishi Srivastava, (iv) Richa Srivastava, (v) Shikha Srivastava. It was on 12.08.2017 the legal heirs of petitioner chose to file a rejoinder affidavit to the counter affidavit filed by respondent no.1. The petitioners denied the contention of respondent no.1 as made out by them in the counter affidavit and also submitted that they have collected information through R.T.I. and other sources, wherein it is invariably available that:-

(i) respondent no.1 and his officers created far higher number of plots in the extension of Parishad's housing colony in Indiranagar, Lucknow than 656 plots of different sizes envisaged in relevant control

and development plan of the Parishad in the year 1985;

(ii) Respondent no.1 did not exercise due diligence for demarcation of boundaries and table survey;

(iii) The process of allotment of plots in the Parishad's housing colony continued for about two decades and was piecemeal etc.

12. Armed with the aforesaid information provided under the provisions of R.T.I., the petitioner vehemently argued that the plot in question is a part of samayojan housing scheme, which was never acquired by respondent no.1 and demand of development charges from the Samiti for development of Samiti's samayojit housing colony on khasra no.131 of Village-Ismailganj is of no relevance to acquisition or non-acquisition. According to them the officers of respondent no.1 have acted in a high handed and illegal manner in creating and auctioning Plot No.12/677 and 12/678 in the year 2001, i.e. after 19 years of samayojan.

13. The petitioner has also disputed the lay out of the housing colony of the Samiti filed by the respondents as allegedly they are fabricated/tampered to support the illegal actions of the respondent no.1. The petitioner has filed certified copy of part map of khasra plots of Village-Ismailganj, Pargana, Tehsil and District-Lucknow showing khasra plot no.131 along with other contiguous plots, extract map of the housing colony of the Samiti. The petitioner categorically contends that plot no.12/674, 12/675 and 12/676 could not be seen in the record of the Sampatti Prabandhak or the concerned executive engineer, which obviously means that no such plots existed in the Parishad's housing scheme of Sector-12, Indira Nagar, Lucknow. There are too many insertions in the extract, unlike part site plan signed by Awas Ayukt. Further, there are many inaccuracies like school, shop figuring in the site plan included in the extract lay out plan, which were never provided in the housing scheme in Sector-12, Indiranagar, Lucknow. Thus, they say that the site plan filed by the respondents is totally unreliable. The petitioners have also filed various documents relating to seeking information and reply thereto under the provisions of R.T.I. from the authority and/or the appellate authority relating to the plot in question.

14. This Court has taken pain to pen down the facts in extenso, in order to satisfy itself about the real controversy between the parties. Essentially the crux of the dispute between the parties lies in the representation dated 31.12.2001 (annexure no.6 to the writ petition) sent by the petitioner to the respondent no.1, which is being extracted herein below:-

"Dear Sir.

Sub: Representation against acquisition of Plot of residential land belonging to me adjoining Sector 12 of Indra Nagar, Lucknow.

As a member of Navneet Sahkari Grih Nirman Samiti Ltd, L-10/2, Badshahnagar Colony, Lucknow was allotted Plot No. 17 in the Housing Scheme of the above society for my residential purposes. The above plot of land measuring about 2275 sq.ft was sold to me by the Society on 19th May 1980. The Plot was part of a piece of land purchased by the Society in Village Munshipurwa Mazra ismailganj, Post Ghazipur, Tahsil & District Lucknow situated on Kukrail Manoranjan Ban Road Khasra No 131 (Khatauni No 193).

Since my husband has been moving on transfer from place to place, it could not be possible so far to construct residential

premises on the above Plot. One of my relatives has been looking after the property and only last week to our utter surprise he found that ***someone has dug up foundation of a building including nearly half of my Plot. On enquiry we learn that the person claims that adjoining land including part of my land has been allotted and sold by your good offices****. There has been no notice of any acquisition proceeding either to me or to the above named Housing Society.*

I register my strong protest and objection against this kind of illegal action and request that the same may be rescinded and the total area of the Plot be restored to me forthwith

Thanking you in anticipation,

Yours faithfully

(SHEELA SRIVASTAVA)

N.O.O.

CC: The Secretary

Navneet Sahkari Grih Nirman Samd: Lto L-102 Badshahnagar Colony, Lucknow

Secretary,

Navneet Sahakan Grih Nirman Samiti 12 Nandini Vihar,

Nandini Montessan School Fendra Nagar Lucknow (UP)

Ref enquiries made by my brother S Vay Kumar Sivastava with your Sri Bimal Chandra Stivastava." (emphasis supplied by underlying)

15. From the representation it is clear that the petitioner is aggrieved because **nearly half of her plot being Plot No.17 has been dug up by respondent no. 2 & 3 for construction** and apparently on enquiry it was learnt by her that the respondent no. 2 and 3 claims that the adjoining land including part of her land has been allotted and sold by respondent no.1.

16. Thus, the issue according to this Court primarily revolves around some over-lapping area between the plot owned by the petitioner on the one hand, which has been allotted as Plot No.17 by "Nanveet Sahkari Grih Nirman Samiti Ltd." in khasra no. 131, Village-Ismailganj, Pargana, Tehsil and District-Lucknow and the plot owned as Plot No.12/678 allotted by "U.P. Awas Evam Vikas Parishad" in khasra no.127, Village-Ismailganj, Pargana, Tehsil and District-Lucknow.

17. There is no denial of the fact that both khasra no.127 and khasra no.131 are adjoining khasra of the same village. There is also no denial of the fact that the plot of the petitioner, which was allotted vide sale deed in the year 1980 remained unconstructed through the year 2001. There is also no denial of the fact that respondent no.1 developed khasra no. 127 into Sector-12, Indiranagar, Lucknow in the year 1985, however, the plot no. 12/678 came to be auctioned and subsequently occupied by respondent no. 2 and 3 in the year 2001 only. There is nothing on record to suggest as to how and in what manner the plot no.17 or plot no.12/678 can be identifiable as independent to each other or for that matter co-exist without causing any violation to the territory/ boundary of the other. The lay out plan of the respondents also does not clearly signifies anything and if the Court may say it makes the matter worse and complex. It is not a case wherein the same plot has been allotted to different individuals and each of them are claiming their right over the same plot, rather the issue is that a plot which is supposed to be belonging to the Samiti is allotted to the petitioner and the same plot is again supposed to be that of the respondent no.1 is now being allotted to respondent no.2 and 3.

18. The present case essentially is for title as possession and the consequential relief would follow the title of the property.

It is no gain saying that the adjudication of disputed question of fact is a matter of discretion and not a bar to the exercise of jurisdiction under Article 226 of the Constitution of India, but it is well known that one of the grounds against the exercise of discretionary power vested in the High Court under Article 226 of the Constitution of India is where disputed facts have to be investigated. The reason is that when such dispute exists between the parties, the right claimed by the petitioner is not capable of being adjudicated in the summary proceedings under Article 226 of the Constitution, because, it requires a detailed examination of evidence as may be had in a suit.

19. The primary object of Article 226 is enforcement of an established right and not the establishment of a right or title itself. The petition under Article 226 of the Constitution of India cannot be converted into a suit to resolve factual controversies as the proceedings are summary in nature. Intricate and complex questions of title to a property, its boundaries or possession, they cannot be ordinarily gone into by a writ court. After perusing pleadings of the parties, it is not possible for this Court to conclusively record findings on factual pleadings urged by the parties. It requires investigation of disputed facts by permitting the parties to lead evidences and it also involves appreciation of evidences that may be so led by the parties. This Court cannot be converted into a trial court in exercising its power under Article 226 of the Constitution of India, particularly, when the party which has approached this Court under Article 226 can work out his/its remedy by approaching the competent jurisdictional civil court. Indisputably, there is no dispute that khasra no.131 and khasra no.127 (later developed as Sector-12, Indiranagar) are situated in the same Village-Ismailganj, Pargana, Tehsil and District-Lucknow and both are adjoining to each other. It is quite possible that there must be some land over-lapping each other as admittedly there had been no demarcation and the dispute also exists relating to demarcation. As a matter of fact none of the parties have sought for demarcation of the disputed plots either before filing the present case or even after filing the same and each of them have been holding their ground in claiming that they are actual owners of the disputed plots. In any case, this Court cannot lose sight of the fact that it is only after proper demarcation that the rights of both the petitioners and respondents no.2 and 3 would flow from their respective sellers which can only be determined by leading evidences in a competent court of revenue/civil jurisdiction as advisable to the parties.

20. In any case, disputed question that arise for decision in the instant case cannot be resolved on the basis of pleadings and documents produced by the parties, and in fact it requires further investigation into the disputed facts. It is well settled by a catena of judgments that the disputed question of facts or a title to a property or a right to possession are not, normally, examined in proceedings under Article 226 of the Constitution of India. Suffice, if some of these judgments are taken note of:-

(i) In "***Sohan Lal Vs. Union of India'; (1957) SCR 738***, the Supreme Court held, thus:-

".....We do not propose to enquire into the merits of the rival claims of title to the property in dispute set up by the appellant and Jagan Nath. If we were to do so, we would be entering into a field of investigation which is more appropriate for

*a Civil Court in a properly constituted suit to do rather than for a Court exercising the prerogative of issuing writs. There are questions of fact and law which are in dispute requiring determination before the respective claims of the parties to this appeal can be decided. B**efore the property in dispute can be restored to Jagan Nath it will be necessary to declare that he had title in that property and was entitled to recover possession of it. This would in effect amount to passing a decree in his favour.** In the circumstances to be mentioned hereafter, it is a matter for serious consideration whether in proceedings under Art. 226 of the Constitution such a declaration ought to be made and restoration of the property to Jagan Nath be ordered....." (emphasis supplied)*

(ii) In "***New Satgram Engineering Works Vs. Union of India'; (1980) 4 SCC 57***0, the Supreme Court held thus:-

"....."***Where there is a dispute as to whether a particular property vests or not***, the dispute undoubtedly is a civil dispute and must, therefore, be resolved by a suit. ....."(emphasis supplied)

(iii) In "***Parvatibai Subhanaro Nalwade (Smt.) Vs. Anawarli Hasanali Makani'; (1992) 1 SCC 414***, the Supreme Court held thus:-

*".....Before closing this judgment we would like to emphasise that in cases relating to immovable properties which are governed by the ordinary civil law the High **Court should not exercise its special jurisdiction under the Constitution** unless the circumstances are exceptional....."(emphasis supplied)*

(iv) In "***Mohan Pandey and Another Vs. Usharani Rajgaria (Smt.) and Others'; (1992) 4 SCC 61,*** the Supreme Court held thus:-

*".....It has repeatedly been held by this court as also by various High Courts that **a regular suit is the appropriate remedy for settlement of disputes relating to property rights between private persons and that the remedy under Article 226 of the constitution shall not be available** except where violation of some statutory duty on the part of a statutory authority is alleged. And in such a case, the court will issue appropriate direction to the authority concerned. If the real grievance of the respondent is against the initiation of criminal proceedings, and the orders passed and steps taken thereon, she must avail of the remedy under the general law including the criminal procedure code, the High Court allow the constitutional jurisdiction to be used for deciding disputes, for which remedies, under the general law, civil or criminal, are available. It is not intended to replace the ordinary remedies by way of a suit or application available to a litigant. The jurisdiction is special and extra-ordinary and should not be exercised casually or lightly....." (emphasis supplied)*

(v) In "***State of Rajasthan Vs. Bhawani Singh'; 1193 (Suppl.) 1 SCC 306***, the Supreme Court held thus:-

*".....Having heard the counsel for the parties, we are of the opinion, that the writ petition was misconceived insofar as it asked for, in effect, a declaration of **writ petitioner's title to the said plot. It is evident from the facts stated hereinabove that the title of the writ petitioner in very much in dispute. Disputed question relating to title cannot be satisfactorily gone into or adjudicated in a writ petition.....**" (emphasis added)*

21. Having narrated the aforesaid facts in extenso, this Court is of the view that the dispute between the parties is a property dispute which could be well resolved by filing a suit before the appropriate Court. Although, the petitioner has sought for possession of the plot in question but this Court is of the view that in the facts of this case such a relief cannot be given, especially when the possession has to be established first. The Hon'ble Supreme Court in case of "**P.R. Murlidharan and Others Vs. Swami Dharamananda Theertha Padar and others"**, reported in ***(2006) 4 SC 501*** held:-

"It would be an abuse of process for a writ petitioner to approach the High Court under Article 226 of the Constitution seeking a writ of mandamus directing the police authorities to protect his claimed possession of a property without first establishing his possession in an appropriate civil court. The temptation to grant relief in cases of this nature should be resisted by the High Court. The wide jurisdiction under Article 226 of the Constitution would remain effective and meaningful only when it is exercised prudently and in appropriate situations."

22. It needs no restatements at our hands that where there is a dispute as to whether a particular property vests or not, in the State or in any private individual the dispute undoubtedly is a civil dispute and must, therefore, be resolved by a suit and not in a proceedings under Article 226 of the Constitution of India. It is well recognized principle of law that a regular suit is the proper remedy for settlement of disputes relating to property rights between parties.

23. The upshot of the above discussion is that writ petition deserves to be dismissed, leaving it open to the petitioner to agitate her grievance in a suit before the civil court of competent jurisdiction. Since the writ petition is dismissed not on merits but on the ground that this Court, in proceedings under Article 226 of the Constitution of India, would not, normally, adjudicate disputed questions of title, it is wholly unnecessary for this Court to examine the respondents contention and same are therefore, left open for adjudication, if need be, in appropriate proceedings.

24. The writ petition fails and is accordingly ***dismissed.*** However, in the circumstances without cost.

25. Interim order, if any, stands vacated.

(2022) 9 ILRA 531
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.09.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 522 of 2022

C/M Seth M.R. Jaipuria School, Lko ...Petitioner

Versus

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

Counsel for the Petitioner:
Salil Srivastava, Som Kartik Shukla

Counsel for the Respondents:
C.S.C.

A. Educational institution – CBSE Manual – Clause 2.3.4 and 2.3.5 – Affiliation with CBSE – Power of St.Government to issue NOC, how can be exercised – Held, scope of powers for grant of no objection certificate for affiliation is only confined to the powers of the St.for objecting only to

the affiliation and nothing beyond that – St.Government has exceeded its mandate in rejecting the request for grant for no objection certificate for affiliation. (Para 27 and 29)

B. Educational institution – Affiliation and Recognition – Difference – Whereas 'affiliation' is meant to prepare and present the students for public examination, 'recognition' of a private school is for other purposes mentioned in the Act and it is only when the School is recognised by the 'appropriate authority' that it becomes amenable to other provisions of the Act. (Para 22)

C. Interpretation of Statute – Guidelines – Relevance – Guidelines issued should have some relevant nexus with the object sought to be achieved. (Para 28)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Chintpurni Medical College & Hospital & anr. Vs St. of Pun. & ors.; (2018) 15 SCC 1.

2. Mangilal Vs St. of M.P.; (2004) 2 SCC 447

3. Gangotri Enterprises Ltd.Vs U.O.I. & ors.; (2016) 11 SCC 720

4. Rattan Lal Sharma Vs Managing Committee Dr. Hari Ram (Co-Education) Higher Secondary School & ors.; (1993) 4 SCC 10

5. A. K. Kraipak & ors. Vs U.O.I. & ors.; 1969 (2) SCC 262

6. St. of U.P. Vs Vijay Kumar Tripathi & anr.; 1995 Supp (1) SCC 552.

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Prashant Chandra, Senior Advocate assisted by Sri Ansuman Singh the counsel for the petitioner and the learned Standing Counsel.

2. The present petition has been filed challenging the order dated 08.10.2021 passed by the committee constituted under the Government Order whereby the request for grant of No Objection Certificate to the petitioner has been rejected.

3. The facts, in brief, are that the petitioner claims to be running a school which is recognized up to Class 8th by the State of U.P. and the petitioner, on account of enhancement of the students, desirous of obtaining affiliation with the Central Board of Secondary Education (CBSE for short), applied before the CBSE for grant of affiliation.

4. It is argued that in terms of the requirements as enumerated by the CBSE, the petitioner possesses all requisite criterias for grant of affiliation. As the Rules framed by the CBSE for grant of affiliation require the production of a NOC from the State of U.P., the petitioner applied for grant of NOC, which has been rejected and which is under challenge.

5. The counsel for the petitioner argues that in terms of the requirements of both the CBSE and ICSE, wherein a requirement for obtaining a NOC is specified, the State Government has issued a Government Order wherein, the procedure for grant of NOC, desired by various schools, is specified. The said GO provides for constitution of a Committee comprising of four persons which shall look into the issue with regard to the application for grant of NOC and shall pass orders thereupon. No further guidelines have been framed as to how and in what manner the said committee shall proceed to grant the NOC, thus, it is left to the discretion of the committee to either grant the NOC or to refuse the same.

6. It is on record that in pursuance to the application filed by the petitioner for

grant of NOC, one of the Members of the Committee namely the DIOS of the district carried out some investigation and based upon the same submitted its report on 16.11.2019. The Joint Director of Education, Lucknow vide his order dated 16.11.2019 itself, quoting the report as submitted by the DIOS proceeded to reject the application of the petitioner. The reasoning as contained in the order of rejection dated 16.11.2019 are quoted herein below:

1. "शासन द्वारा भूमि का अधिग्रहण विद्यालय हेतु किया गया था। इस स्थिति में भूमि का प्रयोग माध्यमिक शिक्षा परिषद, उत्तर प्रदेश से मान्यता प्राप्त विद्यालय के निमित्त ही औचित्यपूर्ण है। यदि विद्यालय की भूमि को प्रबन्धतन्त्र द्वारा किसी अन्य शैक्षिक प्रयोग हेतु लिया जाना है तो उसकी औपचारिक अनुमति सक्षम अधिकारी स्तर से आस्तियों का अपव्यय निवारण अधिनियम-1974 की संगत धाराओं के अन्तर्गत प्राप्त की जानी अनिवार्य है, जो कि विद्यालय प्रबन्धतन्त्र द्वारा नहीं की गयी थी।

2. श्री योगेश्वर ऋषिकुल इण्टर कोज, मेहन्दीगंज लखनऊ की प्रबन्ध समिति के सचिव श्री सुव्रतों मजूमदार द्वारा उ०प्र० शैक्षिक संस्थायें (आस्तियों के अपव्यय का निवारण) अधिनियम 1974 का उल्लघंन कर हुए विद्यालय की कुल भूमि (22 बीघा, '12 बिस्वा, 10 विस्वांसी) की की आधी भूमि लगभग 29914.77 वर्ग मीटर मेसर्स डी लोटर्स बिल्डर्स एवं कालोनाइजर्स को बेच दी गयी।

3. उपाध्यक्ष लखनऊ विकास प्राधिकरण लखनऊ के पत्रांक - 747 / 117/14 दिनांक 28.08.201 द्वारा दिये गये निर्णय में स्पष्ट किया गया है कि शिक्षा के उपयोगार्थ श्री योगेश्वर ऋषिकुल इण्टर कोज मेहन्दीगंज लखनऊ द्वारा लगभग 22 बीघा, 12 बिस्वा, 10 विस्वांसी भूमि प्राधिकरण योजना के अन्तर्गत अर्जन से मुक्त की गयी थी, जिसमें से आधी से अधिक भूमि लगभग 31,918.80 वर्ग मी० भूमि सोसाइटी के सचिव श्री सुव्रतो मजूमदार द्वारा धोखाधड़ी एवं जालसाजी करके करोड़ो रूपये में निजी लाभ हेतु आवासीय एवं व्यवसायिक उपयोग के लिये बेच दी गयी, जो कि अवैधानिक एवं अवैध है।

4. विद्यालय प्रधानाचार्य द्वारा काइम संख्या0525 दिनांक 04.10.2018 द्वारा थाना बाजार खाला, लखनऊ में श्री सुब्रतो मजूमदार, श्री राजीव बिसारिया एवं केता दाऊ दयाल अग्रवाल एवं मेसर्स डी लोटर्स बिल्डर्स एवं कालोनाइजर्स के विरुद्ध भारतीय दण्ड संहिता की धारा 420, 467, 468, 471 के अर्न्तगत प्रथम सूचना रिपोर्ट दर्ज करायी गयी, जिसमें श्री सुब्रतो मजूमदार लगभग 40-45 दिन जेल पर रहे। वर्तमान समय में श्री मजूमदार जमानत पर रिहा हैं तथा प्रकरण माननीय न्यायालय में विचाराधीन है।"

7. Aggrieved against the said order dated 16.11.2019, the petitioner preferred a Writ Petition before this Court being Misc. Single No.3010 of 2021 before this Court. It was urged that the order has been passed by one person based upon the enquiry report of one of the constituent of the committee, as such, the order was bad in law.

8. The said argument found favour with this Court which vide its order dated 15.07.2021 proceeded to set aside the order dated 16.11.2019 giving liberty to the respondents to take a fresh decision in the light of the Government Order dated 14.07.2009. In pursuance to the said liberty granted by this Court, a fresh order has been passed, which is contained in Annexure no.1. The said order is similar to the earlier order dated 16.11.2009 and is under challenge in the present writ petition.

9. Sri PrashantChandra,senior advocate, appearing on behalf of the petitioner was called upon to address this

court with regard to the points noticed in the report of the DIOS and as reproduced in the impugned order as well as the order dated 16.11.2019. In respect of the first objection, wherein it is recorded that the land in question was acquired by the State for setting up a school and thus it would be proper if the said land is used for setting up a school, which has affiliation with the Intermediate Education Board and not for any other school to use the same for academic activities. It was essential to take permission under The U.P. Educational Institutions (Prevention of Dissipation of Assets) Act, 1974 (for short Act of 1974). In response to the said observations, he argues that the land was acquired for setting up an academic institution and the petitioner is exactly serving the said cause, thus, the same has no basis.

10. The second objection recorded by the DIOS wherein it is recorded that the land in question after acquisition was allotted to one Society in the name of Baldev Vidya Peeth and the Manager of the said institution had sold a part of the property to one D-Lotus Builders and Colonizers in contravention of the 'Act of 1974'.

11. The third objection records that in terms of the letter issued by the Lucknow Development Authority to the effect that out of the total land acquired, a substantial part of the said land was left out of acquisition and was allotted to the society in question, which has been sold by the secretary of the society by playing fraud for personal benefit for housing and Commercial purposes, which was arbitrary and illegal.

12. In response to the objection as referred to in Clause 2 and 3 and referred in foregoing paragraphs, Sri Chandra argues that in respect of the property which are owned by the societies, after amendment in the Societies Registration Act, Section 5-A(as it then was) was introduced, wherein the District Judge is empowered to grant sanction of any property being transferred by the Society registered under the Act and the approval of the Court is essential for making any such transfer. In the light of the said amendment as contained in Section 5-A, he argues that prior to transfer in favour of the petitioner, an application for permission from the District Judge was sought for in Misc. Case no.142 of 1993 filed in the Court of District Judge, Lucknow wherein all the questions, including scope of Section 5-A of the Societies Registration Act was considered and the permission for transfer was granted by the District Judge vide an order dated 03.08.1995. He argues that the said order was challenged by the Lucknow Development Authority by filing a Writ Petition No.2719 of 1995 before this court, which too was dismissed by this court on 16.05.2005 and thus, the said order of the District Judge has attained finality. he argues that once there is a specific provision under the Act, the general provision as proposed to be relied upon by the respondents being the 'Act of 1974' looses significance.In any event even under the 1974 Act the final arbiter of disputes is the District Judge as specified under Section 5 of the 1974 Act. Thus, the objections mentioned in Clause 2 and 3 become irrelevant.

13. With regard to the objection mentioned at serial no.4 in the DIOS report and as extracted above, that a first information report has been registered against the secretary of the society, who was imprisoned and was later on enlarged

on bail, in response to the said, Sri Chandra argues that the correct fact is that an FIR was registered however it will have no affect on the decree passed by the District Judge.

14. He also argues that in terms of the requirement as framed by the CBSE and as extracted herein below being paragraph 2:3:5, the requirement of a no objection certificate from the State Government cannot give unbridled powers to the State Government, the said requirement has to be interpreted keeping in view the requirements of the site on which the School is proposed to be established, the likelihood of the school causing any nuisance and that the school being constructed in an area, which is prohibited under any law, the requirement of NOC cannot give unbridled powers to the State Government to dwell on the validity and legality and correctness of all steps of the society in the school.

15. He further argues that the Government Order issued by the State Government is silent on that subject, which is resulting in state authorities exercising powers and entering into spheres which are beyond their jurisdiction only on the basis of the Government Order.

16. He argues that the NOC required under the regulations should have some relevant nexus to the objects sought to be achieved in granting of affiliation and cannot be understood to give unbridled powers to the State Government to harass the applicants. He further argues that the Right to Education now being a fundamental right is to be promoted by the State Government at all levels and the manner in which the decision has been taken, militates against the constitutional duties imposed upon the State Government for providing the education to the citizens. He places reliance on the following judgments:

i. Chintpurni Medical College and Hospital and another vs. State of Punjab and others; (2018) 15 SCC 1.

ii. Mangilal vs. State of M.P. (2004) 2 SCC 447;

iii. Gangotri Enterprises Limited vs. Union of India and others (2016) 11 SCC 720.

iv. Rattan Lal Sharma vs. Managing Committee Dr. Hari Ram (Co-Education) Higher Secondary School and others (1993) 4 SCC 10

v. A. K. Kraipak and others vs. Union of India and others; 1969 (2) SCC 262

vi. State of U.P. vs. Vijay Kumar Tripathi and another; 1995 Supp (1) SCC 552.

17. The Standing Counsel on the other hand argues that the State was well within its jurisdiction to deny the permission as sought by the petitioner. He argues that the permission granted by the District Judge was not an unconditional permission and the DIOS has rightly gone into the those questions while giving the report against the grant of NOC.

18. The State Government on Courts directions had produced the instructions, however there was no record produced by the State Government to the effect that the land granted in favour of the petitioner has ever been cancelled or that they do not continue to be the owners of the land as claimed by them.

19. In view of the submissions made at the bar, this court is to consider as to what are the scope of the powers conferred

upon the State Government in pursuance to clause 2:3:5 of the CBSE Manual which prescribes for obtaining a no objection certificate from the State Government to the effect that the State Government has no objection to the *affiliation* of the school with the CBSE.

20. It is necessary to notice the requirements specified by CBSE for grant of affiliations to the schools desirous of seeking affiliation.The necessary requirements (for deciding the lis)are specified in paragraphs 2.3.4 and 2.3.5 which are quoted herein below.

*"**2.3.4 : Recognition from the respective State Government.***

The Schools seeking affiliation with the Board shall submit formal prior Recognition Certificate from concerned State Education Department as per extant rules and provisions contained in RTE Act 2009.

2.3.5 : No objection from the respective State Government.

*The schools mentioned under clauses 2.1.5, 2.1.6, 2.1.7 and 2.1.8 seeking affiliation with the Board shall **submit formal prior 'No Objection Certificate' to the effect that State Government has no objection to the affiliation of the School with CBSE**. No Objection Certificate once issued to any school will be considered at par even if it prescribes a specific period and/ or level unless it is withdrawn."*

21. While paragraph 2.3.4 prescribes recognition under Right of Children to Free and Compulsory Education ,Act 2009 and Rules framed there under,paragraph 2.3.5 deals with affiliation.

22. The difference between 'recognition' and 'affiliation' was explained by Supreme Court in THE PRINCIPAL AND OTHERS vs THE PRESIDING OFFICER AND OTHERS (1978) 1 SCC 498 wherein the Court recorded as under :

"There is a significant difference between 'affiliation' and 'recognition. Whereas 'affiliation', it may be noted, is meant to prepare and present the students for public examination, 'recognition' of a private school is for other purposes mentioned in the Act and it is only when the School is recognised by the " appropriate authority' that it becomes amenable to other provisions of the Act."

23. In pursuance to the said requirement prescribing obtaining of no objection for affiliation under paragraph 2.3.5, the State Government has issued an extensive Government Order prescribing the manner in which the applications seeking no objection certificate shall be dealt with. The Government Order dated 14.07.2009 records the requirement as issued by the CBSE and also with the ICSE Board and proceeded to constitute a committee comprising of four persons who were conferred with the power of inspection and were further to provide a report in terms of the said inspection for being granted the no objection certificate.

24. It is interesting to note that the CBSE has issued extensive guidelines specifying requirements by the institutions seeking affiliation with them. The specifications include the requirements of Area, requirements of fullfilling essential safety guidelines, informations regarding staff, etc one of the requirements of CBSE for grant of affiliation as contained in paragraph no.2:3:5 is, ***that the State Government has no objection to the affiliation of the school with the CBSE.*** In

the garb of the said requirement, the Government Order dated 14.07.2009 is framed specifying the requirements for grant of no objection certificate and in furtherance of the said guidelines has proceeded to pass the order impugned which has gone into the question of manner in which the property was acquired by the petitioner institute and the various stages of litigation. It further goes into the requirement which are prescribed for grant of affiliation by the CBSE in the Chapter III Rule 3.2 and Chapter II Rule 3.3 and Chapter II Rule 3.4.

25. From the perusal of the impugned order, it appears that the State Government took over the role of the CBSE to find whether the petitioner would be entitled for the affiliation or not. The said action of going into the title and the other requirements as prescribed by the CBSE were clearly beyond the requirement as specified in Clause 2:3:5 as well as in the Government Order dated 14.07.2009. The requirement as specified by CBSE is confined to a no objection only with regard to affiliation, thus the normal meaning that can be deciphered from interpretation of clause 2:3:5 is that the State Government has to grant a no objection certificate only to the effect that whether the State Government has any objection to the institutions being **'affiliated'** with the CBSE. No other requirement is to be fulfilled by the State Government while deciding application for grant of NOC for affiliation.The other requirements are to be judged by the CBSE while granting or refusing to grant affiliation. The Government Order dated 14.07.2009 clearly goes beyond the prescribed scope of the grant of no objection certificate by the State, it clearly infringes the right of the petitioner's institution to run an educational institution after getting affiliation from CBSE which itself is a society registered under the Societies Registration Act. The requirement of obtaining a no objection certificate of affiliation from the State Government cannot confer the right on the State Government to act like a bull in a china shop and to carry a roving enquiry/investigation into the manner of acquisition of title as has been done by means of the impugned order.

26. The scope of no objection certificate as is required in terms of clause 2:3:5 is only confined to the objection by the State with regard to the grant of affiliation with CBSE, as sought by the petitioner from the CBSE. It cannot go into any other question. It is inconceivable as to what the four member committee constituted in terms of the Government Order dated 14.07.2009 is to oversee while granting the no objection certificate for affiliation. It appears that the Government Order as perceived the no objection certificate by the State for affiliation as the power on the State Government to see whether the institution fulfills all the requirements as are prescribed by the CBSE for grant of affiliation. The said fact is also evident from the manner in which the applications have been invited and the disclosures with regard to title etc. have been demanded and have been supplied by the petitioner.

27. In view of the my specific view that the scope of powers for grant of no objection certificate for affiliation is only confined to the powers of the State for objecting only to the affiliation and nothing beyond that. It appears that the requirement as specified in Clause 2:3:5 was incorporated because a State, in exercise of its powers can take a ground to promote education only through its Regional Boards

and not otherwise and thus the no objection certificate as required under Clause 2:3:5 is confined to that issue alone.

28. The Supreme Court while dealing with some guidelines framed by the State of Kerala for granting NOC to the institutions applying for afffiliation with CBSE hads held in the case of State of Kerala vs Mythri Vidyabhavan English Medium School (2020) 20 SCC 669 held that the guidelines issued should have some relevant nexus with the object sought to be achieved.

29. In the present case, not only a roving enquiry has been made but the State has gone ahead in taking decisions which it could not had taken in the garb of requirement of grant of no objection certificate for affiliation. Thus, I have no hesitation in holding that the State Government has exceeded its mandate in rejecting the request for grant for no objection certificate for affiliation. I am not going into the question of validity of the Government Order as the same is not under challenge in the present writ petition. As there is no bar in affiliation of schools with Boards other than the U.P. Board in the State of Uttar Pradesh as various schools affiliated to both CBSE and ICSE Boards are imparting education in the State, there is no reason available with the State to deny the no objection certificate, which is required only for grant of affiliation and nothing more. All the other issues pertaining to the grant of affiliation as sought by the petitioner before the CBSE have to be dealt with by the CBSE in accordance with their rules which have been held to be pragmatic by the Supreme Court in case of State of Kerala (supra). Thus, the order dated 08.10.2021 is quashed with directions to the respondents to grant the no objection certificate for affiliation as sought by the petitioner within a period of two months from today.

30. The writ petition is allowed in terms of the said order.

(2022) 9 ILRA 538
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.09.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-C No. 2756 of 2022

Dr. Anand Kumar Singh & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Ram Kumar Srivastava, Alok Srivastava, Saima Khan

Counsel for the Respondents:
C.S.C., Kshitij Mishra

A. Education – Constitution of India – Article 14 – Right to equality – Admission for medical course – Denial of admission – Permissibility – Rights to put back back in original position, restitution thereof – Held, an admission in medical course is very important in the professional life of a candidate/student and payment of compensation to such candidate/ student would not be a just and equitable relief – A right to equal and fair treatment is imbibed as a component of Article 14 of the Constitution and any denial of fair treatment to the petitioner would not only violate his/her right under Article 14 of the Constitution but would also seriously jeopardize his/her right under Articles 19 & 21 of the Constitution – The petitioners can claim restitution of their rights and

must be put back in the original position. (Para 28 and 29)

B. Education – Admission for medical course – Cut-off dates – Violation – Effect – Two similarly situated candidates were allowed to join, how far relevant – Held, the cut-off dates are sacrosanct and the violation thereof cannot be compromised – Although, the petitioners claiming parity have been successful in demonstrating that they are entitled to be treated equally with candidates, however the hands of this court are tied and we would not depart from the settled view of academic schedule in order to add further anamolies – Further held, While our sympathies are with the petitioners and other similarly placed, we are unable to grant any relief to them or approve of the distinction pointed out; unfortunately, sympathies cannot supplant the Law – High Court granted liberty to the petitioners to pursue for compensation. (Para 32 and 33)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Civil Appeal No. 2739 of 2021; Dr Rohit Kumar vs Secretary Office of Lt. Governor of Delhi & ors. decided by Supreme Court on 15.7.2022

2. Priya Gupta Vs St. of Chattisgarh & ors.; (2012) 7 SCC 433

3. Asha Vs PT. B.D. Sharma University of Health Sciences & ors.; (2012) 7 SCC 389

4. Priya Darshni Dental College & Hospital Vs U.O.I.; (2011) 4 SCC 623

5. Royal Medical Trust & ors. Vs U.O.I. & ors.; AIR 2015 SC 3300

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

1. Heard learned counsel for the parties.

2. The stream of allopathic medical education in Bharat at the level of post graduate courses is broadly academic or experience oriented. Diplomate of National Board (DNB) at the post graduate level lays more emphasis on experience, therefore, the allocation of selected candidates is preferred in the hospitals and now in the medical colleges as well. The experience oriented course recognised as DNB PG Diploma course is treated at par with PG medical courses recognised by Medical Commission of India

3. Mid session admissions to the medical courses, whether graduate or post-graduate, are impermissible in view of the judgement cited before us reported in ***(2002) 7 SCC 258 (Medical Council of India vs. Madhu Singh and others).***

4. To buttress the submission put forth on behalf of the opposite parties, placing reliance upon the judgement rendered by the apex court in the case of **Dr Astha Goel and others vs. Medical Counselling Committee and others reported in 2022 SCC OnLine SC 734**, it was submitted that admission would not be permissible after the session has already begun.

5. The controversy before us, however, has fallen for consideration under peculiar circumstances. It is worthy to note that the petitioners, for the relief sought herein, have approached this Court promptly and without leaving any scope for the objection of delay.

6. The brief facts for appreciating the controversy may be set out as under.

7. The petitioners participated in NEET-2021-22 (PG) while being members of State Medical Services, U.P. All of them have qualified in NEET-21 (PG) whereafter they were to appear in counselling in order

to be allotted respective hospitals or State medical colleges. All the petitioners have opted for DNB PG Course, the allotment whereof was based on counselling to be held by U.P Medical Education department as per schedule.

8. In the counter affidavit placed on record, the scheduled date of counselling started from the month of January and ended on 28.4.2022. The first round of counselling was held in January, 2022; round two was held in February, 2022 and mop-up round was held on 28.4.2022 insofar as State quota seats of which the figure corresponds to 44 and 25 in the respective courses of DNB Diploma and Primary DNB respectively are concerned.

9. The petitioners who had duly participated in the mop-up round of counselling on 28.4.2022, despite having presented themselves for allotment of State medical colleges, were not allotted the same for want of a NOC being issued by the department of Medical Health. It is for this reason that the colleges were not allotted to the petitioners hence they could not report to the colleges for admission and deposit of fee to pursue their course.

10. Learned counsel for the petitioners has submitted that once the petitioners had duly qualified NEET-2021(PG) and had participated in the mop-up round of counselling held on 28.4.2022, there was no reason for the department of Medical Education and Training to have withheld the allotment of respective medical colleges merely on account of non-issuance of NOC by the department of Medical Health, U.P.

11. The allotment of colleges being within the sole prerogative of the department of Medical Education, who, according to the petitioners, was vested with such a power ought not to have kept the candidature of the petitioners hanged over on that account particularly when the other candidates similarly situated were allotted the courses based on the same selection result of NEET-21 (PG)..

12. The petitioners who were not communicated any reason except orally that the colleges cannot be allotted unless NOC is granted by the department of Medical Health, approached this Court at the earliest objecting to the discriminatory treatment which they were meted with. The petitioners have prayed for the relief as under:

"(i) issue a writ order or direction in the nature of mandamus commanding and directing the opposite parties to ignore and suspend the terms and conditions of G.O. dated 10.02.2022 of Para-3(2) for permitting 10 seats and petitioners be allotted DNB PG seats in the colleges for 26 vacant seats, as per G.O. dated 01.11.2021 for DNB (Post M.B.B.S. Diploma) by extending the date of allotment of seats.

(ii) issue a writ order or direction in the nature of mandamus commanding and directing the opposite party nos.2 and 3 to provide the "No Objection Certificate" to petitioners after allotting the seats for DNB (Post M.B.B.S Diploma) course, so that they may submit the same for Post M.B.B.S Diploma Course with immediate effects.

(iii) issue any other order or direction, which this Hon'ble Court may deem, fit, just and proper in the circumstances of the case may also passed in favour of the petitioners."

13. On the aspect of NOC, the department of Medical Health, U.P. had placed reliance upon a government order dated 10.2.2022 whereunder only ten

NOCs were permitted to be granted to the successful candidates for allotment of seats in the medical colleges but the government order having come to be challenged before this Court in Writ-C No. 1624 of 2022 vide judgement dated 4.4.2022, was held to be prospective and inapplicable to the NEET-2021 (PG) held much prior to the issuance of such government order. Likewise an order was also passed in favour of Dr Akansha Verma on 3.6.2022 in Writ-A No. 3395 of 2022 for grant of NOC which was acted upon vide letter dated 18फ/56/2016 dated 14.9.2022.

14. Learned counsel for the petitioners has submitted that the bar of ten seats as provided under the government order dated 10.2.2022 has also come to be lifted with the issuance of a subsequent government order dated 9.9.2022 in view of the orders passed by this Court.

15. It is rather an admitted position before us at this stage that the Director General of Medical Health, U.P. has already granted permission for NOCs vide letter dated 3फ/261/2015 in favour of the petitioners on 16.9.2022, therefore, the grievance that survives is as regards the allotment of the petitioners to the respective colleges against DNB-PG Diploma course for which the options exercised by the petitioners have to be acted upon like other similarly situated candidates.

16. This Court had granted time to the Director General, Medical Education and Training, U.P. to come up with a solution to the legitimate grievance of the petitioners but despite our order passed on 19.9.2022, the Director General failed to appear before this Court to assist in the matter and instead the Joint Director, namely, Dr V. B Singh. was deputed to attend the proceedings and assist the Court in the matter. This may be on account of some personal difficulty that should not sway away the Court proceedings. The officer present has taken us through the record.

17. Learned counsel appearing for the Director General, Medical Education vehemently argued that since the academic session has already begun, therefore, the petitioners cannot be accommodated against the vacant seats and there is no mechanism of redressal that can be invoked at this belated stage.

18. We have carefully gone through the material placed on record. In the first round of counselling held in the month of January, 2022, the start of session was mentioned to be w.e.f. 1.2.2022. Admittedly the second round of counselling proceeded thereafter in February/March and the candidates were allowed to join the respective courses as per the allotment of hospitals/colleges made. Insofar as the seats belonging to State quota against DNB-PG Diploma courses are concerned, the last round of counselling i.e. mop-up round was held on 28.4.2022 and except two candidates, namely, Dr Akansha Verma and Dr Sanjay Singh, no other candidate was allotted a college.

19. Even the two candidates who were allotted the college could not join before 7.5.2022 which was fixed as deadline for admissions against State quota. Interestingly all the candidates who were allowed to participate in the mop-up round of counselling on 28.4.2022, their commencement of admission as per the own circular of Director General, Medical Education issued on 22.4.2022, was fixed as "on spot'.

20. This position is evident from the schedule circulated on 22.4.2022 filed alongwith the counter affidavit. It is according to this schedule that the petitioners had participated in the mop-up round of counselling on 28.4.2022 but due to non-issuance of NOC, they were not allotted the respective colleges of which the list was available with the department in the same circular dated 22.4.2022.

21. The list of respective colleges and hospitals against which the allotment was to be made were readily opted by the petitioners during counselling process, however, the allotment was not made for want of NOC by the department of Medical Health, which hurdle, does not exist any more with the issuance of government order dated 9.9.2022 placed before us.

22. Rule of equality is fundamental in a level playing field. Moreover, the rights of a candidate who succeeds on the basis of competition and merit cannot be subjected to discrimination. NEET-21 (PG) is the foundation of rights against available seats.

23. Ms Saima Khan, learned counsel for the petitioner in support of her argument put forth, has placed reliance on a judgement of the apex court rendered in the case of **Dr Rohit Kumar vs Secretary Office of Lt. Governor of Delhi and others** (Civil Appeal No. 2739 of 2021) decided on 15.7.2022. Learned counsel for the petitioners invited our attention to para-33 of the judgement which is reproduced below:

"33. The proposition of law which emerges from the judgments of this Court in S. Krishna Sradha (supra) and in National Medical Commission v. Mothukuru Sriyah Koumudi and Others (supra) is that in rare and exceptional cases, a meritorious candidate, who has suffered injustice by reason of his/her inability to secure admission in a medical course, whether under-graduate or post- graduate, due to no fault of his/her own, who has taken recourse to law promptly, without delay, might be granted relief of being accommodated in the same post in the next session."

24. It is not in dispute that two candidates Dr Akansha Verma and Dr Sanjay Singh who were allotted colleges in the mop-up round held on 28.4.2022 were granted NOCs in September, 2022 and have been allowed to join the medical college in the month of September, 2022 itself. The NOC in favour of Dr Akansha Verma was issued on 14.9.2022 vide letter no. 18फ/56/2016, whereas, NOC in favour of Dr Sanjay Singh was granted vide letter no. 2फ/706/2014 dated 9.9.2022.

25. The distinction drawn by the department of Medical Education, U.P. that they were allotted the College on 28.4.2022, whereas, the petitioners were not, is superfluous according to learned counsel for the petitioners. The distinction drawn by learned counsel for the department of medical education cannot be accepted for the reason that admission to a course is not dependent on the mere allotment but joining of a candidate on grant of NOC before the deadline. In the present case the "on spot' presence of the petitioners on 28.4.2022 in the mop-up round stood frustrated due to non-issuance of NOC. The NOCs have now been permitted to be issued on 19th of September, 2022, therefore, equal benefit of the NOCs is bound to be accorded to the petitioners at par with Dr Sanjay Singh and Dr Akansha, who on the basis of same

merit and participation, have joined the college after grant of NOCs on 9.9.2022 and 14.9.2022. Moreover, the present is not a case of mid-term admission or subsequent session; the petitioners belong to same very session whose admission schedule got delayed in 2021 due to covid-19.

26. Learned counsel for the petitioners has argued that it is rather a case of parity and there is no question of negative parity of which the benefit is claimed.

27. Learned counsel for the petitioners lastly submitted that there is an age bar for candidates to appear in the NEET-PG and one of the petitioners has now lost the opportunity having become overage, therefore, the benefit of merit cannot be denied to the candidates in absence of a fault attributable to them.

28. Having considered the entire gamut of facts & circumstances of the present case, this court holds that the case of the petitioners is similarly placed with the case of those two candidates, who have been allowed to join the course in the second half of September, 2022. Thus, this court cannot be oblivious of the fact that an admission in medical course is very important in the professional life of a candidate/student and payment of compensation to such candidate/student would not be a just and equitable relief. Further, a right to equal and fair treatment is imbibed as a component ofArticle 14of theConstitution and any denial of fair treatment to the petitioner would not only violate his/her right underArticle 14of the Constitution but would also seriously jeopardize his/her right under Articles 19 & 21 of the Constitution.

29. Since, no fault is attributable to the petitioners, as they have pursued their rights and legal remedies expeditiously and without any delay and there is obvious fault on the part of the authorities and apparent breach of the rules & regulations, this court is of the view that the petitioners can claim restitution of their rights and must be put back in the original position.

30. Although, in view of the celebrated judgment of the Hon'ble Supreme Court in ***Priya Gupta vs. State of Chattisgarh and Ors. reported in (2012) 7 SCC 433 and Asha vs.*** PT. B.D. Sharma University of Health Sciences and Others reported in (2012) 7 SCC 389 it has been held that in exceptional cases, the time schedule for admissions can be relaxed, however, this court is conscious of the fact that the last date for providing admission in the postgraduate course is declared as 07.05.2022 by the Central Government.

31. Since this court has noticed that two candidates pursuant to the issuance of NOC by the Directorate of Medical Health, U.P., have recently joined the PG course in the second half of September, 2022, this court, during the course of hearing, enquired from the parties as to how these two candidates were allowed to join even after the cut-off dates, the explanation whatsoever offered, in our opinion, is contrary to the dictum of the apex court. It has been argued at the Bar that as per the decisions of Hon'ble Supreme Court rendered in ***Priya Darshni Dental College and Hospital vs. Union of India*** reported in ***(2011) 4 SCC 623*** and in ***Royal Medical Trust and Ors. vs. Union of India (UOI) and Ors.*** reported in ***AIR 2015 SC 3300***, the Central Government is now statutorily empowered to modify the schedule for admissions in MBBS and postgraduate

courses and as such this Court is also very well within its jurisdiction to modify the schedule in the admissions to P.G. courses.

32. However, this court being of the considered view that the cut-off dates are sacrosanct and the violation thereof cannot be compromised, therefore, negative parity of any sort does not pursuade us to direct modification of the schedule in PG courses as it may adversely affect the PG admissions calendar and it is open for the authorities to take corrective steps as regards any concession that may have been granted contrary to law. The judgment cited by the learned Counsel of the petitioners has been passed by the Hon'ble Supreme Court in exercise of its plenary power under Article 142 of the constitution of India. Although, the petitioners claiming parity have been successful in demonstrating before this court that they are entitled to be treated equally with candidates, who have been granted NOC by the state Government on 09.09.2022 & 14.09.2022 and have since then joined the PG course as late as in the second week of September, 2022, however the hands of this court are tied and we would not depart from the settled view of academic schedule in order to add further anamolies.

33. It is tragic that the super-specialty seats in medical courses are being wasted due to the lack of empathy of the state machinery, especially when there is a dearth of trained specialist doctors in our country. While our sympathies are with the petitioners and other similarly placed, we are unable to grant any relief to them or approve of the distinction pointed out; unfortunately, sympathies cannot supplant the law.

34. We do, however, find that the petitioners were wronged and were unnecessarily compelled to approach this court. Since, there is no claim for compensation by the petitioners as they have sought for allotment of medical colleges to them, this court in the peculiar facts & circumstances grants liberty to the petitioners to pursue for compensation/damages against the erring respondents in a separate proceeding.

35. The writ petition is accordingly dismissed, with the liberty as aforesaid. In the peculiar facts of the case, the respondent state is additionally burdened with a cost of Rs. 25,000/- to be paid to each petitioner towards the litigation cost of the present writ petition.

36. Let a copy of this judgment be forwarded to the Director General, Medical Education and Training, U.P, for necessary compliance forthwith. Any apportionment of the financial liability between the two directorates shall be an internal matter of the State but the actual payment of cost to each petitioner shall be made by the Director General, Medical Education & Training, U.P., within a month from today.

(2022) 9 ILRA 544
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.09.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-C No. 6330 of 2022

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

Counsel for the Petitioner:
Mohd. Mansoor, Devendra Upadhyay

Counsel for the Respondents:
C.S.C., Rajendra Singh Chauhan

A. Constitution of India, 1950 - Article 226- Maintainability of –aggrieved party-cancellation of lease of building in favour of Samajwadi Party-No pleadings in writ petition regarding filing of petition on behalf of Samajwadi Party-Rather petition sought to be filed by petitioner in his individual capacity although lease deed stands in name of Samajwadi Party-Since petitioner not an aggrieved party, therefore, he has no locus to file present petition-Petition held not maintainable. (Para 2 to 14)

The petition is dismissed. (E-6)

List of Cases cited:

1. Jasbhai Motibhai Desai Vs Roshan Kumar, Hazi Bashir Ahmad & ors. (1976) AIR SC 578

2. M/s Northern Plastic Ltd. Vs Hindustan Photo film Mfg. Co. Ltd & ors. (1997) 4 SCC 452

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

1. Heard learned counsel for the petitioner, Sri Rajendra Singh Chauhan, learned counsel for respondent no.4 and learned Standing Counsel for the State.

2. An interesting question arises in the present writ petition, wherein the petitioner claiming himself to be a member and former district president of Samajwadi Party, Mainpuri has sought to interdict an order dated 08.09.2022 passed by the Additional Chief Secretary, Panchayati Raj, State of U.P. The reason for such challenge is cancellation of a 90 years lease of a building, leased to Zila Panchayat, Mainpuri situated at Devi Road to Samajwadi Party on 10.06.2004 for office purposes.

3. It is the case of the petitioner that the impugned order dated 08.09.2022 has the effect of canceling a lease of 90 years by the State Government without any notice or opportunity of hearing to Samajwadi Party or any of its office bearers, although it has been alleged that the district president of Samajwadi Party, District Mainpuri was informed about the said cancellation vide a letter dated 09.09.2022 by the Apar Mukhya Adhikari, Zila Panchayat, Mainpuri. The petitioner also claims that there had been no violation of the terms of the lease and as such there was no occasion for the respondents to cancel the lease.

4. At the preliminary stage, when the case was called for hearing on 13.09.2022, this Court expressed its doubt on the locus of the petitioner in pursuing the present writ petition, wherein the petitioner sought some time and as such this Court permitted the petitioner to file supplementary affidavit to explain valid authorization so as to maintain the present writ petition.

5. The petitioner vide a supplementary affidavit dated 15.09.2021 filed an authorization in his name, repeating yet again, that he has been duly authorized by the national secretary of Samajwadi Party, and in support of the said contention, he has filed an office memorandum dated 14.09.2022 on the letter-head of Samajwadi Party issued by the national secretary of Samajwadi Party. It is noted that the petitioner while filing the present writ petition had filed an authorization dated 11.09.2022, which was also signed by the same national secretary. There is neither any affidavit from the national secretary nor any documents filed on record, which could satisfy this Court relating to a valid authorization. The authorization dated 14.09.2022 merely mentions about the earlier authorization dated 11.09.2022 and nothing more.

6. Having heard counsel for both the parties, this Court has given its anxious thought to the present petition. However, since a challenge to the maintainability qua the locus of the petitioner to file present writ petition has been raised at the very preliminary stage, this Court finds it's bounded duty to first deal with the locus of the petitioner in preferring the present petition.

7. Admittedly, the impugned order is directed towards the cancellation of lease deed executed in favour of Samajwadi Party, which is a registered political party under Section 29A of the Representatives of Peoples Act, 1951. So it is Samajwadi Party as a "person", who ought to have been an aggrieved person. It is also an admitted position that Samajwadi Party is not the petitioner nor is a party before this Court. The present petition has not been filed by Samajwadi Party through its office bearers. The petition has sought to be filed by the petitioner claiming himself to be an aggrieved party, although the records reveal that it must be Samajwadi Party who should have been an aggrieved party. In any case, this Court cannot be oblivious of the fact that pursuant to the impugned order, the peaceful possession of two rooms of previous old district office of Samajwadi Party situated at Devi Road has been handed over by the Samajwadi Party to the Zila Panchayt, Mainpuri in presence of the magistrate appointed by the district administrator. Apparently, it does not seem to this Court that Samajwadi Party could be an aggrieved person as has been rightly submitted by the learned Additional Chief Standing Counsel. This Court does not wish to dwell into the realm of contentious reasons argued by the learned Additional Chief Standing Counsel that Samajwadi Party had not been using the said premises for the purpose which was leased to them and which has enabled them to cancel the said lease; or that Samajwadi Party had already constructed new building for its district office at Mainpuri and has already shifted and as such the old place of district office was no longer in use by them; or that there was no reason for filing the present writ petition as Samajwadi Party has peacefully handed over the leased premises to the Zila Panchayat Mainpuri.

8. The concept of "*locus standi'* is not alien to litigation as the basic concept under both the inquisitorial and adversarial system of litigation is that the person, who approaches the court of law must first plead as to how the said person is aggrieved or deprived of his or her legal rights. Thus, the concept of locus standi has been imported into the writ jurisdiction.

9. According to our opinion a "person aggrieved", means a person who is wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. "Person Aggrieved" means a person who is injured or he/she is adversely affected in a legal sense. It is a settled law that a person who suffers from legal injury only can challenge the act/action/order etc. by filing a writ petition. Writ petition under Article 226 of the Constitution of India is maintainable for enforcing a fundamental or legal right or when there is a complaint by the petitioner that there is a breach of a statutory duty on part of the authorities, therefore, there must be a justiciable right for the enforcement of which the writ jurisdiction can be resorted to. This Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the

Court that he has a legal right to insist on such performance. The existence of a said right is the condition precedent to invoke the writ jurisdiction. In "***Jasbhai Motibhai Desai Vs. Roshan Kumar, Hazi Bashir Ahmad and Others" ;[AIR (1976) SC 578***], the Apex Court has held that only a person who is aggrieved by an order, can maintain a writ petition. The expression "aggrieved person" has been explained by the Apex Court observing that such a person must show that he has a more particular or peculiar interest of his own beyond that of the general public in seeing that the law is properly administered. In the said case, a cinema hall owner had challenged the sanction of setting up of a rival cinema hall in the town contending that it would adversely affect monopolistic commercial interest, causing pecuniary harm and loss of business from competition. The Hon'ble Apex Court observed as under:-

".....Such harm or Loss is not wrongful in the eye of law, because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity. Judically, harm of this description is called "demnum sine injuria". The term injuria being here used in its true sense reason why law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large.

In the light of the above discussion, it is demonstratively clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully affect his title to something. He has not been subjected to a legal wrong. He has suffered no legal grievance. He 'has no legal peg for' a justiciable claim to hang on. Therefore he is not a 'person aggrieved' and has no locus standi to challenge the grant of the No-objection Certificate....." (Emphasis added)

10. In "***M/s Northern Plastic Limited Vs. Hindustan Photofilm manufacturing Company Limited and Others; [1997 (4) SCC 452]***," the Hon'ble Supreme Court again considered the meaning of "person aggrieved" and again "locus of a rival government undertaking" and held that a rival business man cannot maintain a writ petition on the ground that its business prospect would be adversely affected.

11. Now, therefore, the question arises as to whether the petitioner has a right to file a present writ petition? The petitioner claims to be a member and erstwhile district president of Samajwadi Party. There is no document on record to show his membership or that he was a former district president of Samajwadi Party. The only document relied upon by the petitioner is that the authorization dated 11.09.2022 and 14.09.2022, which according to the petitioner serves both the purposes of locus as well as the authority to file the present writ petition. According to this Court both the issues of locus and authorization are independent, however, in some cases they may overlap. In the present case, the petitioner has apparently failed to show and/or explain his membership as well as the authorization from Samajwadi Party. There is no pleading nor any document or any affidavit has been filed on record to show as to how and in what circumstances, the national secretary of Samajwadi Party has authorized or could authorize the petitioner

to file the present petition for and on behalf of the Samajwadi Party. Thus, the petitioner has no right to maintain the present writ petition under Article 226 of the Constitution of India for and on behalf of the Samajwadi Party. Even the judgments quoted by the petitioner in his written submission do not come to his rescue.

12. This Court is also conscious of the law that "ordinarily" a person who seeks to file a writ petition under Article 226 of the Constitution of India should be one who has a personal or individual right in the subject matter of the petition and a personal right need not be in respect of proprietary interest, as it can also relate to an interest of a trustee. It is thing to say that a person has an individual right to maintain a petition and its other thing to say that the petition has been filed for and on behalf of some other aggrieved persons. The present case is not a case filed by the petitioner in his individual capacity, but it has been filed for and on behalf of Samajwadi Party. This Court is of the view that there is no valid authorization in favour of the petitioner to prosecute this case for and on behalf of Samajwadi Party. There is no pleadings in the writ petition that the petition has been filed for and on behalf of Samajwadi Party, rather the petition is sought to be filed by the petitioner in his individual capacity, since lease deed stands in the name of Samajwadi Party. This Court finds rather absurd as to how the petitioner can be an aggrieved party or as to how his individual right has been adversely affected. Thus, the present writ petition fails. The petitioner under Article 226 of the Constitution of India at the instance of petitioner is, therefore, not maintainable.

13. Since, the petition is held to be not maintainable on behalf of the petitioner, this Court does not wish to express any opinion on the merits or otherwise of the present writ petition, least it would prejudice to the rights and contention of the parties.

14. Leaving all questions of fact and law open, the present writ petition is ***dismissed***.

(2022) 9 ILRA 548
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.09.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 25442 of 2020

Km. Shivani Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Surya Prakash Singh, Anupama Bhadauria, Nitish Shekhar

Counsel for the Respondents:
C.S.C., Gyanendra Kumar Srivastava, Kshitij Mishra

A. Civil Law - Petitioner appeared in NEET exam and secured for the course of MBBS-petitioner deposited a total sum of Rs. 13,30,000/- and allotted college-subsequently the petitioner was allotted a seat in Madhya Pradesh, which the petitioner found to be better option, as such she applied for refund of fees and security money deposited by the petitioner-the same has been refused stating that Clause 8 of the Government Order dated 12.06.2018 there is a bar from withdrawal or resignation, after the start of second round of counseling also Clause 9 and 10 provides for confiscating the security money and fees-It is settled provision of law that the executive instructions cannot partake 'law' under

Article 300-A-As such, confiscation of fees deposited by the student by the respondent no. 4 is without sanction of law and thus violates Article 300 A of Constitution of India-Even if the issuance of brochure and the application of the petitioner is accepted to be a contract, the retention of entire fees is clearly barred by Section 74 of the Contract Act as no loss has been shown to be caused to the respondent by way of resignation coupled with the fact that the seat of the State has not gone vacant, the DGME cannot even claim reasonable compensation-There appears to be no logic in confiscating the entire fees on the ground of Article 14 – The State cannot take a different stand for different years as is evident from the prescription for two different years of NEET Examination-Hence, Respondent no. 4 is directed to refund the entire amount of Rs. 13,30,000/- at the rate of 6% per annum-The Government Order dated 12.06.2018 is quashed.(Para 1 to 36)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Darul-Us-Slam Educational Trust & ors. Vs Medical Council of India & ors. WP No.267 of 2017

2. Bombay Dyeing & Manufacturing Co. Ltd. Vs St. of Bombay & ors. (1958) AIR SC 328

3. Bishambhar Dayal Chandra Mohan & ors. Vs St. of U.P. & ors. (1982) 1 SCC 39

4. Hindustan Times & ors. Vs St. of U.P. & anr. (2003) 1 SCC 591

5. Khem Chand Vs U.O.I. & ors. (1963) AIR SC 687

6. Fateh Chand Vs Balkishan Das (1963) AIR SC 1405

7. MTNL Vs TATA Communication Ltd. (2019) 5 SCC 341

8. Kailash Nath Associates Vs D.D.A (2015) 4 SCC 136

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Ms. Anupama Bhadauria, learned counsel for the petitioner, Mr. Sanjay Bhasin, assisted by Mr. Kshitiz Mishra, learned counsel appearing on behalf of respondent no.4, Mr. Piyush Kumar, learned Standing Counsel appearing on behalf of the State and Mr. Gyanendra Kumar Srivastava, learned counsel for the respondent no.3 and Mr. Amrendra Singh Yadav holding brief of Mr. Amit Jaiswal, learned counsel appearing on behalf of the respondent no.6/College.

2. The present petition has been filed seeking refund of the deposit of Rs.13,30,000/- along with interest paid by the petitioner to the respondent no.4 towards fees and security deposit.

3. The contention of learned counsel for the petitioner, in brief, is that the petitioner appeared in National Eligibility Entrance Test (NEET) of the year 2018 and secured the rank 333095 for the course of M.B.B.S. It is stated that after the first round of counseling the petitioner deposited Rs.2,00,000/- by means of a demand draft in favour of the opposite party no.4 on 22.06.2018 as security deposit. It is also stated that the petitioner was informed that she has been allotted respondent no.6/College for pursuing the M.B.B.S. Course for Academic Session 2018-19.

4. It is stated that after allocation of seat the petitioner was called upon by the respondent no.4 to deposit the fee, which was deposited by the petitioner amounting to Rs.11,30,000/- on 7.7.2018. Thus the petitioner deposited a total sum of Rs.13,30,000/- and was allotted the respondent no.6/College. It is claimed that

subsequently the petitioner was allotted a seat in Madhya Pradesh, which the petitioner found to be better option, as such she applied for refund of fees and security money deposited by the petitioner, which has been refused by means of order dated 6.1.2020 (Annexure No.1).

5. A perusal of the order impugned reveals that the same has been refused on the ground that the resignation of the petitioner has been accepted on the condition that in the event the applicant resigns after the second round of counseling the amount deposited by the student towards the fees as well as the security shall not be refunded. It is also stated therein that in Clause 8 of the Government Order dated 12.06.2018 there is a bar from withdrawal or resignation, after the start of second round of counseling. It was also recorded that in the brochure issued for the NEET, 2018 in Clause 9 and 10 there is a provision for confiscating the security money and the "fee' deposited by the students thus, on this ground the request of the applicant was rejected for refund of Rs.13,30,000/-.

6. Learned counsel for the petitioner argues that the provision of security and deposit were introduced subsequent to the judgment of the Hon'ble Supreme Court in the case of ***Darul-Us-Slam Educational Trust and ors. Vs. Medical Council of India and Ors; Writ Petition (s) (Civil) No.(s).267/2017*** she specifically makes a mention of paras 3, 4 and 6 of the said judgment which are quoted hereunder:

"3. As per the judgment of this Hon'ble Court in the case of Ashish Ranjan vs. Union of India & Ors. [(2016) 11 SCC 225], there shall be only two rounds of common counselling each conducted by the DGHS/State Government or authority designated by the State Government for All India Quota (including Deemed University) and State Quota seats respectively.

4. After the second round of counselling for All India Quota seats, the students who take admission in All India Quota seats should not be allowed/permitted to vacate the seats. This would ensure that very few seats are reverted to the State Quota and also All India Quota seats are filed by students from the all India merit list only. The students who take admission and secure admission in Deemed Universities pursuant to the second round of counselling conducted by the DGHS shall not be eligible to participate in any other counselling.

6. The students who secure admission in MBBS course pursuant to the Common Counselling conducted by the State Government, at the time of common counselling itself, should be made to deposit with the admission/cousnelling committee the Demand Draft towards the fees payable to the institution College/ University. The admission/counselling committee shall forthwith forward the Demand Draft to the respective Institution/Colleges/University. The necessity for including the above-mentioned requirement has arisen as it has been time and again noticed that when students report to the college after the counselling they are refused admission by the colleges on some pretext or the other and it is shown by the college as if the student never reported to the college for admission. If the Demand Draft is deposited by the admission/counselling committee then there would be no scope for colleges to refuse admission to any student."

7. Learned counsel for the petitioner argues that it appears that in pursuance to the said judgment the State Government issued a Government Order dated

12.06.2018 which provides for forfeiture of the "security only' and there is no provision in the said Government Order for forfeiture of the fee deposited by the students. With regard to the other grounds, she argues that the students being in a vulnerable position do not have any choice but to sign on the dotted lines and thus the acceptance of resignation with the condition that the security money and the fees would be forfeited is beyond the control of the petitioner.

8. Learned counsel for the petitioner further argues that the petitioner had tendered her resignation without accepting any condition, the acceptance of the said resignation with the condition was neither in the control of the petitioner nor justified and cannot bind the petitioner.

9. She further argues that the third basis being the provision as contained in brochure issued by the respondents is wholly arbitrary, illegal and has no nexus to the object sought to be achieved. She further argues that the Director General Medical Education/respondent no.4 is only authorized to oversee the counseling process and the amount retained by them is not only contrary to the government order, but the same are without any authority of law by the respondent no.4.

10. She argues that the petitioner has been deprived of her property without any authority of law and thus her rights guaranteed under Article 300-A of the Constitution of India have been violated. She further argues that in any event the provision for confiscating the fees as well as the entire security deposit is violative of Article 14 of the Constitution of India, insofar, as there is no rational nexus sought to be achieved and there is no criteria for either fixing the quantum of security deposit or its confiscation. She argues that the State which is expected to promote the education is acting as shylock in confiscating the fees and security money in a country like India which is very poor. She thus claims that the writ petition is liable to be allowed and the amount of fees and security money be directed to be refunded along with interest as claimed by the petitioner.

11. Mr. Sanjay Bhasin, learned counsel appearing for the respondent no.4 seeks to defend the confiscation of the security money as well as the fees. In support of his submission, he draws source of of confiscation power from the regulations framed by the Medical Council of India being the Graduate Medical Education Regulations, 1997 as amended up to May, 2018. He argues that in terms of the said Regulations, 5-A (4) provides as under:

"5A (4)-In order to prevent seat blocking in common couseling for admission to MBBS course and permissiblity to exercise fresh choice during counseling, forfeiture of fee shall be in accordance with the Matrix contained in "Appendix-F."

S. No.	Round	Free Exit	Exit with forfeiture of fees	Ineligible for further counseling	Amount of registration fee
1.	AIQ I/Deemed				

2.	AIQ II/Deemed		If not joined	If joined	Government Rs.10,000 (half for SC/ST/OBC Deemed-Rs.2,00,000
3.	State Quota I				
4.	State Quota II		If not joined	If joined	Government - Rs.10,000 (half for SC/ST/OBC) Private-Rs.1,00,000
5.	State Quota Mop-up			If joined	
6.	Deemed Mop-Up			If joined	

12. It is argued that the matrix as contained in Annexure No.F to the said Regulation, would be the source of power for retaining the amount of security deposit fees by the respondent no.4. He defends the Government Order dated 12.06.2018 by arguing that the same is in pursuance to the guidelines issued by the Supreme Court in the case of **Darul-Us-Slam Educational Trust** (supra). He thus argues that the retention of the money deposited by the petitioner does not violate the right of the petitioner under Article 300-A of the Constitution of India. He further argues that for the students who are selected to the government colleges, the security money to be deposited is Rs.30,000/-, whereas for the private medical colleges the security money to be deposited is Rs.2,00,000/-, which is reasonable and acts as deterrent to the students who flip their seats and thus deprive the meritorious students of their rights of participating in counseling.

13. He further argues that even in terms of the brochure/guidelines issued in pursuance to which the petitioner had applied, there was a clear stipulation that the security deposit shall be forfeited in respect of candidates who do not join after the first round of counseling or resign after joining and the said brochure/guidelines were in nature of an offer which was accepted by the student and thus there was a contract created in between the parties by which the petitioner is bound. Shri Bhasin places reliance on Section 74 of Indian Contract Act.

14. Learned Standing Counsel appearing on behalf of the State, on the other hand, argues and justifies the Government Order on the ground that the

same was inline of the prescriptions as contained in the judgment of Apex Court in the case of **Darul-Us-Slam Educational Trust (supra)** and thus prays that the writ petition is liable to be dismissed.

15. Learned counsel for the petitioner has placed the Government Order dated 29.10.2020 for the subsequent year NEET Examination, wherein the refund of fee deposited is prescribed and only 10 % of the total fees deposited is to be confiscated. She further says that in the case of private medical colleges even the security has to be refunded. She thus argues that the State Government has taken different stand for different years which is wholly arbitrary and illegal and is violative of Articles 14, 19 and 21 of the Constitution of India. She further argues that the retention of the money by the D.G.M.E. is unjust enrichment which is neither authorized nor favored by law. In reply to the argument of Shri Bhasing on the strength of Section 74 of the Contract Act she argues that unless damages are ascertained and established no amounts can be awarded.

16. In the light of the submissions made by parties' counsel at the bar, this court is to test the power of D.G.M.E. to confiscate the money deposited by the students who are pursuing the NEET Examination as well as the legality of the retention of the security deposited by the students.

17. To test the first argument raised by learned counsel for the petitioner and tried to be repelled by learned counsel for the respondents, as to whether the D.G.M.E. can confiscate the security deposit in pursuance to the Government Order dated 12.06.2018. To test the said argument as being violative of Article 300-A as inserted in the Constitution.It is clear Article 300-A of Constitution of India provides that no person shall be deprived of his property save by authority of law.

18. The money deposited by the petitioner as a security deposit would be a property as held by the Hon'ble Supreme Court in the case of **Bombay Dyeing & Manufacturing Co. Ltd. Vs. State of Bombay and others; AIR 1958 SC 328** to the effect that the money would also amount to property and thus to deprive a person of property, there has to be an authority of law.

19. The word "law' as used in the context of Article 300-A of the Constitution has to mean the law framed by legislature and not the executive directions as given under Article 162 of the Constitution. This view is fortified by the decision of Hon'ble Apex Court in the case of **Bishambhar Dayal Chandra Mohan and others Vs. State of U.P. and others; (1982) 1 SCC 39,** wherein the Hon'ble Supreme Court in para 41 has observed as under:

"There still remains the question whether the seizure of wheat amounts to deprivation of property without the authority of law. Article 300-A provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Article 300-A The word 'law' in the context of Article 300-A must mean an Act of

Parliament or of a State Legislature, a rule, or a statutory order; having the force of law, that is positive or State made law. The decisions in Wazir Chand v. State of Himachal Pradesh and Bishan Das and others v. The State of Punjab and others are an authority for the proposition that an illegal seizure amounts to deprivation of property without the authority of law. In Wazir Chand's case (supra), the police in India seized goods in possession of the petitioner in India at the instance of the police of the State of Jammu and Kashmir. The seizure was admittedly not under the authority of law, inasmuch as it was not under the orders of any Magistrate; nor was it under Sections 51, 96, 98 and 165 of the Code of Criminal Procedure, 1898, since no report of any offence committed by the petitioner was made to the police in India, and the Indian police were not authorised to make any investigation. In those circumstances, the Court held that the seizure was not with the authority of law and amounted to an infringement of the fundamental right under Article 31 (1). This view was reaffirmed in Bishan Das's case (supra)."

20. Relying on the said judgment the Hon'ble Supreme Court in the case of ***Hindustan Times and others Vs. State of U.P. and another; (2003) 1 SCC 591*** has reaffirmed the same. The relevant paragraphs nos.23, 24 and 25 are as under:

"23. The expression 'law', within the meaning Article 300-A, would mean a Parliamentary Act or an Act of the State Legislature or a statutory order having the force of law.

24. In Bishambhar Dayal Chandra Mohan & Ors. etc. v. State of Uttar Pradesh & Ors. etc. [(1982) 1 SCC 39], this Court held as under :-

"41. There still remains the question whether the seizure of wheat amounts to deprivation of property without the authority of law. Article 300-A provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Article 300-A. The word "law" in the context of Article 300-A must mean an Act of Parliament or of a State legislature, a rule, or a statutory order, having the force of law, that is positive or State- made law."

25. It is not the contention of the respondents that any service is rendered to the petitioners herein. It is also not the contention of the respondents that the petitioners are bound to pay the amount in question by reason of their statutory obligation to pay retiral benefits to the working journalists. It is also not the case of the respondents that the petitioners herein have not been discharging their statutory obligations in the matter of payment of retiral benefits to the working journalists working in their own establishment in terms of the provision of the Central Acts as well as in terms of the Bachawat Award."

21. Further, the Hon'ble Supreme Court in the case of ***Khem Chand Vs. Union of India and others; AIR 1963 SC 687*** has held as follows:

"Equally untenable is the appellant's next contention that the impugned rule contravenes the provisions of Article 19 (1)

(f) of the Constitution. The argument is that as a result of this Court's decree the appellant had a right to his arrears of pay and allowances. This right constituted his property; and as the effect of the impugned Rule is that he would not, for some time at least, get those arrears it restricts his right. It may be conceded that the right to arrears of pay and allowances constituted property within the meaning of Article 19 (1) (f) of the Constitution and further, that the effect of r. 12(4) is a substantial restriction of his right in respect of that property under Article 19 (1) (f). The question remains whether this restriction is a reasonable restriction in the interests of the general public. No body can seriously doubt the importance and necessity of proper disciplinary action being taken against government servants for inefficiency, dishonesty or other suitable reasons. Such action is certainly against the immediate interests of the Government servant concerned; but is absolutely necessary in the interests. of the general public for serving whose interests the government machinery exists and functions. Suspension of a government servant pending an enquiry is a necessary part of the procedure for taking disciplinary action against him. It follows, therefore, that when the penalty of dismissal has been set aside but the disciplinary authority decides to hold a further enquiry on the same facts against him a fresh order of suspension till the enquiry can be completed, in accordance with law, is a reasonable step of the, procedure. We have no hesitation in holding, therefore, that in so far as r.12(4) restricts the appellant's right under Article 19 (1) (f) of the Constitution, it is a reasonable restriction in the interests of the general public. Rule 12(4) is therefore within the saving provisions of Article 19 (1) (f), so that there is no contravention of the constitutional provisions."

22. In view of the settled proposition of law that the executive instructions cannot partake 'law' as referred to under Article 300-A, I have no hesitation in holding that the petitioner could not be deprived of refund of security deposit only on the basis of provisions made in the Government Order as relied upon by Mr. Bhasin to justify the confiscation of security deposit.

23. Now coming to the issue as to whether the fees could be confiscated. Fees is also a property at the hand of a student and to deprive the same, there is a need for sanction by law as framed by the legislature. There being no law as framed, clearly the confiscation of the fees deposited by the student by the respondent no.4 is without sanction of law and thus violates Article 300 A of Constitution of India.

24. Submission of Mr. Bhasin that there is a provision of confiscation of fees as provided in the Regulation of 1997 and the Appendix-F referred therein and quoted hereinabove, I do not see any prescription prescribed under Appendix-F permitting the confiscation of fees and to that extent the argument of Mr. Bhasin is repelled.

Whether the Fee and security deposit can be confiscated under Section 74 of Contract Act

25. The issue with regard to refund of fees is also to be tested on the anvil of the arguments of Mr. Bhasin raised on account of the conditions specified in the brochure. Even if the brochure is treated as an offer, the application of student in pursuance to the brochure be treated as an acceptance and for the purposes of arguments, the same is treated to be in the nature of

contract, the retention of fees and security would be hit by Section 74 of the Contract Act. Section 74 of the Contract Act is quoted herein under:

*"**74. Compensation for breach of contract where penalty stipulated for:-** 34 [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*

Explanation.-- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

(Exception) -- When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the 35 [Central Government] or of any 36 [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein. Explanation.-- A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested. Illustrations

(a) A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practices as a surgeon within Calcutta, he will pay B Rs. 5,000. A practices as a surgeon in Calcutta. B is entitled to such compensation; not exceeding Rs. 5,000 as the court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

37 [(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable consideration in case of breach.

(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that, in default, of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.]"

26. The stipulation of confiscation of fees can clearly be qualified as penalty under Section 74 as quoted hereinabove.

27. **Scope of** Section 74 of the Indian Contract Act was considered and explained by the Hon'ble Supreme Court in the case of **Fateh Chand v. Balkishan Dass - AIR 1963 SC 1405** wherein the Hon'ble Supreme Court has held as under:

*"**10.** Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.*

*11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether Section 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. **There is however, no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the, aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered.** Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. **In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding***

the amount specified in the contract as liable to forfeiture. *We may briefly refer to certain illustrative cases decided by the High Courts in India which have expressed a different view."*

28. The scope of Section 74 came up for consideration before the Hon'ble Supreme Court yet again in the case of ***MTNL V. TATA Communication Ltd.; (2019) 5 SCC 341*** wherein the Hon'ble Supreme Court placing reliance on the earlier judgment of the Hon'ble Supreme Court in the case of ***Kailash Nath Associates v. D.D.A.; (2015) 4 SCC 136*** approved the position of law as clarified by the Hon'ble Supreme Court in the case of Kailash Nath Associates (supra) in the following para:

"11. In Kailash Nath Associates v. DDA [Kailash Nath Associates v. DDA, (2015) 4 SCC 136 : (2015) 2 SCC (Civ) 502], after considering the case law on Section 74, this Court held: (SCC p. 162, para 43)

"43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded."

29. Thus, even if the issuance of brochure and the application of the petitioner is accepted to be a contract, the retention of entire fees is clearly barred by Section 74 the stand taken by the respondent cannot be accepted and the respondents can at best can claim reasonable compensation for the loss suffered on account of breach of contract. As no loss has been shown to be caused to the respondent by way of resignation coupled with the fact that the seat of the State has not gone vacant, the DGME cannot even claim reasonable compensation and thus to that extent I have

no hesitation in holding that the confiscation of fees by the respondent no.4 cannot be justified by virtue of Section 74 of The Contract Act as argued by Shri Bhasin.

30. There is another aspect to be considered in the matter that the Government Order dated 12.06.2018 also stipulates a candidate to submit the registration fees of Rs.2,000/- for two rounds of counseling and Rs.1,000/- for mop up round of counseling which as prescribed is non-refundable which is just and reasonable expenditure incurred by DGME for counselling. In addition to the registration fees, the students were directed to deposit the security money and the fees.

31. To test the argument further in the light of the prescriptions of the Hon'ble Supreme Court in the case of **Darul-Us-Slam Educational Trust (supra)** was of the view that flows from paragraph no 6 that the students should be compelled to deposit the demand draft towards the fees payable to the institution/ college/ university which is to be transmitted forthwith to the respective institution/ college/ university. The Hon'ble Supreme Court itself has explained in the same very paragraph that the purpose of directing the students to deposit the demand draft is to ensure that there would be no scope for the colleges to refuse admission to any student. The judgment of Hon'ble Supreme Court never prescribed for confiscation that too without any authority of law and thus the submission of Mr. Bhasin is liable to be rejected on that count also.

32. There is further anomaly in the stand taken by the respondents inasmuch as for the subsequent years, it prescribes lesser amounts to be confiscated for security as well as fees. The State cannot take a different stand for different years as is evident from the prescription for two different years of NEET Examination. The stand of the respondent no.4 as the State, do not appear to achieve any objective for which the deposits are made. Irrespective of the intent to provide for a deterrent, the same can be prescribed only in accordance with law as prescribed under Article 300-A of the Constitution of India and as laid down by the Hon'ble Supreme Court in the judgments referred above.

33. Even testing the said arguments on the ground of Article 14 there appears to be no logic in confiscating the entire fees by the respondent no.4 and not even transmitting the same to the institution/university where the admission is granted, is a clear case of retention of money by the State without any authority of law which is clear violation of the rights of the students enshrined under Article 300-A of the Constitution of India. This observation is being made in view of the statement by the institution concerned that no seats were left vacant subsequently in respect of the seat for which the petitioner had tendered her resignation.

34. In view of the findings as recorded above, irresistible conclusion is that the writ petition is bound to be allowed.

35. The writ petition is accordingly **allowed**. The respondent no.4 is directed to refund the entire amount of Rs.13,30,000/- deposited by the petitioner along with interest payable at the rate of 6 % per annum from the date of application for refund till actual payment/realization. The amount of 6 % interest is what is prescribed under the Interest Act as there is no

contract to the contrary in between the parties.

36. Once I have held that the provision for confiscation of security is in clear violation of Article 300-A of the Constitution of India, Clause 6 of the Government Order dated 12.06.2018 is quashed insofar as it prescribes the confiscation of security money. The challenge to Clause 8 in the Government Order dated 12.06.2018 is rejected inasmuch as the same does not violate any rights of the petitioner and is not prohibited under any law. The money as directed shall be paid to the petitioner within two months from today.

37. No order as to the costs.

(2022) 9 ILRA 560
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.09.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 29553 of 2018

C/M Dr. R.P. Memorial Degree College & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Tej Narayan, Girijesh Kumar Dwivedi

Counsel for the Respondents:
C.S.C., O.P.M. Tripathi

A. Educational institution – National Council for Teachers Education Act, 1993 – Sections 14 & 15 – National Council for Teacher Education (Recognition Norms and Procedure) Regulations 2014 – Reg. 8(4) – Recognition for D.El.Ed. course – Minimum requirement of land – Prescription of lease from Government – Permissibility – Rational nexus of the prescription with the object of Act, how far relevant – Held, prescriptions of having the land as prescribed in Regulation 8(4) served a valid purpose, however the prescription of having a land on Government' lease or on a lease from 'Government institutions', appears to be arbitrary. (Para 13)

B. National Council for Teachers Education Act, 1993 – Object – Regulatory mechanism inconsistent to the object of the Act, how far permissible – Held, the Council is bound under the statute to promote the systematic education amongst the teachers and thus is duty bound to act in furtherance of the object sought to be achieved. The regulatory mechanism and the powers conferred on the Council, in terms of the Section 32(1) and in terms of the Regulations as framed, clearly cannot be inconsistent with the objects sought to be achieved. (Para 13)

C. Interpretation of statute – Delegated legislation – Scope of Rules making power – Duty of the Court – J. K. Industries Limited's case relied upon – Where the validity of subordinate legislation is challenged, the question to be asked is whether the power given to the rule making authority is exercised for the purpose for which it is given. Before reaching the conclusion that the Rule is intra vires, the court has to examine the nature, object and the scheme of the legislation as a whole – High Court held, order impugned denying the benefit of recognition solely based upon the petitioner not having a registered Government lease in his favour cannot be justified. (Para (14 and 15)

Writ petition disposed off. (E-1)

List of Cases cited:-

1. J. K. Industries Ltd. Vs U.O.I.; (2007) 13 SCC 673

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard the counsel for the petitioner and Sri O.P.M. Tripathi, the counsel for the respondents.

2. The present petition has been filed challenging the order dated 15.02.2018 whereby the request of the petitioner for granting recognition of conducting D.El.Ed. Course was rejected solely on the ground that the petitioner does not have the land as prescribed in the Regulations of 2014 as well as the appellate order whereby the appeal preferred has been dismissed on 13.8.2018.

3. The facts in brief are that the petitioner is a society which has established an educational institution to the girls student in the name and style of Dr. Rajendra Prasad Memorial College, Rajajipuram, Lucknow and is approved for imparting B.A., B.Sc., B.Com., and B.Ed. Degree Courses. It is stated that on 31.10.2009, the petitioner's college has applied for grant of recognition before the National Council for Teachers Education (N.C.T.E.), the respondent no.3, for imparting D.El. Ed. Course in the prescribed format in terms of the mandate of Section 14 and 15 of the NCTE Act, 1993. On the said application, the respondent no.3 found the same to be short of requirements and the same did not find favour with the respondent authorities, thereafter an appeal preferred by the petitioner was also rejected on 27.09.2010. The petitioner challenged the said two orders by filing a writ petition no.6995 (MS) of 2012, which was allowed and the matter was remanded vide judgment dated 18.07.2013 (Annexure no.5).

4. It is stated that subsequent to the remand, the respondents considered the application of the petitioner and granted recognition for running the D.El. Ed. Course for the academic session 2016-17, the petitioner claims that the petitioner also got the sanction for affiliation from the State Government. It is stated that all of a sudden vide order dated 15.02.2018, the petitioner was informed that the application for recognition has been rejected in exercise of the powers under section 14/15(3)(b) of the NCTE Act 1993 read with the regulations framed thereunder. The petitioner preferred an appeal against the said order, which too has been dismissed. Both the said orders are under challenge.

5. The contention of the counsel for the petitioner is that the sole reason disclosed in the order rejecting recognition is that the petitioner do not have the lease land as required in terms of the regulations.

6. The counsel for the respondent justify the order of cancellation on the requirement as is prescribed under section 8(4) of the Regulations 2014 and argues that the petitioner does not have the lease land given by the Government and thus, his case was rightly rejected.

7. The counsel for the petitioner has annexed a copy of the registered lease deed executed in his favour for a period of ninety years w.e.f. 06.01.1998. The said lease deed, on its perusal reveals that there is no forfeiture clause contained in the covenant.

8. To appreciate the controversy at hand, it is essential to look into the mandatory provision of the NCTE Act, which itself was framed for establishing and promoting Teacher Education System in the whole of the country, recognizing the need for teachers and the manner in which

the said object can be achieved. Section 3 of the Act provides for Establishment of the Council comprising of the members specified therein and Chapter III of the said Act provides for the functions of the Council. Section 14 and 15 of the NCTE Act, which are relevant for the present case are quoted herein below :

Section 14. Recognition of Institutions Offering Course or Training in Teacher Education.?*(1) Every institution offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations:*

Provided that an institution offering a course or training in teacher education immediately before the appointed day, shall be entitled to continue such course or training for a period of six months, if it has made an application for recognition within the said period and until the disposal of the application by the Regional Committee.

(2) The fee to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application by the Regional Committee from any institution under sub-section (1), and after obtaining from the institution concerned such other particulars as it may consider necessary, it shall?

(a) if it is satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper functioning of the institution for a course or training in teacher education, as may be determined by regulations, pass an order granting recognition to such institution, subject to such conditions as may be determined by regulations; or

(b) if it is of the opinion that such institution does not fulfill the requirements laid down in sub-clause (a), pass an order refusing recognition to such institution for reasons to be recorded in writing:

Provided that before passing an order under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the concerned institution for making a written representation.

(4) Every order granting or refusing recognition to an institution for a course or training in teacher education under sub-section (3) shall be published in the Official Gazette and communicated in writing for appropriate action to such institution and to the concerned examining body, the local authority or the State Government and the Central Government.

(5) Every institution, in respect of which recognition has been refused shall discontinue the course or training in teacher education from the end of the academic session next following the date of receipt of the order refusing recognition passed under clause (b) of sub-section (3).

(6) Every examining body shall, on receipt of the order under sub-section (4)?

(a) grant affiliation to the institution, where recognition has been granted; or

(b) cancel the affiliation of the institution, where recognition has been refused

Section 15: Permission for a new course or training by recognised institution.?(1) Where any recognized institution intends to start any new course or training in teacher education, it may make an application to seek permission therefor to the Regional Committee concerned in such form and in such manner as may be determined by regulations.

(2) The fees to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application from an institution under sub-section (1), and after obtaining from the recognized institution such other particulars as may be considered necessary, the Regional Committee shall?

(a) if it is satisfied that such recognized institution has adequate financial resources, accommodation, library, qualified staff, laboratory, and that it fulfills such other conditions required for proper conduct of the new course or training in teacher education, as may be determined by regulations, pass an order granting permission, subject to such conditions as may be determined by regulations; or

(b) if it is of the opinion that such institution does not fulfill the requirements laid down in sub-clause (a), pass an order refusing permission to such institution for reasons to be recorded in writing:

Provided that before passing an order refusing permission under sub-class (b), the Regional Committee shall provide a reasonable opportunity to the institution concerned for making a written representation.

(4) Every order granting or refusing permission to a recognized institution for a new course or training in teacher education under sub-section (3), shall be published in the Official Gazette and communicated in writing for appropriate action to such recognized institution and to the concerned examining body, the local authority, the State Government and the Central Government."

On a plain reading, the intent of scope of section 14 and 15 is to ensure that the institutions seeking recognition has adequate financial resources, accommodation, library, qualified staff, laboratory and other conditions which are required to promote the object for which the Act was framed.

Section 32 of the said Act confers the power upon the council to make regulations not in consistent with the provisions of this Act and the Rules made thereunder and to generally carryout the provisions of this Act. In terms of the power conferred upon the Council, the Council has framed the regulations known as The National Council for Teacher Education (Recognition Norms and Procedure) Regulations 2014 as notified on 28.11.2014. Rule 8(4) of the said Regulations with which we are concerned is quoted herein below:

"8. Conditions for grant of recognition. (1) .....

2. .....

3. .....

(4) (i) No institution shall be granted recognition under these regulations unless the institution or society sponsoring the institution is in possession of required land on the date of application. The land free from all encumbrances could be either on ownership basis or on lease from Government or Government institutions for a period of not less than thirty years. In cases where under relevant State or Union territory laws the maximum permissible lease period is less than thirty years, the State Government or Union territory administration law shall prevail and in any case no building shall be taken on lease for running any teacher training programme.

(*ii) The society sponsoring the institution shall have to ensure that proposed teacher education institution has a well demarcated land area as specified by the norms.*

(iii) The society sponsoring the institution shall be required to transfer and vest the title of the land and building in the name of the institution within a period of six months from the date of issue of formal recognition order under sub-regulation (16) of regulation 7. However, in case, the society fails to do so due to local laws or rules or bye-laws, it shall intimate in writing with documentary evidence of its inability to do so. The Regional Office shall keep this information on record and place it before the Regional Committee for its approval."

11. The order apparently has been passed in exercise of the said powers. The counsel for the petitioner argues that Regulation 8 (4), lays down conditions which have no relevant nexus sought to be achieved under section 14 and 15 of the NCTE Act. He argues that the intent of the law is to ensure that the institutions granting recognition has adequate resources in terms of financial and requirement of accommodation. He argues that the condition that the lease should be from a 'Government' or 'Government institutions' has no relevant nexus sought to be achieved in terms of the mandate of Section 14 and 15 of the Act. He also argues that even under section 32 of the Act, the Council is empowered to make regulations which are not inconsistent with the statutory provisions and should act in furtherance of the objects sought to be achieved, whereas the condition of a lease from Government or Government institution, restricts the scope of objects sought to be achieved under section 14 and 15 of the Act.

12. Sri O.P.M. Tripathi the counsel for the respondent reiterates that prior to the passing of the order, an opportunity was given on 25.05.2017, however as the present case is being decided based upon the scope of the Regulations and has no relevance to the opportunity granted or not, this Court is not going to the question of grant of opportunity to the petitioner as argued by him.

13. The intent of the scope of Section 14 and 15 of the Act is clearly discernible in the language used in section 14 and 15 of the Act. The Act aims to promote systematic education for teachers training and thus seeks to achieve a socio beneficial effect on the society. The Council is bound under the statute to promote the systematic education amongst the teachers and thus is duty bound to act in furtherance of the object sought to be achieved. The regulatory mechanism and the powers conferred on the Council, in terms of the Section 32(1) and in terms of the Regulations as framed, clearly cannot be inconsistent with the objects sought to be achieved. The prescription of lease from 'Government' or 'Government institutions' alone clearly does not seem to achieve the objects sought to be promoted under the Act. There is no rational nexus as to how a 'Government' lease for thirty years suits the cause better than a registered lease for a period of ninety years (as is the case in the present writ). Although there is no challenge to the vires of Regulation 8(4), this court is of the view that the prescriptions of having the land as prescribed in Regulation 8(4) served a valid purpose, however the prescription of having a land on 'Government' lease or on a lease from 'Government institutions', appears to be arbitrary and to save it from it being declared ultra vires, the same has to be read down to hold that the registered lease for more than thirty years which is validly recognized lease under the Transfer of Property Act has to be held to be an

adequate compliance of the requirements as prescribed under the Regulation 8(4)(i) of the Regulations 2014.

14. The Supreme Court in the case of ***J. K. Industries Limited vs. Union of India; (2007) 13 SCC 673***, while interpreting the scope of Rules made in exercise of the delegated legislation recorded as under :

"Apart from the grounds referred to by this Court in the above judgment in the case of Indian Express Newspaper, it is important to bear in mind that where the validity of subordinate legislation is challenged, the question to be asked is whether the power given to the rule making authority (in the present case the Central Government under section 642 (1) of the Companies Act) is exercised for the purpose for which it is given. Before reaching the conclusion that the Rule is intra vires (we have to begin with the presumption that the Rule is intra vires), the court has to examine the nature, object and the scheme of the legislation as a whole and in that context, the court has to consider what is the Area over which powers are given by the section under which the Rule Making Authority is to act. However, the court has to start with the presumption that the impugned Rule is intra vires. This approach means that, the Rule has to be read down only to save it from being declared ultra vires if the court finds in a given case that the above presumption stands rebutted."

15. In the present case, as the petitioner has a registered lease in his favour and is running a B.Ed. course in the same institution and same premises for which recognition has been granted by NCTE under same regulation, the order impugned denying the benefit of recognition solely based upon the petitioner not having a registered Government lease in his favour cannot be justified, as such, the impugned orders dated 15.02.2018 and 13.08.2018 are set aside. The respondents are directed to process the application of the petitioner treating the registered lease deed in his favour to be a valid document as required under Regulation 8(4)(1) of the NCTE Regulations, 2014. The said decision shall be taken in accordance with law within a period of three months. The said direction shall be subject to the petitioner fulfilling all the requirements of deposit of requisite fee etc. that may be required to be paid.

16. The writ petition stands ***disposed off*** with the said observations.

(2022) 9 ILRA 565
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.09.2022

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-C No. 1005661 of 2008

C/m Raj Dutta Shukla Purva Madhyamik ...Petitioner

Versus

State of U.P. ...Respondent

Counsel for the Petitioner:
Sanjay Misra, Girish Chandra Verma

Counsel for the Respondents:
C.S.C., Deepak Srivastava

A. Educational institution – Grant–in–aid list – Enlisting – GO dated 07.09.2006 – Principle of natural justice – Non-supply of report – No opportunity of hearing to rebut it – Effect – Reliance on a report which was obtained subsequent to the

date of hearing, how far permissible – High Court found the impugned order rejecting claim of enlisting the institution in grant–in–aid list in violation of the principles of natural justice as it places reliance on a report dated 10.06.2008, which was obtained subsequent to the date of hearing which happened on 31.12.2007 without giving the said report to the petitioner or permitting him to rebut the same – Order impugned could not have been passed which has occasioned in violation of the principles of natural justice. (Para 25)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Writ C No. 66100 of 2006; C/M Adarsh Janta Junior High School Vs St. of U.P. & ors.

2. Committee of Management Vs St. of U.P. & ors.; (1994) 2 UPLBED 1127

3. Writ C No. 4735 of 2017; C/M Ram Daun Ram Raj Pre-Secondary School & anr. decided on 27.02.2019

4. Writ-C No.24767 of 2018; C/M Sri Satya Narain Junior High School & ors. Vs St. of U.P. & ors. decided on 16.11.2021

5. Writ C No. 1000923 of 2011; C/M Chandra Shekhar Azad Junior High School Lucknow Vs St. of U.P. & ors. decided on 15.07.2022

6. Writ C No.66100 of 2006; C/M Adarsh Janta Junior High School Vs St. of U.P. & ors. decided on 13.02.2013

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri G.C. Verma, learned counsel for the petitioner and Sri Pankaj Kumar Shukla, learned Additional Chief Standing Counsel (A.C.S.C.) for respondent - State.

2. This writ petition has been filed seeking a direction in the nature of certiorari quashing the impugned order dated 16.06.2008 issued by respondent No.1, whereby the representation filed by the petitioner - Committee of Management has been rejected.

3. Brief fact of the case is that the institution in question, namely, Raj Dutta Shukla Purva Madhyamik Vidyalaya Sarauli, Amaniganj, Faizabad was granted recognition in the year 1982 and posts of teaching and non-teaching staff were sanctioned by the competent authority and were filled up in accordance with law and in pursuance thereof, appointment letters to the respective appointments were issued on 10.08.1984.

4. The petitioner raised an objection against the inspection report by which the institution was not found suitable for taking into grant-in-aid list by submitting khatauni of khasra Nos.1408, 1413 & 1414.

5. On 07.09.2006, a Government Order has been issued, which substantiates the case of the petitioner. On 03.11.2006, another objection was raised by the petitioner and explanation to the same was submitted on 10.11.2006.

6. On 01.12.2006, the District Inspector of Schools (DIOS) submitted a report supporting the institution to be enlisted into grant-in-aid list. Subsequently, vide order dated 02.12.2006 Government itself took a decision to enlist the institution into grant-in-aid list on the basis of permanent recognition granted and District Level Committee as well as Regional Level Committee submitted its report in the matter but no heed was paid by the respondents.

7. Thereafter, the petitioner filed Writ Petition No.6234 (M/S) of 2007, which was finally disposed of with a direction to the respondents to take final decision within a

period of one month from the date of order of this Court.

8. Against non-compliance of the aforesaid judgment and order, the petitioner filed a contempt petition. Thereafter, vide order dated 04.01.2007, the Assistant Director, Basic Education Department rejected claim of the petitioner. The petitioner submitted a representation in regard to its claim on 18.01.2007 & 20.01.2007 and in pursuance thereof, a Regional Level Committee was constituted on 17.05.2007. In pursuance thereof, the claim of the petitioner has been rejected vide impugned order dated 16.06.2008. Hence, the present writ petition has been instituted before this Court.

9. Submission of learned counsel for the petitioner is that the petitioner is running the institute in the name of Raj Dutta Shukla Purva Madhyamik Vidyalaya, which was granted temporary recognition on 21.04.1982 and a permanent recognition on 23.03.1985. It is submitted that although the institution of the petitioner was recognized, the same was not having the fruits of grant-in-aid. The State Government with a view to bring certain institutions under grant-in-aid issued a Government Order on 07.09.2006, wherein a decision was taken for bringing certain institutions under grant-in-aid, who were fulfilling the criteria as specified from serial No.1 to Serial No.8 in the said Government Order. The said Government Order also provided timeline for the institutions to file their applications, which were to be disposed of according to the time schedule as specified. Clause-3 of the said Government Order also created the committees at the directorate level as well as at the regional level comprising of a person as specified, who were to verify and to recommend the applications for bringing the institutions under grant-in-aid list.

10. In pursuance to the aforesaid Government Order, it is claimed that the institution of the petitioner filed an application before the District Level Committee and the said committee recommended the case of petitioner's institution for being considered to be brought under grant-in-aid (contained as Annexure No.-2 to the petition).

11. It is also submitted that the recommendation, as made in favour of the petitioner, came up for consideration before the Regional Level Committee, wherein one objection was raised against the application of the petitioner, which is contained in Annexure No.10 to the writ petition. The said objection was that approval of the appointment made with regard to clerk was not available in the records.

12. It is submitted by the petitioner that on 10.11.2006, the said objection was duly removed by the petitioner. On the said objection, it is submitted that the District Basic Education Officer sent a letter / report to the State Government, in which it was admitted that due to clerical mistake of department, the objection was raised and the approval is correct.

13. In this regard, it is also submitted that despite removal of the objection, name of the petitioner was not included in the list of institutions, which were approved for being taken under grant-in-aid list. The said list dated 02.12.2006 is on record of the writ petition as Annexure No.12, which demonstrates that all the boys colleges, which were granted recognition up to 30.04.1989 were taken in the list of grant-in-aid colleges.

14. It is also submitted that petitioner's institution was granted

recognition prior in point of time than the institutions, which were granted the benefit. Subsequently, the Assistant Director, Basic Education raised fresh objection on 04.01.2007 in respect of the application filed by the petitioner (Annexure No.16). It is also submitted that on 20.01.2007, the petitioner gave a detailed reply to the new objection filed. On 17.05.2007, the Regional Level Committee considered the case of the petitioner's institution along with other institutions and recommended the name of the petitioner's institution in the list, wherein the name of petitioner's institution is contained at Serial No.10 (Annexure No.18).

15. It is further submitted that despite the recommendation made in favour of the petitioner by the Regional Level Committee, as no decision was being taken, the petitioner was constrained to approach this Court by filing Writ Petition No.6234 (M/S) of 2007, wherein directions were issued to the State Government to take a decision on the application of the petitioner in accordance with law within a period of two months.

16. It is further stated that despite the said order, as no decision was taken, the petitioner was constrained to file a contempt petition before this Court. In the said petition, it is argued that the notices were issued and during the pendency of the contempt petition, an order came to be passed on 16.06.2008 (Annexure No.1), wherein the application of the petitioner was rejected on the grounds as enumerated.

17. Learned counsel for the petitioner submitted that in terms of the directions issued by this Court, the order passed and impugned reveals that a meeting was convened on 31.12.2007, wherein the petitioner was heard and a report was called from the District Basic Education Officer, Faizabad. The order further records that the Director, Basic Education had sent its report dated 10.06.2008 and on going through the said report, it was found that the approval to the appointment was not issued according to the dispatch register and the institution has not annexed the ownership documents of the land, where the institution was situate as such, it was recorded that the petitioner's institution was not eligible in terms of the provisions of the Government Order dated 07.09.2006. In the said order, it is also stated that in terms of the Government Order dated 07.09.2006, the institutions, which were eligible, have already been taken under grant-in-aid list by means of Government Order dated 02.12.2006 and further subsequent thereto, no financial budget was available and thus, it was not possible to consider the case of the petitioner and the said order is under challenge.

18. He further submitted that in terms of Government Order dated 07.09.2006, it is incumbent that the decision be taken by a committee constituted, which has not been done in the case of the petitioner and despite there being a recommendation in favour of the petitioner, the order impugned has been passed on consideration other than that as were required under the Government Order dated 07.09.2006.

19. He next submitted that in any event the impugned order dated 16.06.2008 is violative of principles of natural justice inasmuch as the order itself records that the petitioner was heard on 31.12.2007, whereas the foundation for passing of the order is some report dated 10.06.2008, which was never given to the petitioner nor was ever the petitioner called to explain the

discrepancies as allegedly noticed in the report dated 10.06.2008.

20. He further submitted that in any view the Government Order dated 07.09.2006 provided for a decision to be taken based upon the report of the committee constituted, whereas the order impugned has been passed based upon the report of the Director of Basic Education dated 10.06.2008, who is not empowered.

21. He next submitted that similarly placed institutions, which were granted recognition subsequent to the petitioner's recognition, have been brought under grant-in-aid and thus, the rights of petitioner enshrined under Article 14 of Constitution of India for being brought under grant-in-aid have been violated. He has also drawn attention of this Court to one of the condition as contained in the Government Order dated 07.09.2006 with regard to ownership of the land by the institution, which condition was set aside by this Court in the judgment passed by this Court in **Writ-C No.66100 of 2006; C/M Adarsh Janta Junior High School Vs. State of U.P. and others**, following the judgment in the case of **Committee of Management Vs. State of U.P. and others; (1994) 2 UPLBED 1127**, wherein Clause 8 was found to be arbitrary and illegal.

22. The counsel for the petitioner further argues that on filing of the application in terms of the Government Order, a right has accrued in favour of the petitioner for being considered within the parameters of the Government Order, which has been violated. He places reliance on the judgment of this Court in **Writ - C No.4735 of 2017 (C/M Ram Daun Ram Raj Pre - Secondary School and another**) wherein in similar circumstances this court had passed the order dated 27.02.2019 which was affirmed in the **Special Appeal Defective No.975 of 2020** and further in Special Leave to Appeal (C) No.3359 of 202. He further places reliance on the judgment of this Court in the case of **C/M Sri Satya Narain Junior High School and others vs. State of U.P. and others in Writ-C No.24767 of 2018** decided on 16.11.2021 wherein in similar circumstances, the court had considered the rights of the petitioner and have granted the relief to the petitioner therein. He also placed reliance on a similar matter being decided by this Court in **Writ-C No.1000923 of 2011 (C/M Chandra Shekhar Azad Junior High School Lucknow vs. State of U.P. and others)** decided on 15.07.2022. In the light of the said, he argues that the writ petition deserves to be allowed and the impugned order is liable to be set aside.

23. On the other hand, learned Additional Chief Standing Counsel has vehemently opposed the submissions advanced by learned counsel for the petitioner and has drawn attention of this Court to the order dated 16.01.2008, wherein the decision was taken in respect of the certain institution, which were brought under grant in aid on 27.12.2006 on the ground that adequate budget could not be sanctioned by the State Government. She further argues that this Court in the judgment reported in **2019 (6) ADJ 255** has given certain directions to the State Government for framing a policy in respect of the said institutions and in terms of the said order, the State Government has framed a policy on 14.07.2020 whereby a decision has been taken for not taking the institution under the grant in aid list for the reasons contained in paragraph Nos.7(7),

7(8) and 8 of the Government Order dated 14.07.2020. The said condition as specified in the Government Order dated 14.07.2020 is basically based on the ground that the State Government is concentrating on improving the standard of the education in the institution which are already on the grant in aid list. In the light of the said, she argues that the present petition is liable to be dismissed.

24. In the light of the arguments as recorded above, this court is to see whether the impugned order rejecting the application of the petitioner vide order dated 16.06.2008 is justified or not. It bears from the record that the State Government had issued a Government Order dated 07.09.2006 for bringing the certain institutions under grant in aid, the application filed by the petitioner in pursuance to the Government Order was duly recommended by the District Level Committee as well as by the Regional Level Committee as bears from the perusal of Annexure No.18 wherein the name of the petitioner had appeared at serial No.10.

25. It also bears from the record that the institutions similarly situated but granted recognition subsequent to the date of recognition granted to the petitioner institution have been taken under grant in aid. In view of the said, the order dated 16.06.2008 is clearly not sustainable firstly because the same is in violation of the principles of natural justice as it places reliance on a report dated 10.06.2008, which was obtained subsequent to the date of hearing which happened on 31.12.2007 without giving the said report to the petitioner or permitting him to rebut the same, the order impugned could not have been passed which has occasioned in violation of the principles of natural justice.

26. In normal circumstances, the matter deserves to be remanded, however considering the stand taken by the State Government in the impugned order of rejecting the application of the petitioner on the two grounds mentioned in the impugned order, this Court proposes to deal the same as sufficient time has elapsed and no useful purpose would be served in remanding the matter. The grounds based upon which the impugned order has been passed denying the benefit of grant in aid to the petitioner are;

i) the approval to the appointment of Clerk was not mentioned in the dispatch register, and

ii) the ownership documents of the land is not included in the certificate.

27. With regard to the second ground which has led to the passing of the impugned order, the same does not merit any acceptance for the reason that the District Basic Education Officer himself in his order dated 01.12.2006 had recorded that all the actions with regard to the approval of the appointment of the Clerk was duly made (Annexure No.12) and with regard to the first ground, which is the foundation of passing the order, that the ownership of the land documents have not been annexed is also not acceptable for the reason that in the report of the District Basic Education Officer dated 01.12.2006 (Annexure No.12), he has himself recorded that all the documents with regard to the ownership have been provided and further more that the said condition has already been set aside by this Court in **Writ-C No.66100 of 2006 [C/M Adarsh Janta Junior High School vs. State of U.P. and others] decided on 13.02.2013**. Even otherwise, the order impugned cannot be sustained as being without jurisdiction as

the decision has to be taken by the State Government based upon the recommendation of the committees constituted under the Government Order. The State Government could not have gone beyond the said recommendations in accepting or rejecting the claim made by various institutions which has precisely been done in the present case wherein the request has been rejected despite there being a recommendation in favour of the petitioner. Even otherwise, the case of the petitioner is squarely covered by the judgment of this Court in the case of **C/M Ram Daun Ram Raj Pre - Secondary School and another (supra)** decided on 27.02.2019.

28. Thus, for all the reasons recorded above, the impugned order dated 16.06.2008 is clearly not sustainable and is liable to be quashed.

29. Accordingly, the order dated 16.06.2008 is set-aside. The State Government is directed to take the petitioner's institution under grant-in-aid in pursuance to the Government Order dated 07.09.2006 as has been done in the case of the other eligible institutions who were applied for being taken under grant-in-aid in pursuance to the Government Order dated 07.09.2006. The decision in that regard shall be taken without fail within a period of four months from today.

30. The Additional Chief Standing Counsel is directed to communicate a copy of this order to the State Government for its compliance and in accordance with law.

31. With the aforesaid observations and directions, the writ petition succeeds and stands allowed.

(2022) 9 ILRA 571
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2022

BEFORE

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

Special Appeal No. 216 of 2022

Shiv Kumar Patel ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Ashish Kumar Srivastava, Sri Ajai Kumar Singh

Counsel for the Respondents:
Sri Hare Ram Tripathi (S.C.), Sri A.P. Paul(State Law Officer), Sri Gyan Bahadur Singh

A. Civil Law – Misdemeanour in Office - Uttar Pradesh Panchayat Raj Act, 1947 - Sections 95(1)(g) & 27 - Uttar Pradesh Panchayat Raj (Removal of Pradhan, Up-Pradhan and Members) Inquiry Rules, 1997 - Rule 3 - Uttar Pradesh Panchayat Raj Rules, 1947- Rule 256, 257 - The purpose and scope of the provisions of Sections 95(1)(g) & 27 of the Act of 1947 are distinct and different. Whilst S.95(1)(g) is directed to ensure removal from office of an elected Pradhan on one or the other ground mentioned in sub-clauses (i) to (v) of Clause (g) of S.95(1). S.27 is designed to recover money occasioned on account of loss, waste or misapplication of money or property belonging to a Gram Panchayat by a Pradhan, if that loss, waste, etc. is the direct consequence of the Pradhan's neglect or misconduct. (Para 9)

It is true that upon the Pradhan demitting office, proceedings u/s 95(1)(g), if not initiated, cannot continue as the entire purpose of those proceedings is to oust the incumbent Pradhan from office. These proceedings certainly cannot commence after the Pradhan has already demitted office. But, **the purpose of Section 27 of the Act of 1947 is to recover money**

belonging to the Gram Panchayat i.e. lost, wasted or misapplied, as a direct consequence of the Pradhan's neglect or misconduct while in office. (Para 11)

The learned Judge has exposited the provisions of S.95(1)(g) and S.27 of the Act of 1947 to mean that though the two are independent, yet action must commence u/s 95(1)(g), or for that matter u/s 27, while the Pradhan holds office in order to enable proceedings for recovery of the loss or surcharge to continue after he/she demits office. In the opinion of the learned Judge, the Pradhan's end of tenure closes all chapter of his liability to the Gram Panchayat. (Para 10)

B. The golden rule is that the words of a statute must prima facie be given their ordinary meaning when the language or phraseology employed by the legislature is precise and plain. This, by itself proclaims the intention of the legislature in unequivocal terms, the same must be given effect to and it is unnecessary to fall upon the legislative history, Statement of Objects and Reasons, framework of the statute, etc. Such an exercise need be carried out only when the words are unintelligible, ambiguous or vague. (Para 11)

It is an established principle of statutory construction, that if the words of a statute are clear and unmistakable in their import, they are to be given their ordinary, natural meaning. This is also called the literal rule of construction. It dictates attributing every word in the statute its plain and simple meaning, grammatically supported. (Para 11)

The words employed in Section 27(1), "if such loss, waste or misapplication is direct consequence of his neglect or misconduct while he was such Pradhan", hold the Pradhan liable for all loss or waste that he causes to the Gaon Sabha by acts of misconduct or negligence while still incumbent. The phraseology of the statute unmistakably points to loss caused by acts of negligence or misconduct of the Pradhan while he was in office. Nothing prevented the legislature to say while "he is such Pradhan,". The employment of the word "was" is a singular pointer to the fixation of liability for past actions done in office. The provisions of S.27(1) are of clear import and they clothe the Authorities under the Act of 1947, with jurisdiction to take proceedings against the Pradhan for recovery of loss, caused to the Gram Panchayat's by his/her neglect or misconduct, after the Pradhan ceases to hold office. (Para 11, 13)

C. The mere mention of a wrong provision in the complaint laid, in our opinion, would not be decisive - An objection on behalf of the respondents, is that the relief claimed in the writ petition is limited to a direction to conclude proceedings u/s 95(1)(g) of the Act of 1947, which is an infructuous prayer, once respondent no. 3 has demitted office. The complaint, that has been laid before the DM, shows on a wholesome reading that it is about misappropriation of funds of the Gram Panchayat by respondent no. 3 while in office. The facts set out in the complaint clearly lend themselves to initiation of appropriate action u/s 27 of the Act of 1947, though they might also have formed basis of proceedings, u/s 95(1)(g), if respondent no. 3 were in office. The complaint cannot be thrown out on the ground alone that respondent no. 3 has demitted office, on the date the complaint was laid before the District Magistrate (DM). The competent Authority, ought to inquire into the complaint independently u/s 27(1) of the Act of 1947, ignoring the fact that respondent no. 3 has demitted office as the Pradhan. Nothing shall be construed an expression on the merits of the complaint laid against respondent no. 3. (Para 14)

A writ of mandamus is issued to the District Magistrate, Prayagraj to consider the complaint dated 10.05.2021 laid by the writ petitioner, against respondent no. 3, as one u/s 27 of the Act of 1947 and proceed with the same in accordance with law.

Special appeal allowed. (E-4)

Precedent followed:

1. Prabhudas Damodar Kotecha & ors. Vs Manahbala Jeram Damodar & anr., (2013) 15 SCC 358 (Para 11)

Precedent distinguished:

1. Indu Devi Vs District Magistrate, Chitrakoot & ors., 2006 (2) ADJ 552 (DB) (Para 12)

Present special appeal assails judgment and order dated 18.10.2021, passed by Hon'ble Single Judge in Writ-C No. 24314 of 2021.

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

1. This special appeal is directed against the order of the learned Single Judge dated 18.10.2021, dismissing the appellant's writ petition. The petitioner-appellant instituted the writ petition, giving rise to this appeal, asking for the issue of a writ of mandamus to the District Magistrate, Prayagraj to decide proceedings under Section 95(1)(g) of the Uttar Panchayat Raj Act, 1947 (for short, 'the Act of 1947'), pending before him against respondent no.3, Chamela Devi, the Village Pradhan, within some stipulated period of time as the Court may determine.

2. Shorn of unnecessary details, Chamela Devi was elected as the Village Pradyan of Village Shivlal Ka Pura, Post Gohri, Tehsil Soraon, District Prayagraj in the elections held in the year 2016. It is the petitioner-appellant's case that respondent no.3 committed misfeasance in office during her tenure. The petitioner-appellant, who shall hereinafter be referred to as 'the writ petitioner, instituted a Public Interest Litigation No. 1944 of 2020, Shiv Kumar and others v. State of U.P. and others, seeking a direction to the District Authorities to make an inquiry into those acts of misfeasance alleged, and cause an FIR to be lodged for the offence of the misappropriation and embezzlement of public moneys. A Division Bench of this Court vide order dated 08.02.2021 disposed of the writ petition virtually dismissing it on the ground of availability of an efficacious statutory remedy. That remedy was said to be available under Rule 3 of the Uttar Pradesh Panchayat Raj (Removal of Pradhan, Up-Pradhan and Members) Inquiry Rules, 1997 (for short, 'the Rules of 1997'). In fact, the said rules are referable to the powers available to the State Government, or on its behalf with the District Magistrate under Section 95(1)(g) of the Act of 1947.

3. The writ petitioner on 10.05.2021 moved a complaint to the District Magistrate, Prayagraj under Section 95(1)(g) of the Act of 1947, complaining of misdemeanour in office against respondent no.3, involving defalcation of public money. There was inaction on the District Magistrate's part to proceed further on the said complaint. This led the writ petitioner to move the present petition, seeking a mandamus in the terms prayed.

4. Before the learned Single Judge, it was contended by the learned Counsel for the writ petitioner that where any financial irregularities have been committed by a Pradhan, the District Magistrate ought to deprive her of her financial powers, after the necessary preliminary inquiry, with the ceasure of powers continuing until the Pradhan is exonerated in the final inquiry. It was also argued before the learned Single Judge, as would appear from the impugned judgment, that Section 27 of the Act of 1947 envisages proceedings by way of surcharge. These proceedings are designed to recover loss, waste or misappropriation of money or property belonging to the Gaon Sabha. The Prescribed Authority has been entrusted with the duty to fix the amount of surcharge, which shall be recovered from the Pradhan or the other person concerned by the Collector.

5. The State, on the other hand, contended that respondent no.3 was in office as the Village Pradhan until 02.05.2021, and after fresh elections to the post of Pradhan in the State of Uttar Pradesh were held in the month of April, 2021, respondent no.3 has been replaced by another incumbent. It was emphasized that the complaint moved by the writ petitioner was on 10.05.2021, that is, after respondent no.3 had demitted office. As such, the State or its Authorities, including the District Magistrate, could not proceed under Section 95(1)(g) of the Act of 1947, read with the Rules of 1997. It was, particularly, argued that it is only in an audit or inquiry that facts are discovered to show that any sum of money has been misappropriated, and, thereupon, proceedings for surcharge can be initiated against a Pradhan under Section 27 of the Act of 1947. It was also contended on behalf of the State that the writ petitioner had not been able to show that any sum of money, allegedly embezzled by respondent no.3, on an inquiry made by the competent Authority, had been found to be defalcated. The learned Single Judge, before whom the writ petition came up, proceeded to formulate the following question:

"Whether provision of Section 95 (1) (g) of the Act of 1947, as well as Section 27 and Rules 256 and 257 of the Rules of 1947 are applicable against an ex Pradhan on the complaint being lodged after he/she ceased to be a Pradhan"

6. The learned Judge undertook a survey of the provisions of Section 95(1)(g) and Section 27 of the Act of 1947, besides Rules 256 and 257 of the Uttar Pradesh Panchayat Raj Rules, 1947, framed under the Act of 1947 (for short, "the Rules of 1947') that have been extracted in the impugned judgment. We would only refer to so much of them as elucidate the point upon which, according to us, the decision turns. The learned Judge, on a conjoint reading of the provisions of Section 95(1)(g) and Section 27 of the Act of 1947 together with Rule 256 of the Rules of 1947, held that though the provisions for surcharge under Section 27 entitle the State for recovering money on account of loss, waste or misuse of any money or property belonging to the Gaon Sabha, caused by a misconduct or neglect of the Pradhan, independent of proceedings under Section 95(1)(g) of the Act, but the powers under Section 27 can be invoked if proceedings against the Pradhan, under Section 95(1)(g) or Section 27, are initiated while the Pradhan is in office.

7. It has further been held that the Act and the Rules do not envisage a contingency, where a Pradhan, whose term has come to an end, can still have his conduct inquired into while in office and recovery made for loss, waste or misuse of Gaon Sabha money or property under Section 27. It has also been opined that launching of fresh proceedings after expiration of the term of office of the Pradhan is not permissible under the Act of 1947, as the word used is "the Pradhan' and not "an Ex-Pradhan'. The proviso to Section 27 that saves proceedings for recovery of money as surcharge on account of loss, waste or misapplication for a period of 10 years of the occurrence of the loss, waste etc. is attracted, where the complaint is made and proceedings initiated during the Pradhan's tenure, in the learned Judge's opinion. The proviso to Section 27(1) would not apply where no proceedings are initiated while the Pradhan was in office. It is on all these reasonings that the learned Judge has dismissed the petition.

8. Before us, elaborate arguments were advanced on both sides to assail and defend the order impugned.

9. We have carefully perused the record. There is hardly any doubt on facts here. By the time, the complaint against respondent no.3 was laid, for whatever reason, she had demitted office and was no longer the Pradhan. Nevertheless, the complaint was about the misconduct or inaction of respondent no.3 whilst she held the office of the Gram Pradhan. To our understanding, the purpose and scope of the provisions of Section 95(1)(g) and Section 27 of the Act of 1947 are distinct and different. Whilst Section 95(1)(g) is directed to ensure removal from office of an elected Pradhan on one or the other ground mentioned in sub-clauses (i) to (v) of Clause (g) of sub-Section (1) of Section 95 of the Act of 1947. Section 27 has an altogether different scope and purpose. Section 27 is designed to recover money occasioned on account of loss, waste or misapplication of money or property belonging to a Gram Panchayat by a Pradhan, if that loss, waste, etc. is the direct consequence of the Pradhan's neglect or misconduct. In this connection, we consider it apposite to refer to the provisions of Section 27 of the Act, which read:

"27. Surcharge.-(1) Every Pradhan or Up-Pradhan of a [Gram Panchayat] every member of a [Gram Panchayat] or of a Joint Committee or any other committee constituted under this Act and every Sarpanch, Sahayak Sarpanch or Panch of a Nyaya Panchayat shall be liable to surcharge for the loss, waste or misapplication of money or property [belonging to the Gram Panchayat or Nyaya Panchayat] as the case may be, if such loss, waste or misapplication is direct consequence of his neglect or misconduct while he was such Pradhan, Up-Pradhan, Member, Sarpanch, Sahayak Sarpanch or Panch :

Provided that such liability shall cease to exist after the expiration of ten years from the occurrence of such loss, waste or misapplication, or five years from the date on which the person liable ceases to hold his office, whichever is later.

(2) The prescribed authority shall fix the amount of the surcharge according to the procedure that may be prescribed and shall certify the amount to the Collector who shall, on being satisfied that the amount is due, realise it as if it were an arrear of land revenue.

(3) Any person aggrieved by the order of the prescribed authority fixing the amount of surcharge may, within thirty days of such order, appeal against the order to the State Government or such other appellate authority as may be prescribed.

(4) Where no proceeding for fixation and realisation of surcharge as specified in sub-section (2) is taken the State Government may institute a suit for compensation for such loss, waste or misapplication, against the person liable for the same."

(emphasis by Court)

10. Now, in a case where no proceedings of any kind are initiated against a Pradhan while in office, for whatever reason, and still, there is a case with some evidence at hand to show that loss, waste or misapplication or for that matter misappropriation of Gram Panchayat's property has happened on account of negligence or misconduct of the Pradhan while he/ she was in office, nothing can be done to recover such loss, according to the learned Single Judge. The learned Judge has exposited the provisions

of Section 95(1)(g) and Section 27 of the Act of 1947 to mean that though the two are independent, yet action must commence under Section 95(1)(g), or for that matter under Section 27, while the Pradhan holds office in order to enable proceedings for recovery of the loss or surcharge to continue after he/ she demits office. In the opinion of the learned Judge, the Pradhan's end of tenure closes all chapter of his liability to the Gram Panchayat.

11. We find the learned Judge's reasoning based on the interpretation of Section 95(1)(g) and Section 27 to be based on strained logic, if not altogether inexplicable. We have already pointed out that the purpose of Section 95(1)(g) and Section 27 is altogether different. It is true that upon the Pradhan demitting office, proceedings under Section 95(1)(g), if not initiated, cannot continue as the entire purpose of those proceedings is to oust the incumbent Pradhan from office. These proceedings certainly cannot commence after the Pradhan has already demitted office. But, the purpose of Section 27 of the Act of 1947 is to recover money belonging to the Gram Panchayat i.e. lost, wasted or misapplied, as a direct consequence of the Pradhan's neglect or misconduct while in office. We wish to emphasize the words employed in Section 27(1), "if such loss, waste or misapplication is direct consequence of his neglect or misconduct while he was such Pradhan,". The import of the words on a plain reading is unmistakable. It is to hold the Pradhan liable for all loss or waste that he causes to the Gaon Sabha by acts of misconduct or negligence while still incumbent. The phraseology of the statute unmistakably points to loss caused by acts of negligence or misconduct of the Pradhan while he was in office. Nothing prevented the legislature to say while "he is such Pradhan,". The employment of the word "was" is a singular pointer to the fixation of liability for past actions done in office. It is an established principle of statutory construction, often called the golden rule, that if the words of a statute are clear and unmistakable in their import, they are to be given their ordinary, natural meaning. This is also called the literal rule of construction. It dictates attributing every word in the statute its plain and simple meaning, grammatically supported. In this connection, reference may be made to the decision of the Supreme Court in **Prabhudas Damodar Kotecha and others v. Manahbala Jeram Damodar and another, (2013) 15 SCC 358**. The golden rule or the principle of literal construction has been enunciated by their Lordships thus:

Golden rule

31. The golden rule is that the words of a statute must prima facie be given their ordinary meaning when the language or phraseology employed by the legislature is precise and plain. This, by itself proclaims the intention of the legislature in unequivocal terms, the same must be given effect to and it is unnecessary to fall upon the legislative history, Statement of Objects and Reasons, framework of the statute, etc. Such an exercise need be carried out only when the words are unintelligible, ambiguous or vague.

32. It is trite law that if the words of a statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The above principles have been applied by this Court in several cases, the judgments of which are reported in Chief Justice of A.P. v. L.V.A. Dixitulu [(1979) 2 SCC 34 : 1979

SCC (L&S) 99] , Kehar Singh v. State (Delhi Admn.) [(1988) 3 SCC 609 : 1988 SCC (Cri) 711 : AIR 1988 SC 1883] , District Mining Officer v. Tisco [(2001) 7 SCC 358] , Gurudevdatta VKSSS Maryadit v. State of Maharashtra [(2001) 4 SCC 534 : AIR 2001 SC 1980] , State of H.P. v. Pawan Kumar [(2005) 4 SCC 350 : 2005 SCC (Cri) 943] and State of Rajasthan v. Babu Ram [(2007) 6 SCC 55 : (2007) 3 SCC (Cri) 52].

12. The learned Counsel for the writ petitioner has placed reliance on a decision of a Division Bench of this Court in **Indu Devi v. District Magistrate, Chitrakoot and others, 2006 (2) ADJ 552 (DB)** to submit that proceedings under Section 27 of the Act of 1947 can very well continue after the Pradhan demits office and these are independent of proceedings for removal of the Pradhan under Section 95(1)(g). No doubt, there are some remarks in Paragraph No.8 of the report in **Indu Devi's (supra)** that seem to support the writ petitioner, but the decision may not be of much help on the point, because **Indu Devi** was a case where proceedings against the Pradhan commenced whilst she was in office. The decision there turned on a different point and the remarks in Paragraph No.8 of the report are not of much assistance to the writ petitioner.

13. Nevertheless, in our considered opinion, the provisions of Section 27(1) are of clear import and they clothe the Authorities under the Act of 1947, with jurisdiction to take proceedings against the Pradhan for recovery of loss, caused to the Gram Panchayat's by his/ her neglect or misconduct, after the Pradhan ceases to hold office.

14. An objection on behalf of the respondents, which must be dealt with, is that the relief claimed in the writ petition is limited to a direction to conclude proceedings under Section 95(1)(g) of the Act of 1947, which is an infructuous prayer, once respondent no.3 has demitted office. The mere mention of a wrong provision in the complaint laid, in our opinion, would not be decisive. The complaint, that has been laid before the District Magistrate, a copy of which is annexed as Annexure No.2 to the writ petition (Annexure No.7 to the affidavit filed in support of the Stay Application to the appeal), shows on a wholesome reading that it is about misappropriation of funds of the Gram Panchayat by respondent no.3 while in office. The facts set out in the complaint clearly lend themselves to initiation of appropriate action under Section 27 of the Act of 1947, though they might also have formed basis of proceedings, under Section 95(1)(g), if respondent no.3 were in office. We do not wish to say that the facts stated in the complaint are true or untrue. All that we say, is that the complaint cannot be thrown out on the ground alone that respondent no.3 has demitted office, on the date the complaint was laid before the District Magistrate. In our opinion, the District Magistrate, or whoever be the competent Authority, ought to inquire into the complaint independently under Section 27(1) of the Act of 1947, ignoring the fact that respondent no.3 has demitted office as the Pradhan. We emphasize twice over that nothing said by us shall be construed an expression on the merits of the complaint laid against respondent no.3.

15. In the result, this appeal **succeeds** and is **allowed**. The impugned judgment dated 18.10.2021 passed by the learned Single Judge is set aside. A writ of mandamus is issued to the District

Magistrate, Prayagraj to consider the complaint dated 10.05.2021 laid by the writ petitioner, against respondent no.3, as one under Section 27 of the Act of 1947 and proceed with the same in accordance with law.

(2022) 9 ILRA 578
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2022

BEFORE

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

Special Appeal No. 483 of 2022

C/M Madrasa Arbia Azizia Majaharool Uloom, Maharajganj ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Narendra Kumar Chaturvedi

Counsel for the Respondents:
Sri A.K. Ray (Addl. C.S.C.), SRI Radha Kant Ojha(Sr. Adv.), Sri Bhagwan Dutt Pandey

A. Societies Registration Act, 1860 – Sections 25 (1) & (2) – Election dispute – Amendment in Bye-Laws of society – Power of Assistant Registrar, extent of – Assistant Registrar declared both sets of elections invalid – Validity challenged – Held, the issue whether the byLaws were amended in accordance with Law, or so to speak, the byLaws of the Society is an issue that is integral to the dispute about the validity of elections – There is a dispute about two rival sets of elections raised *bona fide* before the Assistant Registrar, which ought to have been referred to the Prescribed Authority. The dispute has within its fold issues regarding the validity of amendments made to the byLaws and the electoral college competent to vote. These issues would also have to be determined by the Prescribed Authority and it is within the province of the Prescribed Authority seized of the proceedings under Section 25(1) of the Act to decide the question of membership of the General Body. (Para 17 and 19)

B. Writ jurisdiction – Court process – Single Judge decided the writ petition without calling counter affidavit – No time sought and counsel chosed to address the court on merit – Question of jurisdiction, how far can be decided at admission stage – Held, the appellant cannot be permitted to raise a grievance of that kind once before the learned Single Judge the appellant chose to address the Court on merits, sans an affidavit on their behalf. Even otherwise, most of the papers were on record of the writ petition and the issue is essentially about jurisdiction based on facts, that are sufficiently available on the existing papers – No prejudice to the appellant, therefore, has been demonstrated. (Para 20)

Appeal dismissed. (E-1)

List of Cases cited:-

1. C/M Anjuman Kherul Almin Allahganj & anr. Vs St. of U.P. & ors.; 2013 SCC OnLine All 14353

2. Kisan National Education Trust & ors. Vs Prescribed Authority (Sub-Divisional Magistrate) & ors., 2018 SCC OnLine All 6120

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

1. This is a respondent's appeal arising out of a judgment and order passed by the learned Single Judge allowing the writ petition.

2. The Committee of Management, Madrasa Arbia Azizia Majaharool Uloom, Nichlaul Bazar, District Maharajganj has its affairs torn by factional war. One faction is represented by Abid Ali, who claims to be

the lawfully elected Manager, whereas the other is represented by Muhammadullah.

3. Madrasa Arbia Azizia Majaharool Uloom, Nichlaul Bazar, District Maharajganj is a Society registered under the Societies Registration Act, 1860 (for short, 'the Act'). It was registered on 18.04.1975. The Society is governed by its bylaws. The Society maintains an educational institution. The institution that the Society maintains is funded by the State. The Society has a General Body and a Committee of Management. The tenure of the Committee of Management is three years under the bylaws. Bylaw 23 provides for the various office bearers, who are to be elected from amongst the Members of the General Body. The office bearers are the President, the Vice President, the Manager, the Deputy Manager, besides members of the Committee. Bylaw 26 provides for the contingency, where elections to the Committee of Management cannot be held on schedule and within three years of the last elections. It provides for a holding over in favour of the office bearers of the last elected management till their successors are elected.

4. It is the petitioners' case, who are respondent nos.4 to 6 to this appeal, that the last undisputed elections to the Committee of Management were held on 07.10.2018. In those elections, Muhammadullah, the appellant here, was elected the Manager whereas Iltaf Husain, respondent no.6 to the appeal, was elected the Vice President. The list of office bearers of the Committee of Management elected on 07.10.2018 was duly registered under Section 4 of the Act by the Assistant Registrar, Firms, Societies and Chits, Gorakhpur. It is the petitioner-respondents' case that the appellant, who is effectively Muhammadullah, designed to grab control of the Society. For the purpose, he claimed that he had called a meeting of the General Body on 16.11.2019 for amending the bylaws of the Society. He moved an application on 29.02.2020 before the Assistant Registrar of Societies asking the amended bylaws to be registered. The petitioner-respondents claimed that the Assistant Registrar without issuing notice to all members of the General Body and without following the procedure envisaged for registering an amendment to the bylaws of the Society, registered the amended bylaws on 05.03.2020.

5. The petitioner-respondents then say that by concealing facts, Muhammadullah submitted a forged and fabricated list of office bearers to the Assistant Registrar, seeking its registration under Section 4 of the Act. The petitioner-respondents upon coming to know of the aforesaid fact, filed objections dated 13.07.2021 before the Assistant Registrar. It is the petitioner-respondents' case that upon coming to know of the amendments unauthorizedly made by Muhammadullah, petitioner-respondent no.6, Iltaf Husain, as the Vice President of the Society, invoked his powers under Clause 23 of the bylaws and convened an emergent meeting of the Committee of Management on 25.09.2020. It is pleaded on behalf of the petitioner-respondents that the agenda for the meeting convened on 25.09.2020 was issued to all members of the General Body in accordance with the bylaws. The meeting of the Committee of Management held on 25.09.2020 was attended by office bearers elected on the basis of the elections dated 07.10.2018. It was held under the Chairpersonship of the Vice President, Iltaf Husain. It was unanimously resolved, according to the petitioner-respondents,

that Muhammadullah was acting against the Society's interest. He had submitted an annual list of office bearers for the year 2019-20, different from the one that was in accord with the undisputed elections held on 07.10.2018; also different from the annual list of office bearers registered for the year 2018-19.

6. A show cause notice was issued by the Committee of Management to Muhammadullah, asking him to explain his position with a stipulation that in the event he did not explain his position, the matter would be placed before the General Body, where proceedings would be taken for his removal. The show cause notice indicated that the meeting of the General Body would be held on 16.10.2020, where Muhammadullah could appear personally and submit his explanation along with others, who had factioned off.

7. Shorn of further detail, it is the petitioner-respondents' case that on 16.10.2020, the meeting of the General Body was convened on schedule, but Muhammadullah and those siding with him did not appear or show cause. They did not attend the meeting of the General Body. A resolution was passed by the General Body removing Muhammadullah from the post of the Manager. Nur Ali and Akhtar Husain were removed from the posts of Deputy Manager and Vice President, respectively. By a resolution of the same date passed by the General Body under the bylaws, Abid Ali was elected the Manager and Rizwan Ullah Khan the Deputy Manager. Guddu alias Mohd. Faruq was elected the Vice President of the Committee of Management for the year 2020-21. The Manager was directed to secure registration of the annual list of office bearers.

8. According to the petitioner-respondents, Muhammadullah, the former Manager and those siding with him being expelled, Abid Ali submitted an application dated 04.11.2020 to the Assistant Registrar with a request to register the list of office bearers of the Society for the year 2020-21, and further, to renew the Society's Certificate of Registration. It is the writ petitioner-respondents' case that the list of office bearers submitted by them was based on the undisputed elections held on 07.10.2018 with the necessary modification to it on account of the decision of the General Body to remove the Manager, Muhammadullah and the others, who had factioned off. Those elected in their stead were asked to be registered in the list of office bearers for the year 2020-21. The said list was submitted to the Assistant Registrar on 08.10.2021 along with the details of election proceedings dated 07.10.2021, with a request to register, as the writ petitioner-respondents claim. It is the petitioner-respondents' further case that in between, the appellant got a forged and fabricated election conducted on 08.10.2021 to the Committee of Management in accordance with the bylaws, which the petitioner-respondents say, were got illegally amended. The list of office bearers, different from the one presented by Abid Ali based on the General Body's resolution, was submitted by Muhammadullah on 12.10.2021 to the Assistant Registrar.

9. The writ petitioner-respondents say that their objections to the amendment made to the bylaws were pending, but they were not put to any notice regarding the list of office bearers submitted by Muhammadullah based on the elections dated 08.10.2021, different from theirs. Orders were reserved on 20.10.2021 and

pronounced on 25.04.2022 by the Assistant Registrar. By the order dated 25.04.2022, the Assistant Registrar discarded both sets of elections, determined an electoral college of 25 members and appointed the District Minority Welfare Officer as the Election Officer to hold elections under Section 25(2) of the Act.

10. It is this order dated 25.04.2022, that was impugned by the writ petitioner-respondents before the learned Single Judge.

11. The learned Single Judge held that it was a case of a dispute in respect of elections, which the Prescribed Authority alone, under Section 25(1) of the Act, as amended in its application to the State of Uttar Pradesh, was competent to determine. The Assistant Registrar was not competent to direct holding of elections, invoking his powers under Section 25(2) of the Act, discarding both sets of elections before him.

12. Aggrieved by the aforesaid order, the fourth respondent to the writ petition, who are the faction represented by Muhammadullah, have preferred this appeal under Chapter VIII Rule 5 of the Rules of the Court.

13. Heard Mr. Narendra Kumar Chaturvedi, learned Counsel for the appellant, Mr. Radha Kant Ojha, learned Senior Advocate assisted by Mr. Bhagwan Dutt Pandey, Advocate appearing for respondent nos.4 to 6 and Mr. A.K. Ray, learned Additional Chief Standing Counsel appearing on behalf of respondent nos.1, 2 and 3.

14. The thrust of the submissions advanced before us by Mr. Narendra Kumar Chaturvedi, learned Counsel for the appellant is that a reference under Section 25(1) of the Act is to be made by the Registrar or the Assistant Registrar, as the case may be, when confronted by two rival sets of elections, if the dispute is bona fide. He submits that the dispute on facts should be between two bona fide rival claims and not merely one where a dispute is raised apparently without basis. In case where a dispute has no basis to it ex facie, Mr. Chaturvedi says that the Assistant Registrar is not obliged to make a reference under Section 25(1) of the Act. He can decide and pass appropriate orders in the exercise of his powers under Section 4 with consequential orders under Section 25(2) of the Act.

15. On the other hand, Mr. R.K. Ojha, learned Senior Advocate assisted by Mr. Bhagwan Dutt Pandey, Advocate appearing for respondent nos.4 to 6, submits that the case is one where there was per-eminently a dispute about two sets of elections held by office bearers of the elected Committee of Management that was an office on the basis of the undisputed elections dated 07.10.2018. In between, the appellant had factioned off, amended the bylaws and conducted an election based on an incompetent electoral college, all resting on the illegally amended bylaws. The amendment to bylaws, that was undertaken single handedly and without authority of law, by Muhammadullah was also the subject matter of dispute. Mr. Ojha submits that Muhammadullah had been removed from the post of Manager of the Society by a competent resolution of the General Body dated 16.10.2020, that was passed after the purported elections, that he claims to have submitted, as he was acting without authority and contrary to the interest of the Society. In the background of the aforesaid

facts, the elections convened by Muhammadullah were without the authority of law.

16. The learned Senior Advocate also submits that the Assistant Registrar ultimately held that both sets of elections were invalid and assumed jurisdiction under Section 25(2) of the Act. In doing that, he pronounced upon the validity of the elections held by the writ petitioner-respondents on 07.10.2018 in accordance with law and also upon the elections held on 08.10.2021 by Muhammadullah. Thus, according to the learned Senior Advocate, the Assistant Registrar proceeded to judge the validity of elections held by two office bearers coming from a Committee of Management that was elected in the last undisputed elections, which he had no jurisdiction to do. There was an election dispute involved, clearly *bona fide*, at least about the writ petitioner-respondents' claim, that merited reference to the Prescribed Authority.

17. We have bestowed our due consideration to the case of parties and the rival submissions at the Bar. We find that there is no issue about the fact that both the writ petitioner-respondents and the appellant were office bearers of an undisputed Committee of Management, that was elected to office on 07.10.2018. The Committee had a term of three years under the bylaws with a clause for holding over under until fresh elections. In between, it appears that a dispute in the Management surfaced, because the Manager Muhammadullah got the bylaws amended, which the Assistant Registrar registered on the basis of an application dated 29.02.2020. It is the writ petitioner-respondents' case that this amendment was registered without notice to them or issuing notice to all members of the General Body. It is seriously in dispute whether the procedure for effecting an amendment to the bylaws was followed by the Assistant Registrar. We find that the issue whether the bylaws were amended in accordance with law, or so to speak, the bylaws of the Society is an issue that is integral to the dispute about the validity of elections now held in two rival sets-one by the appellant and the other by the writ petitioner-respondents. The Assistant Registrar by the order impugned, before the learned Single Judge, held both sets of elections invalid, assumed jurisdiction under Section 25(2) of the Act to hold elections himself through his nominee. In doing that, he pronounced upon the validity of elections of both parties, whose claims cannot be said to be mala fide, fantastic, or ones that did not merit consideration. Both sets of elections have been held by two sets of office bearers of the last undisputed Committee of Management. The dispute between them is about the amendment made to the bylaws at the instance of the appellant and the electoral college competent to vote. It is, thus, in our opinion, a thick and *bona fide* election dispute, that was up before the Assistant Registrar and he had no jurisdiction to determine. He ought to have referred it to the Prescribed Authority under Section 25(1) of the Act, who is the competent Authority to summarily determine it, subject only to the final determination of the Civil Court of competent jurisdiction.

18. The issue whether the Assistant Registrar ought to have referred the issue to the Prescribed Authority under Section 25(1) of the Act fell for consideration of a Division Bench of this Court in **C/M Anjuman Kherul Almin Allahganj and**

another v. State of U.P. and others, 2013 SCC OnLine All 14353, where it was held:

6. Both these provisions have been harmonized in the judgment of the Division Bench in All-India Council (AIR 1988 All 236) (supra) where it was held as follows:--

"Section 25 of the Societies Registration Act as amended by the State Legislature enacts a comprehensive code and creates a designated forum or tribunal for adjudication in a summary manner of all disputes or doubts in respect of the election or continuance in office of an office-bearer of such society. It also provides the grounds upon which the election of an office-bearer can be set aside. The procedure to be followed for filling up of the vacancies arising from the decisions rendered by the Prescribed Authority under sub-section (i) of Section 25 has also been laid down (Section 25(2)).

7. It will, therefore, be seen that insofar as disputes or doubts in respect of the election or continuance in office of the office-bearers of a society registered in Uttar Pradesh are concerned, the Legislature has created a specific forum and laid down an exhaustive procedure for determination of the same under Section 25. There is no other provision, express or otherwise, providing for determination of such disputes specifically. It is settled law that where, as here, the Legislature creates a specific forum and lays an exhaustive procedure for determination of a particular class of disputes in respect of matters covered by the statute, such disputes can be determined only in that forum and in the manner prescribed thereunder and not otherwise. If, therefore, a dispute is raised with regard to the election or continuance in office of an office-bearer of a society registered in Uttar Pradesh, the same has to be decided only by the Prescribed Authority under Section 25(1) and not by the Registrar, save, of course, to the decision of the Prescribed Authority being subject to the result of a civil suit."

7. The judgment of the Division Bench came up for consideration in Gram Shiksha Sudhar Samiti (2010 (5) ALJ 41) (supra). In the subsequent judgment the Division Bench held that the earlier judgment has harmonized the provisions of both Sections 4 and 25 and what can be inquired into under Section 25 of the Act, cannot be gone into under the proviso to Section 4. In that case, the Division Bench held that the learned single Judge ought to have set aside an order of the Registrar dated 11 July 2010 and ought to have directed the Registrar to refer the objection to the Prescribed Authority tinder Section 25(1). The Division Bench held that once an application for talcing on record the name of the office bearers and an objection as to the validity of the office bearers who were duly elected has been filed, the Registrar considering under Section 25(1) ought to refer the matter to the Prescribed Authority. Undoubtedly, in the subsequent decision in the Committee of Management (supra) it has been held that the Registrar "is not a post office for referring any and every dispute". The Division Bench there held that more than three years after the holding of an election there was no reason to entertain a petition at the belated stage.

8. In the present case, a list was submitted by the third respondent, of office bearers under Section 4 for 2013-14. The list was objected too. The Deputy Registrar had conflicting claims between the appellants on the one hand and the third respondent on the other hand. Hence when an application for taking on record the names of the officer bearers was filed and an objection to the validity of the elected office bearers was placed before him, the

Registrar ought to have referred the dispute to the Prescribed Authority under Section 25(1). In entertaining the dispute himself and going into merits of the rival claims, the Deputy Registrar has clearly transgressed his jurisdiction. The jurisdiction to decide any doubt or dispute in respect of an election of the office bearers of the Society lies with the Prescribed Authority and the Registrar ought to have made a reference to the Prescribed Authority.

9. The learned Single Judge is right in holding that the Prescribed Authority would have to decide under Section 25(1) upon the dispute which is raised. To that extent the observations of the learned single Judge are justi-fied. However, we find merit in the contention of the appellants that the petition could not have been dismissed merely with liberty to move the Prescribed Authority. The appropriate direction to pass, was to set aside the order of the Deputy Registrar which is an order without jurisdiction since the Deputy Registrar has decided an issue which fell within exclusive domain of the Prescribed Authority.

19. We, therefore, find that on the facts here, there is a dispute about two rival sets of elections raised *bona fide* before the Assistant Registrar, which ought to have been referred to the Prescribed Authority. The dispute has within its fold issues regarding the validity of amendments made to the bylaws and the electoral college competent to vote. These issues would also have to be determined by the Prescribed Authority and it is within the province of the Prescribed Authority seized of the proceedings under Section 25(1) of the Act to decide the question of membership of the General Body. In this regard, reference may be made to the decision of this Court in **Kisan National Education Trust and others v. Prescribed Authority (Sub-Divisional Magistrate) and others, 2018 SCC OnLine All 6120**, where it has been held:

62. In *Vidur Sewa Ashram v. State of U.P.2018 (5) ADJ 717*, a Coordinate Bench of this Court was considering the question whether membership of the general body of a society could be decided by the Prescribed Authority incidentally to the dispute relating to elections.

63. This Court considered the provisions of section 25(1)"of the Societies Registration Act and also the provisions of section 25(2) and also section 4(B) of the Act. It considered the judgment rendered by this Court in *Sita Ram Rai v. Assistant Registrar, Firms, Societies and chits, Gorakhpur (2003) 52 ALR 246 and Vindhya Vasini v. Prescribed Authority (2002) 47 ALR 541* and observed that in Sita Ram Rai's case, it has been held that election disputes, if any, including validity of members entitled to vote can be decided by the Prescribed Authority under section 25(1) of the Act. In Vindhyawasni case, it was held, that the decision relating to number of members of general body entitled to participate in election is incidental for deciding the doubt about the validity of elections under sub-section (1) of section 25 of the Act, and therefore can be decided by the Prescribed Authority.

20. It is in the last contended by the learned Counsel for the appellant that the learned Single Judge could not have disposed of the writ petition finally at the admission stage without inviting a counter affidavit. True, it is that normally in a writ petition, particularly an original petition, the respondents must be given opportunity to respond by filing a counter affidavit, but

here we find that the appellant was heard and was represented by the learned Counsel before the learned Single Judge. There is no case either on the grounds raised or in the affidavit that the learned Counsel representing the appellant before the learned Single Judge asked for time to file a counter affidavit, which was not granted. Apparently, the learned Counsel for the appellant, as the tenor of the judgment impugned would show, chose to address the Court on merits without seeking time to file a counter affidavit. In our opinion, therefore, the appellant cannot be permitted to raise a grievance of that kind once before the learned Single Judge the appellant chose to address the Court on merits, sans an affidavit on their behalf. Even otherwise, most of the papers were on record of the writ petition and the issue is essentially about jurisdiction based on facts, that are sufficiently available on the existing papers. No prejudice to the appellant, therefore, has been demonstrated. In our opinion, the learned Single Judge has committed no error in directing the Assistant Registrar to make a reference under Section 25(1) of the Act.

21. No point was argued or raised before us in addition to that which was considered and dealt with by the learned Single Judge.

22. We find no merit in the appeal. The appeal **fails** and is **dismissed.**

(2022) 9 ILRA 585
ORIGINAL JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 26.08.2022

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 6602 of 2000

Ajai Kumar Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Prashant Kumar, Siddharth Lal Vaish, Sudeep Kumar, Sushil Kumar

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Government Servants (Discipline and Appeal) Rules, 1999 – R. 6 & 7 – Disciplinary proceeding – Principle of Natural Justice – No supply of preliminary enquiry report to the employee – Effect – Held, without supplying the preliminary enquiry report to the employee, the impugned order cannot be passed – The impugned order has been passed in utter disregard of the principles of natural justice, hence, is not sustainable in Law. (16 and 19)

B. Service Law – Disciplinary proceeding – Principle of Natural Justice – Opportunity of hearing – Finding of preliminary enquiry report, how far reliable in regular disciplinary proceeding – Held, once the decision is taken by the authorities to institute regular disciplinary proceedings then findings in the preliminary enquiry report ordinarily is not to be relied upon – In case, such a report is to be relied upon, then the delinquent employees has to be confronted with such materials, and only after hearing their version in the matter that such a report could be relied upon. Any other course followed would clearly be a violation of principles of natural justice. (Para 22)

Writ petition allowed. (E-1)

List of Cases cited:-

1. U.O.I. & anr. Vs Tulsiram Patel; (1985) 3 SCC 398

2. Hari Niwas Gupta Vs St. of Bihar & anr.; (2020) 3 SCC 153

3. Sudesh Kumar Vs St. of Har. & ors.; (2005) 11 SCC 525

4. Jaswant Singh Vs St. of Pun. & ors.; (1991) 1 SCC 362

5. Wing Commander Rajesh Kumar Nagar Vs St. of U.P.; 2021 SCC OnLine All 477

6. M.V. Bijlani Vs U.O.I. & ors.; (2006) 5 SCC 88

7. Himachal Pradesh St. Electricity Board Ltd. Vs Mahesh Dahiya; (2017) 1 SCC 768

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Sudeep Kumar, learned counsel for the petitioner and learned Standing Counsel for the State-respondent.

2. By means of the present writ petition, the petitioner is challenging an order dated 11.10.2000, passed by the respondent No.2 (Annexures-1 and 2 to the writ petition) with a further prayer for issuance of necessary direction to the respondent No.3 to accept the resignation letter dated 30.11.1996 by a formal order w.e.f. 30.11.1996. It is also prayed for issuance of a writ, order or direction in the alternative, in the nature of mandamus commanding the respondents to treat the petitioner's service terminated in pursuance of order dated 14.1.1998, passed by the respondent No.3.

3. Brief fact of the case is that the petitioner was initially appointed on the post of Senior Scientific Assistant in temporary capacity on 27.10.1990. The petitioner submitted an application to his appointing authority i.e. Superintendent of Police, Shahjahanpur for issuance of No Objection Certificate. The said application was forwarded by the Superintendent of Police, Shahjahanpur on 16.7.1996.

4. The petitioner came to know of his appointment in Consolidation Department, where he was posted as Senior Scientific Assistant, Field Unit, Shahjahanpur on 30.11.1996. The petitioner handed over his entire charge to one of his subordinates on the same day. The petitioner submitted his resignation letter to the Superintendent of Police, Shahjahanpur on 30.11.1996.

5. The respondent No.3 again required the petitioner to resume his duties on 20.6.1998. The petitioner expressed his reluctance to join in Forensic Science Laboratory. The respondent No.2 vide order dated 23.9.1999 required the petitioner to justify his resignation from service. Thereafter, on 14.1.2000, the respondent No.3 terminated the petitioner from service. On 2.3.2000, the Superintendent of Police, Shahjahanpur intimated the Director, Forensic Science Laboratory, U.P. at Lucknow that there was no dues lying against the petitioner, in his office.

6. The respondent No.2 advised the petitioner by letter to resign from consolidation department and to continue under their subordination on 23.9.2000. On 9.8.2000, an order was passed by the High Court, disposing of the writ petition of the petitioner. The petitioner submitted a representation to the respondent No.2 on 16.8.2000. Thereafter, on 24.8.2000, the petitioner submitted a supplementary representation to the respondent No.2. The respondent No.4 submitted his alleged report (enquiry report) on 28.8.2000.

7. The respondent No.2 issued his order dated 11.10.2000, dispensing with the departmental enquiry against the petitioner and dismissed him from service, under the provisions of U.P. Government Servants (Discipline and Appeal) Rules, 1999. The representation filed by the petitioner was

rejected by the respondent No.3 on 11.10.2000.

8. Assailing the impugned orders, submission of learned counsel for the petitioner is that there is gross violation of principles of natural justice as Rule 6 (2) of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 provides that in case there are serious charges against the employee then enquiry by issuing charge sheet is to be initiated. Due to non issuance of charge sheet and non holding of regular enquiry, the impugned order vitiates in law and is liable to be set aside.

9. Second submission of learned counsel for the petitioner is that relying on the preliminary enquiry report, the impugned order has been passed. He submits that law is very much settled that in case the order has been passed on the basis of preliminary enquiry, the order cannot be sustained.

10. In support of his submission, he placed reliance upon the following judgments :-

(i) Union of India and another Vs. Tulsiram Patel [(1985) 3 Supreme Court Cases 398]

(ii) Hari Niwas Gupta Vs. State of Bihar and another [(2020) 3 Supreme Court Cases 153]

(iii) Sudesh Kumar Vs. State of Haryana and others [(2005) 11 Supreme Court Cases 525]

(iv) Jaswant Singh Vs. State of Punjab and others [(1991) 1 Supreme Court Cases 362]

(v) Wing Commander Rajesh Kumar Nagar Vs. State of U.P. [2021 SCC OnLine All 477]

(vi) M.V. Bijlani Vs. Union of India and others [(2006) 5 Supreme Court Cases 88]

(vii) Himachal Pradesh State Electricity Board Ltd. Vs. Mahesh Dahiya [(2017) 1 Supreme Court Cases 768]

11. Next submission of learned counsel for the petitioner is that once vide Annexure-6, it was directed that in case of non joining within the stipulated period, service will be dispensed with, there was no occasion to passe the impugned order.

12. On the other hand, learned Standing Counsel submits that the impugned order does not suffer from any infirmity or illegality and is a just and valid order. He further requested to adjourn the case for production of record.

13. In the opinion of the Court, there is no requirement of producing of record and there is controversy or dispute in regard to the documentary evidence, placed by the petitioner.

14. After having heard the rival contention of learned counsel for the parties, I have perused the material on record.

15. To resolve the controversy, Rule 7(ii) of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 is being quoted below :-

"7. Procedure for imposing major penalties. --

(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called

charge-sheet. The charge-sheet shall be approved by the Disciplinary Authority :

Provided that where the Appointing Authority is Governor, the charge-sheet may be approved by the Principal Secretary or the Secretary, as the case may be, of the concerned department."

16. On bare perusal of the record, it is well established that the provision of Rule 7(ii) was not followed while initiating disciplinary proceeding against the petitioner, therefore, there is no hesitation to hold that the impugned order has been passed in utter disregard of the provision referred hereinabove.

17. On perusal of the impugned order, it is also established that the impugned order has been passed on the basis of preliminary enquiry conducted against the petitioner, without supplying the copy of the enquiry report and charge sheet to him.

18. Relevant portion of the judgments cited by the learned counsel for the petitioner is being reproduced hereunder :-

(i) **Union of India and another Vs. Tulsiram Patel** (Supra), paragraph 130

"130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform : capable of being put into practice, done or accomplished : feasible". Further, the words used are not "not practicable" but "not" reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner : to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b).

What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidate witnesses who are going to given evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through other threatens, intimidates and terrorizes the officer who is the disciplinary authority or member of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind

that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause(3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India and others, [1984] 3 S.C.R. 302, is an instance in point. In that case, the appellant was working as a senior clerk in the office of the Chief Commercial Superintendent, Northern Railway, Varanasi. The Senior Commercial Officer wrote a letter to the appellant calling upon him to submit his explanation with regard to twelve charges of gross indiscipline mostly relating to the Deputy Chief Commercial Superintendent. The appellant submitted his explanation and on the very next day the Deputy Chief Commercial Superintendent served a second notice on the appellant saying that his explanation was not convincing and that another chance was being given to him to offer his explanation with respect to those charges. The appellant submitted his further explanation but on the very next day the Deputy Chief Commercial Superintendent passed an order dismissing him on the ground that he was not fit to be retained in service. This Court struck down the order holding that seven out of twelve charges related to the conduct of the appellant with the Deputy Chief Commercial Superintendent who was the disciplinary authority and that if an inquiry were to be held, the principal witness for the Department would have been the Deputy Chief Commercial Superintendent himself, resulting in the same person being the main accuser, the chief witness and also the judge of the matter."

(ii) **Hari Niwas Gupta (Supra)**, paragraphs- 10, 11, 18 and 19

"10. Clause (1) states that persons employed in civil services or posts under the Union or the States or members of the all-India service shall not be dismissed, removed or reduced in rank by an authority subordinate to that by which he/she was appointed. Clause (2) provides that such a person could be dismissed or removed or reduced in rank only after an inquiry in which he has been informed of the charges against him and after being afforded a reasonable opportunity of being heard in respect of those charges. The second proviso incorporates exceptions when the need for holding an inquiry under clause (2) can be dispensed with. Clause (b) of the second proviso to Article 311(2) can be invoked to impose a punishment of dismissal, removal, or reduction in rank on the satisfaction, to be recorded in writing, that it is not reasonably practicable to conduct an inquiry before imposing the punishment. This Court in Jaswant Singh v. State of Punjab,1 relying on an earlier decision in Union of India v. Tulsiram

Patel,2 has affirmatively held that the obligation of the competent authority to record

reasons when passing an order under clause (b) to the second proviso to Article 311(2) is mandatory, and it was inter alia observed:

"5. It was incumbent on the respondents to disclose to the court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent 3 in the impugned order. Clause (b) of the second proviso to Article 311(2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry. This is clear from the following observation at page 270 of Tulsiram case: (SCC p. 504, para 130) A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the departments case against the government servant is weak and must fail."

11. In the present matter, the Division Bench vide the impugned judgment has as a fact found that the High Court had failed to record satisfaction in writing for dispensing with an inquiry before arriving at its decision to dismiss the judicial officers. For this reason, the order of dismissal dated 12th February 2014 passed by the Governor of the State of Bihar under clause (b) of the second proviso to Article 311(2) was quashed and set aside. Consequently, the judicial officers were to be reinstated in service. This is what has been observed in the quoted portion of the final directions by the Division Bench, which refers to the fact that two (sic-one) judicial officers had attained the age of superannuation during the pendency of the writ petitions and, therefore, they would be deemed to be continuing in service for the limited purpose of enabling the disciplinary proceedings to continue. The other officer(s) would be deemed to be under suspension. The High Court was required to take a decision within two months and if no decision was taken, the proceedings would lapse and the judicial officers would be entitled to all consequential benefits as if the proceedings had been set aside in entirety. It was directed that the judicial officer(s) who continued to be in service, would be paid subsistence allowance, and the retired would be paid provisional pension to the extent of 25% forthwith.

18. The observations in our opinion are being misread as the aforequoted portion refers to the legal position that normally departmental inquiry should be held. It also refers to the scenario where a departmental inquiry cannot be conducted that is, when conducting of departmental enquiry was turning out to be a difficult task, in which case a decision could have been taken to dispense with the enquiry; by recording specific reasons. It is observed that the principles laid down in Tulsiram Patel (supra) and Tarsem Singh (supra) have to be kept in mind. Appropriate in this regard, would be a reference to the following observations in Tulsiram Patel (supra), which read:

"130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that it is not reasonably practicable to hold the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are not reasonably practicable and not impracticable. According to the Oxford English Dictionary practicable means Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible. Websters Third New

International Dictionary defines the word practicable inter alia as meaning possible to practice or perform: capable of being put into practice, done or accomplished: feasible. Further, the words used are not not practicable but not reasonably practicable. Websters Third New International Dictionary defines the word reasonably as in a reasonable manner: to a fairly sufficient extent. Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation."

19. Thus, the authorities to invoke the power under clause (b) to the second proviso of Article 311(2) to dispense with a departmental inquiry must record a finding that such an inquiry cannot be conducted and record specific reasons for the same. In this case, the Division Bench had recorded the contention of the respondent- High Court as the disciplinary authority that it would be impossible to assimilate, collect and produce direct evidence and material as the acts and misdeeds were in another country. The Division Bench having found that reasons had not been recorded for dispensing with the inquiry, has neither accepted nor rejected this contention of the High Court. It will not be appropriate and correct to interpret the decision of the Division Bench by reading one or more sentences of a paragraph in isolation. The entire judgment has to be read to understand the ratio and finding and the observations must be read in the context in which they have been made."

(iii) **Sudesh Kumar** (Supra), paragraphs- 5, 6 and 7

"5. It is now established principle of law that an inquiry under Article 311(2) is a rule and dispensing with the inquiry is an exception. The authority dispensing with the inquiry under Article 311(2) (b) must satisfy for reasons to be recorded that it is not reasonably practicable to hold an inquiry. A reading of the termination order by invoking Article 311(2)(b), as extracted above, would clearly show that no reasons whatsoever have been assigned as to why it is not reasonably practicable to hold an inquiry. The reasons disclosed in the termination order are that the complainant refused to name the accused out of fear of harassment; the complainant, being a foreign national, is likely to leave the country and once he left the country, it may not be reasonably practicable to bring him to the inquiry. This is no ground for dispensing with the inquiry. On the other hand, it is not disputed that, by order dated 23-12-1999, the visa of the complainant was extended up to 22-12-2000. Therefore, there was no difficulty in securing the presence of Mr. Kenichi Tanaka in the inquiry.

6. A reasonable opportunity of hearing in Article 311(2) of the Constitution would include an opportunity to defend himself and establish his innocence by cross-examining the prosecution witnesses produced against him and by examining the defence witnesses in his favour, if any. This he can do only if inquiry is held where he has been informed of the charges levelled against him. In the instant case, the mandate of Article 311(2) of the Constitution has been violated depriving reasonable opportunity of being heard to the appellant.

7. In this view of the matter, we are of the view that the order terminating the services of the appellant is not sustainable in law. It is, accordingly, quashed and set

aside. However, the respondents are at liberty, if so advised, to hold an inquiry against the appellant by affording him a reasonable opportunity of hearing and thereafter pass any order as it may deem fit and proper in accordance with law."

(iv) **Jaswant Singh (Supra)**, paragraph-5

"5. "The impugned order of April 7, 1981 itself contains the reasons for dispensing with the inquiry contemplated by Article 311(2) of the Constitution. Paragraph 3 of the said order, which we have extracted earlier, gives two reasons in support of the satisfaction that it was not reasonably practicable to hold a departmental enquiry against the appellant. These are (i) the appellant has thrown threats that he with the help of other police employees will not allow holding of any departmental enquiry against him and (ii) he and his associates will not hesitate to cause physical injury to the witnesses as well as the enquiry officer. Now as stated earlier after the two Revision Applications were allowed on October 13, 1980. the appellant had re-joined service as Head Constable on March 5, 1981 but he was immediately placed under suspension. Thereafter, two show cause notices dated April 4, 1981 were issued against him calling upon him to reply thereto within 10 days after the receipt thereof. Before the service of these notices the incident of alleged attempt to commit suicide took place on the morning of April 6, 1981 at about 11.00 a.m. In that incident the appellant sustained an injury on his right arm with a knife. He was, therefore, hospitalised and while he was in hospital the two show cause notices were served on him at (5 of 8) about 10.00 p.m. on April 6, 1981. Before the appellant could reply to the said show cause notices the third respondent passed the impugned order on the very next day i.e. April 7, 1981. Now the earlier departmental enquiries were duly conducted against the appellant and there is no allegation

that the department had found any difficulty in examining witnesses in the said inquiries. After the Revision Applications were allowed the show cause notices were (4 of 6) [CW-1737/2008] issued and 10 days time was given to the appellant to put in his replies thereto. We, therefore, enquired from the learned Counsel for the respondents to point out what impelled respondent No. 3 to take a decision that it was necessary to forthwith terminate the services of the appellant without holding an inquiry as required by Article 311(2). The learned Counsel for the respondents could only point out Clause (iv)(a) of sub-para 29(A) of the counter which reads as under:

"The order dated 7.4.81 was passed as the petitioner's activities were objectionable. He was instigating his fellow police officials to cause indiscipline, show insubordination and exhibit disloyalty, spreading discontentment and hatred, etc. and his retention in service was adjudged harmful."

This is no more than a mere reproduction of paragraph 3 of the impugned order. Our attention was not drawn to any material existing on the date of the impugned order in support of the allegation contained in paragraph 3 thereof that the appellant had thrown threats that he and his companions will not allow holding of any departmental enquiry against him and that they would not hesitate to cause physical injury to the witnesses as well as the enquiry officer if any such attempt was made. It was incumbent on the respondents to disclose to the Court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction

recorded by respondent No. 3 in the impugned order. Clause (b) of the second proviso to Article 311(2) can be invoked only when the authority is satisfied from the material placed (6 of 8) before him that it is not reasonably practicable to hold a departmental enquiry. This is clear from the following observation at p. 270 of Tulsi Ram's case:

"A disciplinary authority is not expected to dispense with a disciplinary authority lightly or arbitrarily or out of ulterior motives or merely in (5 of 6) [CW-1737/2008] order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail."

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer. In the counter filed by the third respondent it is contended that the appellant, instead of replying to the show cause notices, instigated his fellow police officials to disobey the superiors . It is also said that he threw threats to beat up the witnesses and the Inquiry Officer if any departmental inquiry was held against him. No particulars are given. Besides it is difficult to understand how he could have given threats, etc., when he was in hospital. It is not shown on what material the third respondent came to the conclusion that the appellant had thrown threats as alleged in paragraph 3 of the impugned order. On a close scrutiny of the impugned order it seems the satisfaction was based on the ground that he was instigating his colleagues and was holding meetings with other police officials with a view to spreading hatred and dissatisfaction towards his superiors. This allegation is based on his alleged activities at Jullundur on April 3, 1981 reported by SHO/GRP, Jullundur. That report is not forthcoming. It is no one's contention that the said SHO was threatened. The third respondent's counter also does not reveal if he had verified the correctness of the information. To put it tersely the subjective satisfaction recorded in paragraph 3 of the impugned order is not fortified by any independent material to justify the dispensing with of the inquiry envisaged by Article 311(2) of the (7 of 8) Constitution. We are, therefore, of the opinion that on this short ground alone the impugned order cannot be sustained."

(v) **Wing Commander Rajesh Kumar Nagar (Supra)**, paragraphs-53 to 58

"53. Once the decision is taken by the authorities to institute regular disciplinary proceedings then findings in the preliminary enquiry report ordinarily is not to be relied upon. In case such a report is to be relied upon then the delinquent employees has to be confronted with such materials, and only after hearing their version in the matter that such a report could be relied upon. Any other course followed would clearly be a violation of principles of natural justice.

54. In the facts of the present case, once the decision was taken to institute regular disciplinary proceedings against the petitioner and charge-sheet was issued, the enquiry officer was expected to have independently examined the evidence collected during the course of disciplinary proceedings and return its finding as to whether charges against the employees are made out.

55. In the instant case, it appears that the State Government is pre meditated and malafide, which is substantiated by a frequent change of the inquiry officers, who could align with the wishes of the authorities. The petitioner has not been given proper opportunity to submit the reply of the show cause notice as he has not been supplied the relevant documents for the preparation of the reply.

56. A recent decision of the Apex Court in H.P. State Electricity Board Ltd. Vs. Mahesh Dahiya, passed in Civil Appeal No.10913 of 2016, has been pleased to refer to and rely upon a previous decision of the Apex Court in M.V. Bijlani Vs. Union of India and others, (2006) 5 SCC 88 to observe as under:-

"24. ..... On the scope of judicial review, the Division Bench itself has referred to judgment of this Court reported in M.V. BIJLANI VERSUS UNION OF INDIA AND OTHERS (2006) 5 SCC 88. This Court, noticing the scope of judicial review in context of disciplinary proceeding made following observations in para 25: "It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

25. The three Judge Bench of this Court in B.C. CHATURVEDI VERSUS UNION OF INDIA AND OTHERS 1995 (6) SCC 749 had noticed the scope of judicial review with regard to disciplinary proceeding. Following observations have been made in paras 12 and 13: "12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of

natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case." "13. The disciplinary

authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to re-appreciate the evidence or the nature of punishment. In a disciplinary inquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In Union of India V. H.C. Goel this Court held at p. 728 that if the conclusion, upon consideration of the evidence reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could issued."

26. Both the learned Single Judge and the Division Bench have heavily relied on the fact that before forwarding the copy of the report by letter dated 02.04.2008 the Disciplinary Authority-cum-Whole Time Members have already formed an opinion on 25.02.2008 to punish the writ petitioner with major penalty which is a clear violation of principle of natural justice. We are of the view that before making opinion with regard to punishment which is to be imposed on a delinquent, the delinquent has to be given an opportunity to submit the representation/ reply on the inquiry report which finds a charge proved against the delinquent. The opinion formed by the Disciplinary Authority-cum-Whole Time Members on 25.02.2008 was formed without there being benefit of comments of the writ petitioner on the inquiry report. The writ petitioner in his representation to the inquiry report is entitled to point out any defect in the procedure, a defect of substantial nature in appreciation of evidence, any misleading of evidence both oral or documentary. In his representation any inputs and explanation given by the delinquent are also entitled to be considered by the Disciplinary Authority before it embarks with further proceedings as per statutory rules. We are, thus, of the view that there was violation of principle of natural justice at the level of Disciplinary Authority when opinion was formed to punish the writ petitioner with dismissal without forwarding the inquiry report to the delinquent and before obtaining his comments on the inquiry report. We are, thus, of the view that the order of the High Court setting aside the

punishment order as well as the Appellate order has to be maintained.

27. In view of the above discussion, we are of the view that present is the case where the High Court while quashing the punishment order as well as Appellate order ought to have permitted the Disciplinary Authority to have proceeded with the inquiry from the stage in which fault was noticed i.e. the Stage under Rule 15 of Rules. We are conscious that sufficient time has elapsed during the pendency of the writ petition before learned Single Judge, Division Bench and before this Court, however, in view of the interim order passed by this Court dated 31.08.2015 no further steps have been taken regarding implementation of the order of the High Court. The ends of justice be served in disposing of this appeal by fixing a time frame for completing the proceeding from the stage of Rule 15.

28. We having found that principles of natural justice have been violated after submission of the inquiry report dated 29.12.2007 all proceedings taken by the Disciplinary Authority after 29.12.2007 have to be set aside and the Disciplinary Authority is to be directed to forward the copy of the inquiry report in accordance with Rule 15(2) of Rules 1965 and further proceedings, if any, are to be taken thereafter. "

57. In State of U.P. Vs. Shatrughan Lal and Another, (1998) 6 SCC 651. The relevant paragraphs of the judgment is reproduced as under:-

"It has also been found that during the course of the preliminary enquiry, a number of witnesses were examined against the respondent in his absence, and rightly so, as the delinquents are not associated in the preliminary enquiry, and thereafter the charge sheet was drawn up. The copies of those statements, though asked for by the respondent, were not supplied to him. Since there was a failure on the part of the appellant in this regard too, the principles of natural justice were violated and the respondent was not afforded an effective opportunity of hearing, particularly as the appellant failed to establish that non-supply of the copies of statements recorded during preliminary enquiry had not caused any prejudice to the respondent in defending himself."

58. Reliance is also placed upon a decision of this Court in Chandrika Yadav Vs. State of Uttar Pradesh and others, passed in Writ Petition No.55836 of 2005, in which following observations have been made:-

"From the order of disciplinary authority and the pleadings of the counter affidavit, it is evident that the preliminary enquiry was conducted in the matter and various materials as well as the findings of the preliminary enquiry have been relied upon by the disciplinary authority. It is well settled law that findings and materials of the preliminary enquiry cannot be relied upon in the disciplinary proceeding if the delinquent was not associated with preliminary enquiry. Admittedly, in the present case, petitioner was not given any such opportunity. It is a trite law that object of the preliminary enquiry is to satisfy the employer itself that a disciplinary proceeding can be conducted against an employee. Its purpose is to collect the facts. Once the employer is satisfied on the basis of the materials and report of the preliminary enquiry that disciplinary proceeding may be initiated in terms of the relevant service Rule, the delinquent is placed under suspension, and a copy of the charge-sheet and other documentary evidences relied upon in support of the charges are served upon him.

It is noteworthy that if in the disciplinary proceeding the department wants to rely on some materials of preliminary enquiry, it is necessary to supply a copy of said materials to the employee. Reference may be made to the judgement of the Supreme Court in the case of Employees of Firestone Tyre and Rubber Co. (Private) Ltd. v. The Workmen, AIR 1968 SC 236. In a recent judgement in the case of Nirmala J. Jhala v. State of Gujarat and another, (2013) 4 SCC 301, the Supreme Court had the occasion to deal with the scope of preliminary enquiry at length. The observations of the Supreme Court in Nirmala J. Jhala (supra), which are relevant to the present

controversy, read as under:

"45. In view of the above, it is evident that the evidence recorded in preliminary inquiry cannot be used in regular inquiry as the delinquent is not associated with it, and opportunity to cross-examine the

persons examined in such inquiry is not given. Using such evidence would be violative of the principles of natural justice."

"47. The preliminary enquiry may be useful only to take a prima facie view, as to whether there can be some substance in the allegation made against an employee which may warrant a regular enquiry."

"51. There is nothing on record to show that either the preliminary enquiry report or the statements recorded therein, particularly, by the complainant-accused or Shri C.B. Gajjar, Advocate, had been exhibited in regular inquiry. In the absence of information in the charge-sheet that such report/statements would be relied upon against the appellant, it was not permissible for the enquiry officer or the High Court to rely upon the same. Natural justice is an inbuilt and inseparable ingredient of fairness and reasonableness. Strict adherence to the principle is required, whenever civil consequences follow up, as a result of the order passed. Natural justice is universal justice. In certain factual circumstances even non-observance of the rule will itself result in prejudice. Thus, this principle is of supreme importance. [Vide S.L. Kapoor v. Jagmohan, (1980) 4 SCC 379; D.K. Yadav v. J.M.A. Industries Ltd., (1993) 3 SCC 259; and Mohd. Yunus Khan v. State of U.P., (2010) 10 SCC 539)"

"52.2 The enquiry officer, the High Court on administrative side as well as on judicial side, committed a grave error in placing reliance on the statement of the complainant as well as of Shri C.B. Gajjar, Advocate, recorded in a preliminary enquiry. The preliminary enquiry and its report loses significance/importance, once the regular enquiry is initiated by issuing charge-sheet to the delinquent. Thus, it was all in violation of the principles of natural justice."

"52.4 The onus lies on the department to prove the charge and it failed to examine any of the employees of the court i.e. stenographer, Bench Secretary or peon attached to the office of the appellant for proving the entry of Shri Gajjar, Advocate in her chamber on 17-8-1993."

In the present case, no such procedure has been adopted by the respondents as the disciplinary authority has relied upon the preliminary enquiry but there is nothing on the record to indicate that said materials of the preliminary enquiry were supplied to the petitioner. Along with the counter affidavit the respondents have not filed the alleged statement of petitioner's wife Smt. Genda Devi or Smt. Seema Devi. Learned Standing Counsel also could not point out any material from the records produced by him, from which it can be established that the petitioner has contracted second marriage with Smt. Seema Devi. There is no evidence on the record to the said effect. Merely some letters purportedly written by the petitioner to Smt. Seema Devi cannot establish the relationship of husband and wife. Petitioner has denied that those letters were written by him and the department has not established that those letters were written by the petitioner. Even if those letters are

assumed to be correct and written by the petitioner, a perusal thereof do not establish that there was a relationship of husband and wife between them.

After careful consideration of the facts and circumstances of the case as well as the submissions advanced by the learned Counsel for the parties, I am of the view that the disciplinary proceeding conducted

against the petitioner is vitiated on the ground of violation of principles of natural justice and as such, the orders passed by the disciplinary authority, appellate authority and revisional authority dated 07th May, 1997, 31st August, 2003 and 28th March, 2005 respectively (annexures-1, 5 and 7 respectively to the writ petition), impugned in this writ petition, cannot be sustained and are hereby quashed. The matter is remitted back to the disciplinary authority to conduct a fresh enquiry in the matter after serving a copy of the charge-sheet upon the petitioner. The enquiry may be conducted and completed in accordance with the law as expeditiously as possible preferably within a period of four months from the date of communication of this order. Petitioner is directed to cooperate in the enquiry and he will not take unnecessary adjournments."

(vi) ***M.V. Bijlani (Supra)****, paragraph-25*

"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidences to prove the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

(vii) **Himachal Pradesh State Electricity Board Ltd**., paragraphs- 23, 24, 25, 26, 27, 29, 30 and 31

"23. The basis of coming to the conclusion by both learned Single Judge and the Division Bench that Disciplinary Authority has violated the principle of natural justice is based on the fact that although the inquiry report was sent to the writ petitioner by letter dated 02.04.2008, the Disciplinary Authority-cum-Whole Time Members have already came to the opinion on 25.2.2008 that writ petitioner be punished with major penalty. The Division Bench of the High Court has placed reliance on Union of India and others v. R. P. Singh.

24. In the above case the issue was, as to whether non-supply of the copy of advise of U.P.S.C. to delinquent officer at pre-decision stage violates the principle of natural justice. This Court placed reliance on the Constitution Bench judgment in Managing Director, ECIL, HYDERABAD AND OTHERS Versus B. KARUNAKAR AND OTHERS and laid down following in para 21:

""21. At this juncture, we would like to give our reasons for our respectful concurrence with S.K. Kapoor (supra). There is no cavil over the proposition that the language engrafted in Article 320(3)(c) does not make the said Article mandatory. As we find, in the T.V.Patel's case, the Court has based its finding on the language employed in Rule 32 of the Rules. It is not in dispute that the said Rule from the very inception is a part of the 1965 Rules. With the efflux of time, there has been a change of perception as regards the applicability of the principles of natural justice. An inquiry report in a disciplinary proceeding is required to be furnished to the delinquent

employee so that he can make an adequate representation explaining his own stand/stance. That is what precisely has been laid down in the B.Karnukara's(AIR 1994 SC 1074) case. We may reproduce the relevant passage with profit: -

""29. Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officers report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employees right to defend himself against the charges levelled against him. A denial of the enquiry officers report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.""

25. The Constitution Bench in Managing Director, ECIL, HYDERABAD AND OTHERS Versus B. KARUNAKAR AND OTHERS after elaborately considering the principle of natural justice in the context of the disciplinary inquiry laid down following in para 29, 30 (iv)(v):

29. Hence it has to be held that when the enquiry officer is not the Disciplinary Authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the Disciplinary Authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a par t of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the Disciplinary Authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

30. (iv). In the view that we have taken, viz., that the right to make representation to the disciplinary authority against the findings recorded in the enquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in Mohd. Ramzan case should apply to employees in all establishments whether Government or non-Government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the enquiry officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.

(v). The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non- furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of

reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an unnatural expansion of natural justice which in itself is antithetical to justice"

26. Present is not a case of not serving the inquiry report before awarding the punishment rather the complaint has been made that before sending the inquiry report to the delinquent officer, Disciplinary Authority has already made up its mind to accept the findings of the inquiry report and decided to award punishment of dismissal. Both the learned Single Judge and the Division Bench on the aforesaid premise came to the conclusion that principle of natural justice have been violated by the Disciplinary Authority. The Division Bench itself was conscious of the issue, as to whether, inquiry is to be quashed from the stage where the Inquiry Officer\Disciplinary Authority has committed fault i.e. from the stage of Rule 15 of the CCS (CCA) Rules as non-supply of the report. Following observations have been made in the impugned judgment by Division Bench in para 21:

""Having said so, the core question is whether the inquiry is to be quashed from the stage where the Inquiry Officer/Disciplinary Authority has committed fault, i.e. from the stage of Rule 15 of the CCS (CCA) Rules, i.e. non-supply of inquiry report, findings and other material relied upon by the Inquiry Officer/Disciplinary Authority to the writ writ petitioner- respondent herein to explain the circumstances, which were made basis for making foundation of inquiry report or is it a case for closure of the inquiry in view of the fact that there is not even a single iota of evidence, prima facie, not to speak of proving by preponderance of probabilities, that the writ petitioner has absented himself willfully and he has disobeyed the directions?""

27. The above observation clearly indicates that Division Bench was well aware that fault has occurred on the stage of Rule 15 of the CCS (CCA) Rules. The Division Bench had also relied on the judgment of this Court in KRUSHNAKANT B. PARMAR Versus UNION OF INDIA AND ANOTHER (2012) 3 SCC 178 where this Court had laid down that absence from duty without any application on prior permission may amount to unauthorised absence but it does not always mean willful. Learned counsel for the appellant, as noted above, has confined his submission on the proof of the second part of the charge and he has not invited us to enter into the issue as to whether absence of the writ petitioner was willful or not.

29. On the scope of judicial review, the Division Bench itself has referred to judgment of this Court reported in M.V. BIJLANI VERSUS UNION OF INDIA AND OTHERS (2006) 5 SCC 88. This Court, noticing the scope of judicial review in context of disciplinary proceeding made following observations in para 25: It is true that the jurisdiction of the court in judicial

review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses

only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with.

30. The three Judge Bench of this Court in B.C. CHATURVEDI VERSUS UNION OF INDIA AND OTHERS 1995 (6) SCC 749 had noticed the scope of judicial review with regard to disciplinary proceeding. Following observations have been made in paras 12 and 13:

12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply

to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person

would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to re- appreciate the evidence or the nature of punishment. In a disciplinary inquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In Union of India V. H.C. Goel this Court held at p. 728 that if the conclusion, upon consideration of the evidence reached by the disciplinary authority, is perverse or

suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could issued.

31. Both the learned Single Judge and the Division Bench have heavily relied on the fact that before forwarding the copy of the report by letter dated 02.04.2008 the Disciplinary Authority-cum-Whole Time Members have already formed an opinion on 25.02.2008 to punish the writ petitioner with major penalty which is a clear violation of principle of natural justice. We are of the view that before making opinion with regard to punishment which is to be imposed on a delinquent, the delinquent has to be given an opportunity to submit the representation/reply on the inquiry report which finds a charge proved against the delinquent. The opinion formed by the Disciplinary Authority-cum-Whole Time Members on 25.02.2008 was formed without there being benefit of comments of the writ petitioner on the inquiry report. The writ petitioner in his representation to

the inquiry report is entitled to point out any defect in the procedure, a defect of substantial nature in appreciation of evidence, any misleading of evidence both oral or documentary. In his representation any inputs and explanation given by the delinquent are also entitled to be considered by the Disciplinary Authority before it embarks with further proceedings as per statutory rules. We are, thus, of the view that there was violation of principle of natural justice at the level of Disciplinary Authority when opinion was formed to punish the writ petitioner with dismissal without forwarding the inquiry report to the delinquent and before obtaining his comments on the inquiry report. We are, thus, of the view that the order of the High Court setting aside the punishment order as well as the Appellate order has to be maintained."

19. On perusal of the aforesaid, it is clear that without supplying the preliminary enquiry report to the employee, the impugned order cannot be passed, thus, it is well established that the impugned order has been passed in utter disregard of the principles of natural justice, hence, is not sustainable in law.

20. In regard to the third submission of learned counsel for the petitioner that once there was stipulation in not joining the service, the service will be dispensed with, there was no occasion in not joining the petitioner into service in passing the impugned order. This submission also has merit and there was no occasion to pass the impugned order, relying on the preliminary enquiry report.

21. Submission of learned Standing Counsel on the point raised hereinabove are not attracted to this Court and being devoid of merit, is rejected.

22. Once the decision is taken by the authorities to institute regular disciplinary proceedings then findings in the preliminary enquiry report ordinarily is not to be relied upon. In case such a report is to be relied upon then the delinquent employees has to be confronted with such materials, and only after hearing their version in the matter that such a report could be relied upon. Any other course followed would clearly be a violation of principles of natural justice.

23. In view of the reasons recorded above, the impugned order dated 11.10.2000 is hereby quashed.

24. The writ petition succeeds and is **allowed.**

25. The respondents are directed to follow the consequential action in pursuance thereof.

(2022) 9 ILRA 603
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ-A No. 8605 of 2022
with
Writ-A Nos. 8611 of 2022, 8617 of 2022, 9736 of 2022, 9913 of 2022, 10011 of 2022, 10247 of 2022, 10454 of 2022, 10520 of 2022, 10553 of 2022, 10614 of 2022, 11167 of 2022, 19613 of 2018

Guru Charan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar, Sri Ram Krishna Patel

Counsel for the Respondents:
C.S.C., Sri Chandan Kumar, Sri J.N. Maurya

A. Allahabad High Court Rules, 1952 – Ch. XXII R. 7 – Writ – Maintainability – Res judicata – Claim subsequently rejected, how far barred the writ – Held, subsequent rejection of claims of petitioners clearly constitutes a fresh cause of action due to which, the same would not be barred under Ch. 22 R. 7 of the Allahabad High Court Rules. (Para 3)

B. Service Law – UP Aided Educational Institutions Employees Contributory Provident Fund, Insurance, Pension Rules, 1964 – GO dated 10.08.1978 and 29.08.181 – Benefit of Gratuity Scheme – Age of superannuation – Option to chose either 58 years or 60 years – Rule 4 provide that the benefits of Gratuity Scheme would be applicable only upon those teachers who would give an option to superannuate at the age of 58 years – Held, the natural corollary of the proposition was that in case of teachers exercising their right to continue in service up-till the age of 60 years, the benefit of gratuity would be unavailable since they would be getting extra salary for the two years of service rendered thereafter. (Para 12 and 32)

C. Service Law – Benefit of Gratuity Scheme – Entitlement – Petitioner's predecessors did not performed extra years service between the age of 58 years to 60 years – Payment of gratuity refused – Validity challenged – Held, the grant of gratuity is a natural corollary to services not being rendered for the extra period of two years in terms of conditions of Rules of 1981 and as such, such an option once granted earlier can definitely be revised – Denial of grant of gratuity to the petitioners in terms of conditions of Rules of 1981 is clearly contrary to provisions not only of the aforesaid Rules of 1981. (Para 66 and 67)

D. Interpretation of Statute – Beneficial legislation – Liberal construction – The beneficial provisions are required to be construed liberally in order to provide maximum effect to such provision. (Para 56)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Writ A No. 17399 of 2019; Usha Rani Vs St. of U.P. & ors. decided on 07.11.2019

2. Special Appeal (D) No. 1168 of 2020; St. of U.P. V. Prabha Shukla

3. Sushila Yadav Vs St. of U.P. & ors.; (2021)10 ADJ 235

4. Writ A No. 17399 of 2019; Usha Rani Vs St. of U.P. & ors.

5. Writ A No. 40568 of 2016; Noor Jahan Vs St. of U.P. & ors.

6. Writ A No. 8679 of 2018; Smt. Omwati Vs St. of U.P. & ors.

7. Prakash Chandra Sharma Vs Deputy Director of Education, Bareilly & ors.; (1997) 2 UPLBEC 1155

8. St. of U.P. & anr. Vs Shashthi Dutt Shastri & ors.; 2017 (Suppl.) ADJ 768(DB)

9. Writ A No. 14575 of 2021; Shikha Sharma Vs St. of U.P. & ors.

10. Panchi Devi Vs St. of Rajasthan & ors.; (2009)2 SCC 589

11. Maniben Maganbhai Bhariya Vs District Development Officer Dahod & ors.; AIR 2022 (SC) 2119

12. Writ Petition No. 2727(S/S) of 2014; Jagteshwari Maurya Vs St. of U.P. & ors.

13. Writ A No. 14397 of 2019; Renu Gupta Vs St. of U.P. & ors.

14. Writ Petition No. 6173(S/S) of 2014; Mala Tripathi versus St. of U.P. & ors.

15. Special Appeal Defective No. 1168 of 2020; Prabha Shukla Vs St. of U.P.

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

1. Heard Mr. Rajesh Kumar, Mr. Ram Krishna Patel, Mr. Adarsh Singh, Mr. Om Prakash Chaube, Mr. Gorakh Yadav, Mr. Kamal Kumar Kesherwani, Mr. Chandra Sekhar Pandey,Sr. Advocate and Mr. Manoj Yadav, learned counsels appearing for petitioner and Mr. J.N. Maurya, learned Chief Standing Counsel assisted by Mr. Chandan Kumar, learned Standing Counsel appearing on behalf respondent-State.

2. The question of law required to be adjudicated upon in this bunch of petitions is as follows:

(a) Whether option pertaining to grant of death-cum-retirement gratuity explicitly given or deemed to have given in terms of statutory rule by a member of teaching staff of Intermediate College can be revised without amendment in statutory rules only on the basis of subsequent Government Orders ?

(b) Whether such revision of option can be exercised at the instance of family members of such a teacher consequent upon his demise having failed to exercise such an option during his life time ?

3. At the very outset, learned counsel for respondents have taken a plea of some of the petition's not being maintainable in terms of Chapter 22, Rule 7 of the Allahabad High Court Rules since earlier also the same petitioners had filed petitions. However it is not disputed that the earlier petitions had not challenged the orders rejecting claims of petitioner, which are under challenge in the present petitions. As such, the subsequent rejection of claims of petitioners clearly constitutes a fresh cause of action due to which in the considered opinion of this Court, the same would not be barred under Chapter 22 Rule 7 of the Allahabad High Court Rules. The petitions are therefore held maintainable.

4. The predecessors-in-interest of petitioners were teachers serving in Government Aided Private Educational Institutions. There was disparity in service conditions of the teachers serving in Government run institutions and those serving in Government aided private educational institutions. Government of India appointed Secondary Education Service Commission, which made certain recommendations for removing disparity. On basis of these recommendations. State of Uttar Pradesh initially introduced a scheme known as "Triple Benefit Scheme' and framed Rules known as 'Uttar Pradesh Aided Educational Institutions Employees Contributory Provident Fund, Insurance,

Pension Rules, 1964' which came in effect from 1st October, 1964. In pursuance of the aforesaid Rules, Government Order dated 17-12-1965 was issued for implementing the Scheme under which the benefits of (i) contributory provident fund, (ii) special life Insurance, and (iii) pension including the family pension were to be given to all the teachers serving in the State aided primary schools, Junior High Schools, Higher Secondary Schools, Degree Colleges, Training Colleges etc. However, the pensionery benefits under the above Triple Benefits Scheme were still not at par with pensionery benefits admissible to teachers serving in Government institutions. To remove this disparity and in order to provide the same pensionery benefits to the teachers of Government Aided Private Institutions which were admissible to Government teachers, State of Uttar Pradesh issued Government Order dated 31st March, 1978. However, as the age of superannuation in case of teachers serving in Government colleges was 58 years, the teachers serving in Government Aided Private Institutions were asked to opt for the age of superannuation at 58 years for getting the pensionery benefits at par with the teachers serving in Government Colleges. Government Order inviting such option was issued on 10-8-1978. Under this Government Order if teacher opted to retire at the age of 58 years, he was to get death-cum-retirement gratuity along with other pensionery benefits.

5. Additionally, the 'Rules of U.P. School and College Teachers' Gratuity Fund' were framed and came into effect from 01.04.1964 which postulated grant of gratuity to teachers of Aided Educational Institution. They were to apply to all members of the teaching staff of State Aided Educational Institutions managed either by local body or private management which were recognized and aided by the State Education Department pertaining to primary school, junior high school, higher secondary school and degree college. Paragraph 5 of the said Rules provided gratuity and methods of its calculation in view of services rendered provided the teacher at the time of his death in service had put in not less than three years continuous service. There was no option required to be given by a teacher for inclusion in the aforesaid scheme which became automatically applicable upon all such teachers indicated herein-above.

6. Since the pensionary benefits of teachers serving in State Aided Non-Government Educational Institution run by private management were not at par with their counter parts in Government Colleges, the State Government-considered the demand agitated by such teachers and issued a Government Order dated 31.03.1978 which provided that permanent whole time teachers in State Aided Secondary Educational Institutions run by the private management and local bodies retiring on or after 01.03.1977 would be entitled to get pension calculated at the same time and in the same manner as admissible to their counter parts employed in the Government Colleges in the equal rank and grade.

7. This benefit was, however, extended subject to the conditions, inter alia, that benefit of death-cum-retirement gratuity of family pension to dependents of a teacher after his death available to teachers in Government Colleges would not be available and the Contributory Provident Fund Scheme in relation to such teachers would be supplanted by General Provident Fund Scheme with effect from 01.03.1977.

The Triple Benefit and Contributory Provident Fund Schemes were deemed to be amended accordingly in respect of such teachers.

8. The teachers serving in State Aided Secondary Educational Institutions controlled by Private Managements, however, continued to agitate for more pensionary benefits and in consideration of their demand, the State Government issued another Government Order dated 10.08.1978, thereby extending the benefit of death-cum-retirement Gratuity to teachers of State Aided Non-Government Secondary Institutions on their opting for retirement at the age of 58 years and also subject to the fulfilment of other conditions stipulated therein. It may be usefully observed that benefit of death-cum-retirement gratuity was available to the teachers in Government colleges and it was by means of the said Government Order that the said benefit was extended for the first time to the teachers in the State Aided Non-Government Educational Institutions.

9. In order to avail of the benefit of death-cum-retirement gratuity, a teacher in State Aided Non-Government Educational Institution was required to give his option for retirement at the age of 58 years which, it may be stated, is the prescribed age for the retirement of teachers in Government Colleges as against 60 years which is the prescribed age of superannuation for teachers in State Aided Non-Government Secondary Institutions.

10. According to the Government Order dated 10.08.1978, teachers willing to opt for gratuity, were required to give their options in a prescribed proforma, in accordance with a Niyamawali which was required to be prepared by the Director of Education and publicized with the approval of the State Government as would be evident from paragraph 4 of the Government Order.

11. The Niyamawali known as "राज्य सहायता प्राप्त उच्चतर माध्यमिक विद्यालयों के अध्यापकों की मृत्यु तथा सेवावृित्तिक आनुतोषिक की नियमावली" was prepared by the Director of Education, as comprehended by Paragraph 4 of the Government Order dated 10.08.1978, was published/issued/notified vide Government Order dated 29.08.1981.

12. The Rules of 1981 however provided that option for inclusion in the rules would be required to be made by existing teachers in service within a period of six months from the date of notification of the Rules and subsequent appointees were required to give their option within a period of two years from entering into service. Rule 4 of the Rules of 1981 issued on 29.08.1981 specifically provided that a teacher in service was required to give an option of continuing in service either up-till the age of 58 years or extended service upto 60 years. The benefit of the Gratuity Scheme was available only to those teachers who gave an option to superannuate at the age of 58 years. Rule 4 of the Rules of 1981 also provided that option once given would be deemed to be final in nature.

13. Subsequent to the aforesaid Rules of 1981, the Government issued order dated 06.07.1982 indicating that the time limit of six months provided earlier for giving option to existing teachers was inadequate and therefore a further time limit up-till 31.12.1982 was provided for giving of option. Thereafter, Government issued

another order dated 06.10.1990 in terms of the earlier Government Orders dated 31.03.1978, 28.07.1978 and 03.11.1978. It was indicated in the Government Order that since inadvertently various teachers were deprived of being included in the Gratuity Scheme since they were unable to give their option within the prescribed time limit, government after consideration extended the time limit for giving such option to a further 90 days from the date of issuance of the Government Order. Paragraph 2 of the aforesaid Government Order provided that in case of teachers who failed to give their option, it would be deemed that they had opted to superannuate at the age of 58 years and therefore would be covered by the Gratuity Scheme automatically. Paragraph 3 of the Government Order also provided that the option would be available also for those teachers who had already given their options so that maximum teachers would come within purview of beneficial scheme.

14. Subsequent to the said Government Order, another Government Order dated 04.11.1991 was issued, again with regard to providing options for inclusion under the Gratuity Scheme. This Government Order provided amendment of the earlier Government Order dated 06.10.1990 again extending the time limit for giving of option. The order also indicated similar provision of option being provided by the teachers for superannuation either at the age of 58 years or 60 years. Subsequent to the said order, another Government Order dated 18.11.1991 was issued finding that despite issuance of various Government Orders on the subject, many teachers had not been able to exercise their options and therefore another opportunity was provided for providing of such options.

15. Considering the Government Orders dated 06.10.1990 and 04.11.1991 a Division Bench of this Court in the case of Shri Kamla Sharma Versus Deputy Director of Education and another, Special Appeal No.482 of 1993 held that options exercised by teachers already could be changed in terms of the aforesaid Government Orders. However another Division Bench in the case of Prakash Chand Sharma versus Deputy Direction of Education, Bareilly Region, Bareilly and another passed in Special No.2891 of 1995 took a contrary view in the matter while distinguishing the earlier Division Bench on facts. However, the aforesaid contradictory judgments were thereafter referred for adjudication before the Full Bench in the case of Smt. Prabha Kakkar Versus Joint Director of Education, Kanpur and others 2000(2)UPLBEC 1378 (Allahabad). The questions framed before the Full Bench were whether in terms of the scheme provided in the Government Orders, acceptance of option exercised by teacher and its communication was necessary to make it final and irrevocable. The questions framed are as follows:-

1. Whether in the Scheme provided in the Government Orders dated 10.8.1978. 6.10.1990 and 4.11.1991 and the Rules of 1981 acceptance of the option exercised by the teacher and its communication was necessary to make it final and irrevocable?

2. Whether the option exercised by teacher became final and irrevocable after it was counter signed by the District Inspector of Schools?

3. Whether by efflux of long time the option exercised by teacher in pursuance of the Government Orders could be legally deemed to have been accepted and it could not be changed or revoked?

16. The Full Bench after considering aspects of the case, recorded its conclusion that the act of acceptance of option by the Deputy Director of Education and its communication to the employee was necessary in order to make it final before which option given by teachers could be withdrawn. The Full Bench also held that options once exercised by a teacher could be deemed to have been accepted but in view of subsequent Government Order dated 17.02.1999, teachers of Government Aided Private Higher Secondary Schools could change their option within a year before retirement. However since questions 1 and 2 had already been answered, the aforesaid question was not specifically answered since it was not necessary to decide.

17. The Full Bench noticed the Government Order issued subsequently on 17.02.1999 in which it was again stated by the Government that a number of teachers in recognized and government aided colleges have not been able to give their options and were therefore deprived of benefit of the Gratuity Scheme. It was therefore decided by the Government that such teachers could change their options already given, up-till 1st of July one year prior to date of superannuation. The said proposition was reiterated in the Government Order dated 17.11.1999 wherein facility to change their option already given earlier was also indicated.

18. Consequent thereupon, the Government Order dated 04.02.2004 was issued again pertaining to issue of option to be made by such teachers in view of the fact that Regulation 21 of the Regulations framed under the Intermediate Education Act, 1921 stood amended with the age of superannuation of a teacher now being 60 years instead of 58 years.

19. Mr. Adarsh Singh, learned counsel for petitioners has submitted that in all the petitions in the present bunch, the predecessor-in-interest of the petitioners who were earlier working as teachers in State Aided Private Institution had passed away prior to exercise of their facility of change in option. It is submitted that the Government Orders indicated herein-above and particularly the Government Order dated 17.02.1999 have been issued in terms of paragraph 20 of the Rules of 1981 which grant power upon the Government to issue necessary orders to remove any difficulty or confusion in the grant of benefits of gratuity to such teacher. As such, it is submitted that once power to remove difficulties has already been conferred upon the State Government by statutory rule itself, there was no occasion for the State Government to have first amended the rule and in such cases, the issuance of various Government Orders in terms of paragraph 20 of the Rule of 1981 would suffice. It is thus submitted that there is no occasion to hold that statutory provision by subordinate legislation has been overridden by administrative order.

20. It has also been submitted by learned counsel for petitioners that various government orders and wordings used therein clearly indicate that the Government had at all time wished a beneficial provision upon the teachers and required as many as possible to be covered by the aforesaid Gratuity Scheme.

21. It has also been contended that although the Rules of 1981 stipulate that

option once given could not be changed thereafter but the government order issued on the subject clearly indicate that difficulties were being caused due to such a strict stipulation having been inserted in the Rules of 1981 and due to such difficulties having been caused, were sought to be removed by the government itself by issuance of the Government Orders which were clearly in terms of paragraph 20 of Rules of 1981. As such it is submitted that the government was fully empowered to bring about the change pertaining to options being given by teachers.

22. With regard to the second question, it has been submitted that since the predecessors-in-interest of the petitioners have passed away prior to exercise of change in option as stipulated in the Government Order, and the scheme being beneficial in nature,the family members of such deceased teacher would be entitled to exercise a change in option particularly in view of the stand of government itself indicated in the Government Order that benefit of said scheme should be available to as many teachers as possible.

23. Reliance has been placed by counsel for petitioners on the Division Bench judgment of Sri Ranjana Kakkar versus State of U.P. and others, 2008 (10) ADJ 63(DB), judgment and order dated 21.06.2022 Shikha Sharma versus State of U.P. and other and connected matter Writ A No.14575 of 2021 and other connected matters, Jagteshwari Maurya versus State of U.P. and others Writ Petition No. 2727 (Service Single) of 2014 and various other judgments to submit that issue in question already stands concluded by cited judgments.

24. Learned counsel for petitioners has also placed reliance on the case of **Usha Rani vs. State of U.P. and others**, Writ A No.17399 of 2019 decided on 07.11.2019 in similar facts and circumstances.

25. Mr. J.N. Maurya, learned Chief Standing Counsel assisted by Mr. Chandan Kumar, learned Standing Counsel appearing on behalf State has refuted the submissions advanced by learned counsel for petitioners with the submission that all the judgments cited by learned counsel for petitioners are distinguishable on facts inasmuch as the specific provisions and prohibitions of Rules, 1981 had not been considered in any of them. It has been further submitted that the Rules of 1981 specifically provided that giving of options was mandatory upon all the teachers. It is further submitted that Rule 4 of the Rules of 1981 had a clear stipulation that option once given could not be changed. It has also been submitted that the Government Orders issued on the subject pertain only for a change in the option and were inapplicable in the present cases where option was not given by the predecessors-in-interest of the petitioners and such option was therefore deemed in terms of Rule 3 of the Rules of 1981. It has been further submitted that even otherwise the option either given explicitly or deemed to have been given could not have been changed and therefore there was no occasion for any confusion which would require removal under Rule 20 of the Rules of 1981 and as such the Government Orders on the subject are inapplicable upon the petitioners.

26. It has been further submitted that even otherwise option once exercised by the predecessor-in-interest of the petitioners

could have been changed only by such predecessor-in-interest being the teachers who were duly appointed. It is submitted that in none of the Government Orders, is any provision for family members of such teachers to exercise any option of revision particularly when the teacher concerned himself did not require any change in the option either given explicitly or deemed.

27. He has submitted that it is settled principle of law, if a statute provides something to be done in a certain manner then the thing has to be done in that very manner; from the bare perusal of the aforesaid Rules (emphasis on Rule 4), a teacher of a State Aided Non-Government Institution had to exercise an option to choose the date of his/her superannuation as it was, as per Chapter III Regulation 21 of Intermediate Education Act, 1921; either at the age of 58 years or 60 years and on the basis of this exercise of option, his or her retiral benefits were to be determined.

28. It has also been submitted that the submission of learned counsel for petitioners that vide Government Order dated 06.10.1990 read with Government Order dated 04.11.1991, successors of the deceased had an option to revoke the last exercise option is in-correct since the Government Order dated 06.10.1990 was issued in continuation of Government Orders dated 31.03.1978, 28.07.1978 and 03.11.1978, which did not pertain to death come retirement gratuity.

29. Submission is that Paragraph 2 of the Government Order dated 06.10.1990 no doubt, engendered some confusion due to ambiguous and incongruous words employed therein. The tenor of the Government Order however, unambiguously indicates that it was not intended to confer any right in favour of a teacher, to withdraw the option already exercised by him for gratuity and countersigned/accepted by the Competent Authority under and in accordance with the Government Order dated 10.08.1978 read with the Niyamawali issued vide Government Order dated 29.08.1981.

30. Learned counsel has also drawn attention to language of Government Order dated 17.02.1999 which states that an incumbent (teaching staff) can change its last exercised option on or before 1st July of the year in which he is superannuating (as per his last exercised option). If this thing is allowed then an incumbent who has exercised his option to superannuate at the age of 60 years (which was at that time before amendment), can he be allowed to change his option on attaining the age of 59 years (which was at that time before amendment), since there were only two options which an incumbent had to choose with regard to age of superannuation and those were 58 and 60 years. Dealing with this type of situation a Division Bench of this Hon'ble Court, in the case of ***State of U.P. V. Prabha Shukla, Special Appeal (D) No.1168 of 2020*** has held that an incumbent can exercise his/her option to change his or her earlier option before attaining the age of 58 years only.

31. Learned counsel for respondents have also placed reliance on various judgments which shall be discussed herein-after.

32. **Question No.1.** Upon consideration of submissions advanced by learned counsel for parties and perusal of material available on record, it is evident that Government itself was cognizant of disparity of services between teachers employed by Private

Aided Institutions and those employed in Government Colleges or schools. To that effect and for removal thereof, the Rules of 1964 were notified which automatically became applicable upon all the teachers in service at that time. Evidently there was no requirement of any option to be exercised by any of the teachers. It was only with the advent of Rules of 1981 that the proposition of teachers giving an option was formulated with the provision that the benefits of Gratuity Scheme would be applicable only upon those teachers who would give an option to superannuate at the age of 58 years. The natural corollary of the aforesaid proposition was that in case of teachers exercising their right to continue in service up-till the age of 60 years, the benefit of gratuity would be unavailable since they would be getting extra salary for the two years of service rendered thereafter.

33. A perusal of the wordings of various Government Orders makes it evident that the government itself was quite anxious regarding the applicability of the Gratuity Scheme upon as many teachers as possible; clearly the scheme was in the nature of a beneficial provision provided by the State Government to such teachers.

34. The issue of whether the prohibition indicated in the Rules of 1981 regarding change in option can be done away with by means of Government Orders without effecting any amendment in the Rules of 1981 would be required to be considered.

35. The Rules of 1981 have been effected since 30.06.1978. Rule 11 of the aforesaid Rules clearly stipulate an option to be given by a teacher for superannuation either at the age of 58 years or continuance in service up-till the age of 60 years. Rule 20 of the Rules of 1981 clearly stipulate that government would be empowered to issue various orders for complete and effective implementation of the Gratuity Scheme as notified by the Rules of 1981 in case there is any difficulty or confusion with regard to such implementation.

36. In all the Government Orders indicated herein-above, it has been indicated that effective implementation of the Gratuity Scheme could not be made due to non exercise of option by most of the teachers. The Government Orders also indicate that option could not be exercised by the majority of teachers due to certain confusion or administrative laxity. Time and again Government Orders have been issued as indicated herein-above extending the limitation for exercise of option to be included under the Gratuity Scheme.

37. In paragraph 44 of the counter affidavit filed by the State, it is itself admitted that the Government Order dated 06.10.1990 engendered some confusion due to ambiguous language employed therein.

38. Clearly the Government itself envisaged the scheme to be beneficial in nature. A reading of not only the Rules of 1981 but the various Government Orders on the subject also clearly indicate that concept of death-cum-retirement gratuity was required to be implemented upon as many teachers as possible in order to provide them benefit of a beneficial scheme. The government itself appears to be quite anxious that the Gratuity Scheme should be made applicable upon as many teachers as possible.

39. A conspectus of the Rules and Government Orders issued by State

particularly the Rules of 1964, 1981 and various Government Orders on the subject are all indicative of the fact that Government itself realized the serious disparity in service benefits pertaining to teacher employed in Private Aided Institutions viz-a-viz those employed in Government Institutions and a conscious effort was made by the Government at all times to remove such disparity. From the Government Orders issued in 1978 also it is evident that not only disparity pertaining to gratuity but to other pensionary benefits was also sought to be removed. Although the Rules of 1964 became automatically applicable upon teachers of Private Institutions but the Rules of 1981 took a divergent stand with such teachers requiring to give their options either to continue in service uptill the age of 58 years or the extended period of 60 years with the benefit of death-cum-retirement scheme being applicable only in case of continuation in service uptill the age of 58 years.

40. The aspect of such option was enforced for the first time by means of Rules of 1981 with Rule 3 requiring such an option within a period of six months from the teachers already in service and rule 4 requiring such an option from subsequent appointee within a period of two years from the date of regularization/confirmation in service. The said rule also indicated that options once given would be considered to be final.

41. As such submission of learned counsel for respondents is that the prohibition indicated in Rule 4 of the Rules of 1981 would be construed to be final in nature under which an option once given or deemed to have been given cannot be changed. It has therefore been submitted that such a prohibition indicated in the Rules cannot be construed to have been waived by means of administrative Government Orders.

42. So far as aforesaid submission is concerned, it is evident that Rule 20 of the Rules of 1981 clearly stipulates that the Government would have power to issue directions to remove any difficulty or confusion with regard to implementation of the said Rules. The said Rule is clearly an exception to the prohibition indicated in Rule 4 of the Rules of 1981 and specifically empowers the State Government to issue necessary directions for removal of such difficulty or confusion.

43. A perusal of the Government Orders issued subsequent to the Rules of 1981 enhancing the time limit for providing of options clearly state repeatedly that the aforesaid prohibition is creating a difficulty in smooth implementation of the beneficial concept of death-cum retirement gratuity. The respondents themselves have in their counter affidavit admitted the fact that there was confusion with regard to implementation of the Government Order dated 06.10.1990. Seen in that light, it is apparent that once statutory rules themselves provide an exception clause to the prohibitory nature of a previous paragraph or rule, such subsequent clause of the Rule can be construed to be an explanation to the mandatory prohibitory clause. Seen from that view, it is clear that Rule 20 of the Rules of 1981 is more in the nature of an explanation/exception to the prohibitory clause of Rule 4 of the Rules of 1981.

44. Since the various Government Orders issued subsequent to the notification of Rules of 1981 repeatedly indicate that

they are being issued in order to remove doubt and confusion regarding implementation of the death-cum-retirement gratuity scheme, such Government Orders can be deemed to have been issued in terms of Rule 20 of the Rules of 1981.

45. It is also relevant that by means of Government Order dated 17.02.1999, it has been indicated that due to unavoidable circumstances, teachers of Private Aided Institutions were unable to provide an option in terms of Government Orders dated 06.10.1990 and 04.11.1991 and therefore it had been provided that due to constant demand for providing such facility, the State has taken a decision that option once earlier given could be changed by a teacher of such an institution within one year prior to his date of superannuation. The said Government Order along with the one issued subsequently on 17.11.1999 provided a change in the option granted earlier. The said Government Order is in continuation of the Government Order dated 06.10.1990 which in paragraph 3 states that the facility of option would be available also in case of a teacher who had already earlier given such an option.

46. Learned counsel for respondent State has submitted that even if assuming that the option once given could have been changed in terms of the Government Orders but such a facility even then would be available only to those teachers who had specifically given their options in terms of provisions of Rules of 1981 and would not be applicable in those cases where the options were not explicitly given but was deemed.

47. With regard to aforesaid submission, the wordings of Rules 3 and 4 conjointly of the Rules of 1981 makes it apparent that although specific option was required to be exercised by the teachers within stipulated time period but such an option was also deemed in case it was not given within the stipulated time period. The natural corollary of the aforesaid conditions would be that an option of such a teacher would be deemed in case it is not explicitly given. Thus option stands exercised in any case.

48. Evidently, the provisions of Rule 4 of 1981 specifically with regard to deeming clause excluded a number of teachers which did not solve the problem of disparity between teachers appointed in Private Aided Institutions and those working in Government Institutions and as such the Government felt, as evidenced in provisions of various Government Orders that the same did not extend the beneficial provisions which was the primary concern of the Government. As per wordings of subsequent Government Orders, this was the reason for giving an opportunity to change the option once earlier given.

49. From a perusal of the Rules of 1964 read with Rules of 1981 and various Government Orders on the subject, it is evident that the provisions of implementation of death-cum-retirement gratuity upon such teachers employed by Private Aided Institutions was a beneficial provision notified for the purpose of inclusion of as many teachers as possible in the Gratuity Scheme.

50. The Full Bench in the case of **Prabha Kakkar (supra)** has also answered the question no.1 to the effect that the act of acceptance of option by the Deputy Director of Education and its communication to the employee was necessary in order to make it final. It was further held that counter signature of

District Inspector of Schools on such option could neither be taken as acceptance nor fully attached any kind of finality. As such, it can be discerned that the Full Bench has also taken the view that option once given in terms of the Government Orders dated 10.08.1978, 06.10.1990 and 04.11.1991 even after the advant of Rules of 1981 can be changed. It was upon answering of first question that the Full Bench concluded that questions pertaining to irrevocability of option exercised by a teacher and its option to be changed or revoked, was not required to be answered.

51. Evidently, the Full Bench having considered not only the aforesaid Government Orders but also the Government Order dated 17.02.1999 has also come to the conclusion that no finality could be attached to an option once given by a teacher and such an option once given can be changed or revoked subsequently as well as.

52. The aforesaid aspect has also been considered by a Coordinate Bench of this Court in the case of ***Sushila Yadav versus State of U.P. and other (2021)10 ADJ 235*** in which also the entire gamut of Government Orders and decision on the point have been considered particularly with regard to judgment rendered by other Coordinate Benches in the case of ***Usha Rani versus State of U.P. and others; Writ A No.17399 of 2019, Noor Jahan versus State of U.P. and others, Writ A No.40568 of 2016*** and ***Smt. Omwati versus State of U.P. and others Writ A No.8679 of 2018*** as well as in the case of Smt. Mala Tripathi versus State of U.P.and others. The said judgment also takes into account the judgment rendered by ***Ranjana Kakkar (supra)*** and ***Prabha Shukla (supra). Upon examination of various aspects, the judgment in the case of Prakash Chandra Sharma versus Deputy Director of Education, Bareilly Region Bareilly and others (1997)2 UPLBEC 1155*** and in the case of Division Bench Judgment of ***State of U.P. and another versus Shashthi Dutt Shastri and others, 2017 (Suppl.) ADJ 768(DB)***. The relevant paragraphs are as under:

".....More importantly neither the 1963 Rules nor the various Government Orders issued in connection with the right of teachers working in primary educational institutions administered by the Board to claim gratuity provided for the same being lost forever or being forfeited consequent to a failure to submit an aged option. ....."

".....The absence of a negative stipulation and a prescription specifying the adverse consequences of inaction clearly operates in favour of teachers and the petitioners here. The Court also bears in mind the undisputed position on facts which has emerged of teachers being permitted to submit their options prior to attaining the age of superannuation and latest by 1st of July of the academic year in which they were to attain the age of retirement. Once that is conceded to be the the accepted procedure consistently followed, the Court fails to find any justification to hold teachers to be under an obligation to submit an option immediately upon entry into service. ....."

53. The aforesaid aspect has also been considered by another Coordinate Bench in the case of ***Shikha Sharma versus State of U.P. and others***; in Writ A No.14575 of 2021 and other connected matters in which also after examining various aspects of the matter and particularly the Government Orders it has been held that an option once given earlier could be changed in terms of

the Government Order particularly since no Government Order or amendment in instructions or rules have been issued restoring the provision prevailing prior to Government Order dated 06.10.1990. The relevant portion of the judgment is as follows:

"12. Considering the fact that the State Government by the aforesaid Government Order dated 06.10.1990 provided for a deeming clause of acceptance of option of retirement at the age of 58 years from all the teachers, who did not exercise an option, there does not appears to be any fault on the part of the deceased husband of the petitioner. No Government Order, amendment in instructions or rules have been brought on record which restores the position prevailing prior to the Government Order dated 06.10.1990. Therefore, it is clear that even the teachers who did not exercise their option to retire at the age of 58 years would not be deprived of benefit of gratuity only because the deceased did not exercise the option of retirement at the age of 58 years. Further reason is that it was open for the deceased to change his option as per subsequently issued government order a year before the date of superannuation but his/her untimely death robbed him/her of the opportunity. "

54. Learned State counsel has placed reliance on the judgment rendered by Hon'ble the Supreme Court in the case of ***Panchi Devi versus State of Rajasthan and others; (2009)2 SCC 589*** to submit that an employee who had already received terminal benefits on death of the deceased spouse was not entitled to exercise change in option. The said judgment has been relied upon to buttress the submission that option once given cannot be changed particularly since the right which is created for the first time cannot be given retrospective effect.

55. The aforesaid judgment clearly on the facts is inapplicable in the present facts and circumstances of the case since the rights had accrued prospectively and not retrospectively whereas in the present case, all the Government Orders clearly have retrospective operation since they referred to the earlier Government Orders under which options were sought but could not be given due to administrative laxity or for any other reason.

56. With regard to interpretation of a beneficial provision, Hon'ble the Supreme Court in the case of ***Maniben Maganbhai Bhariya versus District Development Officer Dahod and others*** reported in ***AIR 2022 (SC) 2119*** has held that beneficial provisions are required to be construed liberally in order to provide maximum effect to such provision. It has been held as under:-

"13. When social security legislations are being interpretated, it always has to be interpreted liberally with a beneficial interpretation and has to be given the widest possible meaning which the language permits, known as Beneficial Interpretation. When a statute is meant for the benefit of a particular class and if a word in the statute is capable of two meanings, i.e., one which would preserve the benefits and one which would not, then the former is to be adopted.

14. Maxwell on Beneficial Construction holds the following:

"The construction of a statute must not strain the words as to include cases plainly omitted from the natural meaning of the language. Nevertheless, even where the usual meaning of the words falls short of

the object of the legislature, a more extended meaning will be attributed to them if they are fairly susceptible to it. The relaxation of strictly literal rule of interpretation is known as beneficial construction"

15. This Court had an occasion to examine discussions in detail about constructive and welfare legislations. The judgment in State Bank of India v. Shri N. Sundara Money, 1976(1) SCC 822 followed with Bangalore Water Supply and Sewerage Board v. A. Rajappa and others, 1978(2) SCC 213; Sant Ram v, Rajinder Lal and others, 1979(2) SCC 274 and later the Constitution Bench in Steel Authority of India Ltd. and others v. National Union Waterfront Workers and others, 2001(7) SCC I are the exposition of law on the subject."

57. In view of the aforesaid discussion, it is clear that the stringent prohibition indicated in Rule 4 of the Rules of 1981 could have been explained or whittled down by subsequent Government Orders in terms of Rules 20 of the Rules of 1981 particularly since all the subsequent Government Orders clearly stipulate that they have been issued permitting a change in earlier option due to confusion or difficulty being faced in proper implementation of the Rules.

58. Considering the aforesaid, submission of learned counsel for respondents State that option once given could not have been changed in terms of Government Orders without a corresponding change in the Rules themselves does not hold good ground. As such, it is held that the option once earlier given explicitly or deemed by a member of teaching staff of Intermediate College could have been revised in terms of the subsequent Government Orders without any amendment in the statutory Rules itself.

59. **Question No.2** with regard to the aforesaid question, a Division Bench judgment of this Court in the case of ***Ranjana Kakkar (supra)*** has clearly held that where an incident cannot be foreseen and a person is invited to give their options according to his own wisdom, his choice should not be allowed to work to his disadvantage after his death particularly in case the untimely death makes his option unworkable and also to provide maximum benefits of social security as would be intention was of the Government Order. The relevant paragraphs of the judgment are as follows:

"11. The providence to survive upto the age of 58 years could not be known to the teachers exercising options. The God has not yet bestowed the man with the powers to foresee or to predict death. The man arranges his affairs in accordance with the wisdom given to him by God. The Almighty has reserved the powers of sustaining and guiding human destiny. No one, who was required to give an option under the scheme, could have predicted, whether he would survive to claim the benefits.

12. Where an event cannot be foreseen and a person is invited to give options with the understanding to arrange his affairs according to his own wisdom, his choice should not be allowed to work to his disadvantage after his death. He should be provided with the maximum of the benefits and social security after his death. Late Prof. Amamath Kakkar did not live beyond the age of 45 years. He may have planned for his affairs upto the age of 60 years, both for himself and his family. The God

however willed otherwise. His untimely death made his option unworkable. In order to give him maximum benefits of the social security, which was the intention of the Government Order dated 24.12.1983, he could not be denied the D.C.R.G payable to him and calculated upto to his death, for the completed years of service rendered by him to the University. His life was cut short and thus his option became unworkable and futile, on his death at the age of 45 years. He could not be pinned down to his option by the University, to deprive his family of the gratuity earned by him and payable to his family.

13. The 'gratuity' is defined in Webster's New Collegiate Dictionary as something given voluntarily, or beyond obligation usually in return for, or in anticipation of some service. The Black's Law Dictionary defined gratuity as 'a recompense or reward of service or benefits given voluntarily without solicitation or promise. Late Amarnath Kakkar could have given up gratuity voluntarily on his option, if he had the occasion to avail the benefit of two years additional service, When he could not avail the benefit and was not in a position to change his option, he cannot be denied the reward by way of gratuity payable to him on completing 58 years of service. The event provided in his option i.e. the extended service upto the age of 60 years, became an impossibility to be performed by him and thus his option would be deemed to be revoked in law, on the principles of frustration of contract."

60. A Coordinate Bench of this Court in the case of ***Jagteshwari Maurya*** versus ***State of U.P. and others;Writ Petition No.2727(S/S) of 2014*** has also taken a similar view considering the Government Order dated 17.11.1999 and also placing reliance on other Coordinate Bench judgment in the case of ***Renu Gupta versus State of U.P. and others, Writ A No.14397 of 2019 and Mala Tripathi versus State of U.P. and others,Writ Petition No.6173(S/S) of 2014***.

61. Learned State counsel however has placed reliance in the case of ***Prabha Shukla versus State of U.P., Special Appeal Defective No.1168 of 2020*** to submit that it has been held that once an option for extension of service beyond the normal age of retirement with denial of benefit of gratuity had been exercised by a teacher, the family members could not have claimed the benefit in conflict with option already exercised by the deceased.

62. However a perusal of aforesaid judgment makes it apparent that the facts and circumstances of the case were quite distinguishable since the employee therein had passed away after attaining the age more than 59 years and as such the Division Bench came to a conclusion that since he had died after attaining the age of 59 years and did not exercise his option for change, then the family members cannot claim the benefit of such change.

63. In the present facts and circumstances of the petitions, none of the predecessors-in-interest of the petitioners have passed away after attaining the age of 59 years and therefore the option of change was unavailable to them at the time of their demise. Clearly the aforesaid judgment as such is inapplicable.

64. Another aspect of the matter pertaining to change of option also is that the primary purpose of denying benefit of gratuity to an employee exercising his option to continue in service till the age of 60 years appears to be that in such

circumstances the said teacher would be employed for a further period of two years and would also be getting salary for the post that he holds. Clearly the payment of gratuity as such was linked to the extra years of service rendered by the teacher.

65. In the present bunch of petition, the predecessors of petitioner have passed away without performing the extra years of service between the ages of 58 years to 60 years. Thus the very purpose of denying gratuity to such persons is inapplicable.

66. Viewed from this perspective, grant of benefit of gratuity in such circumstances is directly relatable to the Rules of 1981 itself and therefore there is no occasion for the respondents to hold that change in option is being sought by family members of the deceased who fail to exercise the option since the grant of benefit of gratuity is the natural corollary of extra years of service not being rendered by the predecessors of petitioner. The second aspect of the matter of course, is that predecessors have passed away prior to the time when they were required to submit their options in terms of the various Government Orders and therefore also since they did not have an opportunity to change their option, naturally the family member being successors to their interest would have a right to exercise that option in terms of the Government Order. As such answer to the question is that the grant of gratuity is a natural corollary to services not being rendered for the extra period of two years in terms of conditions of Rules of 1981 and as such, such an option once granted earlier can definitely be revised.

67. In view of aforesaid answers to the two questions, it is held that the denial of grant of gratuity to the petitioners in terms of conditions of Rules of 1981 is clearly contrary to provisions not only of the aforesaid Rules of 1981 but to the consequent Government Orders as well. Considering the aforesaid, the orders impugned rejecting grant of benefit of death-cum-retirement gratuity to the petitioners being bad in law are quashed by issuance of a writ in the nature of certiorari. A further writ in the nature of mandamus is issued commanding the concerned authority to make payment of death-cum-retirement gratuity to the petitioners in terms of Rules of 1981. Calculation for same and actual payment of benefits shall be accorded within a period of six months from the date of a copy of this is produced before the concerned authority.

68. Resultantly, the writ petitions succeed and are **allowed**. Parties shall bear their own costs.

(2022) 9 ILRA 618
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 23131 of 2018

Ved Prakash & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Arpan Srivastava, Sri Neelabh Srivastava, Sri Amit Kumar Srivastava, Sri Anil Bhushan(Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Jitendra Kumar Pandey

A. Service Law – UP Intermediate Education Act, 1982 – Section 33-C – L.T.

Grade teacher – Ad hoc appointment – Grant of approval – Petitioner was regularized by the Regional Level Committee in 2015 – Subsequently the committee refused to grant approval in 2018 – Validity challenged – Earlier, petitioner had to file five writ petition for one cause of action – Held, the respondents are hell bent to scuttle the orders passed by this Court in various writ petitions on the same cause of action between the same party and have invited unnecessary litigation which resulted in harassment of petitioners – High Court imposed cost of Rs. five lacs upon the State. (Para 46 and 82)

B. Service Law – Civil Procedure Code – Section 11 – Res judicata – Applicability to writ proceeding – Earlier, several writ petition were decided between the same party, how far barred by principle of res judicata – Held, the doctrine of *res judicata* is based on the high public policy to bring about an end to litigation by giving finality to judgments interse parties – The said principle has not only been made applicable to suit but also in other proceedings like writ petitions under Article 226 of the Constitution of India. (Para 59 and 60)

C. Service Law – Power of review – Exercised by the authority, extent of – Held, the Regional Level Committee has no power to review its order as it is settled in Law that the review is the creation of statute and authority can exercise the power of review if it is conferred by the statute. (Para 76)

D. Service Law – Constitution of India – Article 14 – Principle of natural justice – Opportunity of hearing, how far significant before passing any order – Held, the impugned order is not sustainable in Law for want of principle of natural justice, inasmuch as the order impugned do not reflect that any notice or opportunity of hearing was afforded to the petitioners before passing the impugned orders. (Para 77)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Ashika Prasad Shukla Vs District Inspector of Schools, Allahabad & anr.; 1998 (3) UPLBEC 1722

2. Gulabchand Chhotalal Parikh Vs St. of Bombay; AIR 1965 SC 1153

3. Workmen of Cochin Port Trust Vs Board of Trustees of the Cochin Port Trust & ors.; (1978) 3 SCC 119

4. Smt. Naseem Bano Vs St. of U.P. & ors.; AIR 1993 SC 2592

5. Neelima Srivastava Vs St. of U.P & ors.; AIR 2021 SC 3884

6. Suresh Chandra Vs District Inspector of Schools, Saharanpur & ors.; (1991) 2 UPLBEC 1097

7. Anilesh Pratap Singh Vs St. of U.P. & ors.; (2003) 3 UPLBEC 2519

8. Radha Raizada and other Vs Committee of Management, Vidhawati Darbari Girls Inter College & ors.; (1994) 3 UPLBEC 1551

9. Prabhat kumar Sharma & ors. Vs St. of U.P. & ors.; (1996) 10 SCC 62

10. Mahesh Kumar Gupta & ors. Vs St. of U.P. & ors.; (2015) 10 ADJ 403 DB

11. Raghunath Rai Bareja & anr. Vs Punjab National Bank & ors.; 2007 (2) SCC 230

12. Greater Mohali Area Developement Authority & ors. Vs Manju Jain & ors.; AIR 2010 SC 3817

13. Gulabchand Chhotalal Parikh Vs St. of Bombay; AIR 1965 SCC 1153

14. Daryao's's case; (1962) 1 SCR 574

15. Workmen Coachin Port Trust's case AIR 1978 SC 1283

16. Neelima Srivatava Vs St. of U.P & ors.; AIR 2021 SC 3884

17. Uttar Pradesh Vs Nawab Hussain; (1977) 3 SCR 428

18. Raghunath Rai Bareja & anr. Vs Punjab National Bank & ors.; (2007) 2 SCC 230

19. Greater Mohali Area Development Authority & ors. Vs Manju Jain Others; AIR 2010 SC 3817

20. Dr. Smt. Kuntesh Gupta Vs Management of Hindu Kanya Mahavidhyalaya, Sitapur (U.P.) & ors.; AIR 1987 SC 2186

21. Hari Krishna Mandir Trust Vs St. of Maharashtra & ors.; (2020) 9 SCC 356

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

1. Heard Sri Anil Bhushan, learned Senior Counsel, assisted by Sri Amit Kumar Srivastava, learned counsel for the petitioners and Sri Neeraj Tripathi, learned Additional Advocate General, assisted by Sri Shashank Shekhar Singh, Additional Chief Standing Counsel for respondents no. 1 to 4.

2. The petitioners, who are four in numbers, have assailed the order dated **23.08.2018** passed by the Director of Education, (Secondary), Government of U.P., Lucknow and order dated **28.10.2021** passed during the pendency of the writ petition by the Regional Level Committee and have further prayed for a writ of mandamus directing the Joint Director of Education to pay arrears of salary.

3. The facts in brief are that D.A.V. Inter College, Aryapur Khera, Mainpuri (hereinafter referred to as "the College') is a recognized Institution under the provisions of U.P. Intermediate Education Act, 1921 and Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 is applicable in the present case.

4. According to the petitioners, two posts of L.T. Grade teacher were sanctioned by the Director of Education vide order dated **31.03.1991** and two posts became vacant on account of retirement of Kaptan Singh and Shyam Bihari Dubey (Assistant Teacher) on 30.06.1991. The **Committee of Management of the College (respondent no.5)** decided to make appointment on the said posts and passed a resolution to this effect on **07.07.1991**. The respondent no.5 sent a requisition to the **District Inspector of Schools, Mainpuri (respondent no.4)** (hereinafter referred to as '**D.I.O.S. Mainpuri**') on **20.08.1991** to forward the same to the **U.P. Secondary Education Service Selection Board, Allahabad (hereinafter referred to as ''Commission**') for filling the aforesaid four posts.

5. Further case of the petitioner's is that after sending the requisition by the respondent no.5 to the Commission, the respondent no.5 advertised the aforesaid posts in the daily newspaper on **03.10.1991** and the same was also pasted on the notice board of the College. Pursuant to the advertisement issued by the College, several candidates had applied, and on the basis of quality point marks, the petitioners were found to be the most suitable candidates, accordingly, they have been selected against the aforesaid four posts of L.T. Grade Teacher. Consequently, the petitioners have been issued appointment letters as L.T. Grade Teacher on **20.10.1991**.

6. Pursuant to the appointment letters, the petitioners joined on **01.11.1991**. The respondent no.5 forwarded the papers of the petitioners to the respondent no.4 for grant of financial approval, which was rejected by the respondent no.4 by order dated **13.04.1992** on the ground that a ban was imposed by the State Government on ad hoc appointments.

7. The petitioners challenged the order dated **13.04.1992** passed by

respondent no.4 rejecting financial approval, by means of **Writ Petition No.18381 of 1992**, in which this Court on 22.05.1992 passed an interim order directing the respondent no.4 to release the salary of the petitioners. Thereafter, the salary of the petitioners have been paid from **01.11.1991 to July, 1995.**

8. It is further stated that respondent no.4 stopped the salary of the petitioners which led the petitioners to file **Writ Petition No.28887 of 1995** which was disposed of by this Court vide judgement and order dated **16.10.1995** with liberty to the petitioners to file appropriate amendment application in the pending writ petition.

9. By amendment, Section 33-C has been added in U.P. Act No.5 of 1982 relating to regularization of ad hoc Teachers. Section 33-C came into force on 20.04.1998. According to Section 33-C, teachers appointed between 14.05.1991 to 06.08.1993 are entitled to be regularized under this Section.

10. The petitioners claim that after the insertion of Section 33-C in Act 1982, they submitted an application to the respondent no.4 praying that their claim for regularization as well as for payment of salary be considered. On the said application, the Accounts Officer submitted report that the appointment of the petitioners is as per law and they come within the purview of Section 33-C of the Act, 1982 for regularization, therefore, they may be paid salary. Thereafter, the respondent no.4 by order dated **06.06.1998** directed the Accounts Officer to release the salary of the petitioners after verifying that they have been working in the College.

11. In the meantime, the Writ Petition No.18381 of 1992 was disposed of by this Court vide order dated **04.02.1999**, whereby this Court directed the authorities to consider the claim of the petitioners for regularization under Section 33-C of the Act, 1982.

12. Thereafter, pursuant to the judgement and order of this Court dated **04.02.1999**, the Joint Director of Education by order dated **28.02.2001** rejected the claim of the petitioners for regularization on the ground that the appointment of the petitioners was not in accordance with law as the advertisement was not published in two daily newspapers having wide circulation in the area.

13. The order dated **28.02.2001** was challenged by the petitioners by filing **Writ Petition No.24305 of 2001**, which was allowed by this Court vide judgement and order dated 24.02.2005 on the ground that the rejection of the petitioners' claim by the Regional Level Committee on the ground that the advertisement was not made in two daily newspapers does not sustain in view of Division Bench judgement of this Court in the case of **Ashika Prasad Shukla Vs. District Inspector of Schools, Allahabad and another, 1998 (3) UPLBEC 1722,** since the advertisement was made in the year 1991, i.e., prior to the date of the judgement of Full Bench in the case of **Radha Raizada's case**. Accordingly, this Court allowed the writ petition by judgement and order dated **24.02.2005**, quashed the order dated 28.02.2001 and directed the Joint Director of Education to constitute a Committee for consideration of regularization of petitioners under Section 33-C of the Act, 1982.

14. Pursuant to the judgement of this Court dated **24.02.2005** passed in **Writ Petition No.24305 of 2001,** the Regional

Level Committee again by order dated **17.08.2006** rejected the claim of the petitioners, which came to be challenged by the petitioners in **Writ Petition No.53709 of 2006**, which was allowed by this Court by judgement and order **dated 02.07.2009** and the matter was again referred to the Regional Level Committee to consider the claim of the petitioners for regularization in the light of judgement and order dated **24.02.2005 passed in Writ Petition No.24305 of 2001.**

15. Thereafter, in compliance of the judgement and order dated 02.07.2009 passed in Writ Petition No.53709 of 2006, the Regional Level Committee considered the claim of the petitioners and again rejected their claim by order dated 24.07.2010 on the ground that the advertisement in respect of selection of the petitioners was not published in two leading newspapers; secondly, under Section 18 of the Act, 1982, the selection process for appointment on ad hoc basis can be initiated only after expiry of 60 days from the date the posts have been notified to the Commission, whereas in the instant case the posts were not notified to the Commission, hence no appointment could be made by the Commission on the aforesaid posts in view of non-compliance of Section 18 of the Act, 1982, therefore, the appointment of the petitioners was per-se illegal and they are not eligible for regularization under Section 33-C of the Act,1982.

16. The order dated 24.07.2010 was again assailed by the petitioners by means of Writ Petition No.69975 of 2010 which was allowed by this Court vide judgement and order dated 09.04.2013 holding that the grounds on which the claim of the petitioners have been rejected by order dated 24.07.2010 are not sustainable in law. Accordingly, this Court remitted the matter to the Screening Committee/Selection Committee again to comply with the directions issued by this Court vide order dated 24.02.2005 in Writ Petition No. 24305 of 2001 and the order dated 02.07.2009 passed in Writ Petition No.53709 of 2006.

17. Again, the Regional Level Committee by order dated 04.10.2013 rejected the claim of the petitioners which came to be challenged by the petitioners in separate writ petitions. However, this Court decided the writ petition filed by the petitioners treating Writ-A No.62780 of 2013 (Surya Kant Mishra & Another Vs. State of U.P. and Others) as the leading writ petition on 12.08.2015 holding the grounds of rejection are untenable in law.

18. After five round of litigation, the claim of the petitioners' was considered by the Regional Level Committee pursuant to the judgement and order of this Court dated **12.08.2015** passed in **Writ-A No.62728 of 2013**; the Regional Level Committee by order dated 30.12.2015 regularized the services of the petitioners w.e.f. **01.11.1991**.

19. After the regularization order was passed, the petitioners claimed their salary, but instead of granting salary to the petitioners, respondent no.2 by order dated **23.08.2018** rejected the claim of petitioners for arrears of salary, which is impugned in the present writ petition.

20. When the objection was taken by the petitioners that once the Regional Level Committee has passed order regularizing the services of the petitioners, therefore, respondent no.2, has no jurisdiction to sit in

appeal over the order passed by the Regional Level Committee and deny the salary of the petitioners.

21. To overcome the aforesaid objection, the respondents constituted a Regional Level Committee who passed an order on **28.10.2021** rejecting the claim of the petitioners, which also came to be challenged by the petitioners in the writ petition by means of amendment application which was allowed by this Court.

22. The respondents have not chosen to file any counter affidavit, however, have filed various affidavits and personal affidavits which shall be dealt with at the appropriate place in the judgement.

23. Challenging the order dated **23.08.2018** passed by respondent no.2, Sri Anil Bhushan, learned Senior Counsel has contended that the order of respondent no.2 dated **23.08.2018**, is illegal and without jurisdiction. It is contended that once the Regional Level Committee has passed an order on **30.12.2015** holding the appointment of the petitioners in accordance with law and regularizing the service of the petitioners, the respondent no.2 cannot sit in appeal over the order passed by the Regional Level Committee and deny the salary to the petitioners holding that the appointment of the petitioners is illegal, and not in accordance with law.

24. It is further submitted that the order dated **28.10.2021** passed by the Regional Level Committee during the pendency of writ petition also smacks of malafide, inasmuch as when this Court has taken serious note of the conduct of the respondents in rejecting the claim of the petitioners for salary in order dated 29.10.2018 in the present writ petition, the respondent no.2 in order to cure the lacuna in order dated **29.10.2018**, referred the matter to the Regional Level Committee who passed the order dated 28.10.2021 denying the salary to petitioners, which cannot be permitted in law.

25. It is further contended that, even otherwise, the order dated **28.10.2021** passed by the Regional Level Committee is illegal and without jurisdiction inasmuch as it is settled in law that the power of review is the creation of statute, and in the instant case as there is no power of review vested with the Regional Level Committee, therefore, the order dated 28.10.2021 is not sustainable in law.

26. It is further contended that it is also settled in law that the power of review can be exercised only in cases where the order has been obtained by fraud or misrepresentation, whereas in the instant case the order dated **28.10.2021** does not state that the order dated **30.12.2015** regularizing the services of the petitioners was obtained by fraud or misrepresentation, therefore, the order dated 28.10.2021 passed by Regional Level Committee is illegal and without jurisdiction. It is submitted that the order dated 28.10.2021 has been passed without affording any opportunity of hearing and therefore is not sustainable in law.

27. It is further urged by learned counsel for the petitioners that the issue in respect to the validity of appointment of the petitioners has been decided by this Court in various writ petitions, i.e., Writ Petition No.24305 of 2001 decided on 24.02.2005; Writ Petition No.53709 of 2006 decided on 02.07.2009; Writ Petition No.69975 of

2010 decided on 09.04.2013 and leading Writ Writ Petition No.62780 of 2013 decided on 12.08.2015, accordingly, it is contended that that as the judgements passed by this Court in the aforesaid writ petitions have attained finality, the respondents cannot reject the claim of the petitioners on the ground that the appointment of the petitioners was not as per law.

28. It is submitted that principle of res-judicata applies in the present case as the issue with regard to validity of appointment of petitioners has been settled by this Court in aforesaid writ petitions which have attained finality. In this respect learned counsel for the petitioners has placed reliance upon the judgement of the Apex Court reported in **AIR 1965 SC 1153, Gulabchand Chhotalal Parikh v. State of Bombay ; (1978) 3 SCC 119, Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust & Ors; AIR 1993 SC 2592, Smt. Naseem Bano Vs. State of U.P. and Ors. & AIR 2021 SC 3884, Neelima Srivastava v. State of U.P & Ors..**

29. Rebutting the aforesaid submissions, learned Additional Advocate General submits that Section 18 of Act 1982 provides that ad hoc appointment can only be made when the requisition has been sent to the Commission notifying the posts, and two months have lapsed from the date posts have been notified to the Commission and the Commission has failed to make appointment on the said post, accordingly, it is submitted that in the instant case the respondent no.5 has started the process of appointment before 60 days period expired from the date posts were notified to the Commission which amounts to non-adherence of mandatory requirement of Section 18 of Act, 1982, hence, all appointments being in contravention to Section 18 of Act, 1982 are perse illegal and no benefit can be claimed on the basis of such appointment. It is further contended that the procedure to make any appointment on substantive posts under Section 18 of the Act 1982 is contemplated under Para 5 (2) of U.P. First Removal of Difficulties Order 1981 (hereinafter referred to as 'Order, 1981'). Under the Order, 1981, respondent no.4 is vested with the power to initiate appointment and in case the appointment is made by the Committee of Management, the approval by D.I.O.S. is necessary, but in the instant case, no approval has been granted by the D.I.O.S. to the appointment of the petitioners, therefore, the petitioners' appointment is void and as such the order impunged has been passed in accordance with law.

30. In support of the said argument, he has placed reliance upon the judgements of this Court reported in **(1991) 2 UPLBEC 1097, Suresh Chandra vs. District Inspector of Schools, Saharanpur and others; (2003) 3 UPLBEC 2519, Anilesh Pratap Singh vs. State of U.P. & Others; (1994) 3 UPLBEC 1551, Radha Raizada and other vs. Committee of Management, Vidhawati Darbari Girls Inter College and Others; (1996) 10 SCC 62, Prabhat kumar Sharma & others vs. State of U.P. & others & (2015) 10 ADJ 403 DB, Mahesh Kumar Gupta & Others Vs. State of U.P. & others.**

31. He further contends that it is also settled in law that law will prevail over equity, and as in the instant case the appointment of the petitioners were dehors the procedure contemplated for making

adhoc appointment, therefore, the petitioners are not entitled to any benefit on the principle of equity. In this respect he has placed reliance upon the judgement of the Apex Court of **2007 (2) SCC 230, Raghunath Rai Bareja & another Vs. Punjab National Bank & others.**

32. Lastly, he contends that the pure legal question can be raised at any time and in this respect he has placed reliance upon the judgement of **AIR 2010 SC 3817, Greater Mohali Area Developement Authority & others Vs. Manju Jain & Ors..**

33. I have heard learned counsel for the parties and perused the material brought on record.

34. Before proceeding to deal with the respective contentions of the counsel, this Court expresses its anguish and pain about the resilient approach of the respondent authorities in scuttling the orders passed by this Court which led to filing of 5 writ petitions by the petitioners before this writ petition, this is the 6th round of litigation between the parties on the same cause of action.

35. Proceedings in the instant case are detailed below to demonstrate that due to stubborn and reckless approach of the respondent authorities, not only the valuable time of the Court has been wasted but also valuable time and resources of the State machinery has been wasted resulting in unnecessarily financial burden upon the State due to mulish and irresponsible behaviour of State Officers. When the writ petition was filed and heard on admission, this Court passed the following order on 29.10.2018:-

"Petitioners, who are four in number, have approached this Court challenging an order of the Director of Education (Secondary), U.P., Lucknow dated 23.08.2018; whereby, petitioners' representation, made in pursuance of the direction issued by this Court in Writ A No. 6001 of 2018 dated 27.02.2018, has been rejected.

It appears that petitioners had earlier approached this Court by filing Writ A No. 62780 of 2013, along with Writ A Nos. 62782 of 2013 and 70291 of 2013, which came to be disposed of with a direction upon the authority concerned to consider petitioners' claim for regularization in accordance with section 33-C of the U.P. Secondary Education Services Selection Board Act, 1982(hereinafter referred to as, 'the Act of 1982'). The observation made by this Court reads as under:-

"So far as the facts are concerned, almost they are all admitted by the respondent counsel. In the present matter for the selection of teachers on substantive vacancy in the institution, the same is required to be moved before the commission under Section 18 of the U.P. Secondary Education Services Selection Board Act, 1982 and when such eventuality happens in institution and regular Assistant Teacher is not made available by the board, the Committee of Management after due advertisement may appoint assistant teacher in L.T. Grade. In pursuance to the advertisement they have applied for the post and selected for the post of Assistant Teacher vide appointment letter dated 20.10.1991 and on the basis of interim order granted by this Court on 22.05.1992 they have been paid salary. After Section 33-C of the Act 1982 came into existence, the petitioners demanded for their regularisation of their services which was eventually rejected by the Regional Committee vide an order dated 28.02.2001 precisely on the ground that the procedure

prescribed under Section 18 of the Act was not followed by the Committee namely advertisement had not taken place in two leading newspapers which have wide circulation in the region. Hon'ble Court while deciding the writ petition No. 24305 of 2001 had categorically came into conclusion that no such procedure has been provided under Section 18 of the Act but this direction for making an advertisement in two leading newspapers was given by the Full Bench of this Court in Radha Raizada's case reported in 1994 (3) UPLBEC 1551 and subsequently in Ashika Prasad Shukla Vs. District Inspector of Schools, Allahabad and another, 1998 (3) UPLBEC 1722, a Division Bench of this court held that the direction issued by the Raizada's case (supra) was with prospective in nature and would be applicable in case where the person is appointed subsequent to the decision of this Full Bench and as such the same would not be applicable in the case of the petitioners. Therefore, the first objection initially taken by the regularisation committee does not have any ground to stand and consequently the earlier impugned order dated 28.02.2001 was quashed by this Court with direction to the Joint Director of Education to constitute a committee for regularisation of the petitioners under Section 33-C. Therefore, it is apparent that whatever the objection taken by the respondents had been rejected by this Court while allowing the Writ Petition No. 24305 of 2001. But unfortunately again the respondents have taken a plea while rejecting their claim for regularisation on the ground that the petitioners were not paid salary since 1995, therefore, their claim do not fall under Section 33-C of the Act. The records clearly give an impression that the D.I.O.S. while forwarding the papers on 06th June, 2000 had clearly held that the the appointments of the petitioners were made in between 14.05.1991 to 06.08.1993 and they were working continuously in the institution and subsequently it had also brought on record that the salary of the petitioners were paid on the basis of interim order passed by this Court in the year 1991. Therefore, subsequently, the objection raised by the Regularisation Committee that the petitioners were not paid since 1995 is not sustainable in accordance with the provisions of Section 33-C.

It is suffice to say that it is not disputed that initial appointment of the petitioner in the institution was in accordance with law. The Accounts Officer submitted a detailed report dated 23.05.2001 stating therein that the petitioners were entitled for the salary as well as for regularisation but unfortunately the records would lead to the conclusion that the claims of the petitioners were rejected on the basis on non-existence grounds and at no point of time the department had taken any decision strictly in accordance with the law but time to time they have changed the ground for rejecting the claim of the petitioners. The statue clearly provides that working of a teacher is essential ingredients for consideration of regularisation and the petitioners' cases also fall under the cut off date but the aforesaid consideration had not been made by the regularisation committee. It is evident from the record that the petitioners were working in the institution and if it is admitted situation that the petitioners were working on the date when regularisation rules came into existence they are entitled to be considered for regularisation. Unfortunately the petitioners inspite of their best effort, their services had not been regularized till date, even though their rights accrued 1992. Inspite of various directions issued by this court their future

is still at stake. In view of the aforesaid facts and circumstances, the order impugned dated 04.10.2013 passed by the Regularisation Committee headed by the Joint Director of Education cannot be sustained and is hereby set aside. The writ petitions are allowed. The matter is remitted to the Regularisation Committee headed by the Joint Director of Education to consider and decide it within two months, in view of the observations made hereinabove."

Pursuant to the directions of this Court dated 12.08.2015, the matter, relating to regularization of the petitioners' claim, was considered by the Committee constituted under the Act. The Committee proceeded to pass specific order on 30.12.2015 regularizing the services of the petitioners with effect from 01.11.1991. This order has been passed by a Committee chaired by the Joint Director of Education, Agra, which had the District Inspector of Schools as Member, apart from two other members. This order has attained finality. It appears that in respect of petitioners' claim for release of arrears of salary, claim has been forwarded to the authorities for release of payment, but no decision was taken upon it. It was in that context that a writ petition came to be filed before this Court being Writ A No. 6001 of 2018, which has been disposed of by the following orders on 27.02.2018:-

"The writ is disposed of directing the respondent No.2, Director of Education Secondary, Government of U.P., Lucknow to pass final orders on the recommendations of the DIOS dated 28.2.2017 annexed as Annexure No. 14 to the writ petition, within a period of six weeks from the date of production of certified copy of this order."

Even thereafter, the order was not complied with and consequently, a contempt petition had to be filed, in which notices were issued on 24.07.2018. It is thereafter that the impugned order has been passed by the Director of Education. After noticing the relevant facts, the authority has proceeded to observe, in his order, that petitioners' claim for regularization has not been examined by the appropriate regional Committee constituted in terms of section 33-C of the Act of 1982 and therefore, their services cannot be treated to have been regularized in law and they would not be entitled to benefit of such order.

Observation, contained in the order, clearly omits to consider the specific decision taken by the Committee on 30.12.2015. It is pursuant to this decision of the Committee regularizing the petitioners' service that petitioners' claim for release of salary has been forwarded. The order of the Director appears to be based upon complete non-application of mind; in as much as, relevant orders passed by the Committee have been completely ignored.

It is unfortunate that despite a specific direction as well as orders passed in contempt petition, the authority has not cared to look into the records and the order impugned has been passed in routine and mechanical manner.

In the facts and circumstances, the Director of Education (Secondary) is directed to file his personal affidavit, within a period of two weeks from today, justifying his order in light of the decision taken by the Committee on 30.12.2015. The personal affidavit of the Director shall be filed by the next date fixed.

List on 15.11.2018 at the top of the list. Liberty stands reserved to the petitioners to make a mention for the case to be taken upon on that date."

36. Perusal of the order dated 29.10.2018 discloses that the Court

expressed displeasure about the manner in which the order impugned in the writ petition has been passed and directed the respondent no.2 to justify his order dated 23.08.2018 in the light of the decision taken by the Regional Level Committee on 30.12.2015 regularizing the services of the petitioners.

37. The respondent no.2 Sri Vinay Kumar Pandey filed a personal affidavit dated 11.12.2018 stating therein that he had joined as Director of Education on 27.08.2018 and impugned order was passed by the then Director of Education (Secondary). He further stated that he immediately after joining, had issued notice to the petitioners, therefore, six weeks' time was prayed for passing a detailed order after hearing the parties.

38. The matter was taken up subsequently on few dates but the case was adjourned. This Court on 29.07.2021 directed the Director of Education (Secondary), U.P. Lucknow to file a personal affidavit indicating further compliance of orders in furtherance of averments made by him in personal affidavit dated 11.12.2018 within a period of two weeks, failing which he was directed to appear in the Court personally.

39. The order dated 27.09.2021 was not complied with, which led the Court to issue bailable warrant on 18.10.2021 and directed the matter to be posted on 08.11.2021.

40. On the said date, a supplementary counter affidavit dated 08.11.2021 was filed by the respondents enclosing therewith an order dated 28.10.2021 passed by the Regional Level Committee cancelling the order dated 30.12.2015, by which the services of the petitioners have been regularized.The judgement and order dated 19.12.2017 passed in PIL No.35090 of 2015 referred to in paragraph no.24 of Supplementary Counter Affidavit was the basis of order dated 28.10.2021. It is further stated that on the basis of the said order, the authority before granting salary has to ensure four conditions referred as A, B, C & D in paragraph no.24 of the supplementary counter affidavit which has been provided in the judgement and order dated 19.12.2007 passed in PIL No.35090 of 2015. In para-25 of the affidavit it is stated that the Government Order dated 18.04.2019 was also issued in the light of the order dated 19.12.2017 passed in PIL No.35090 of 2015. Paras-24 & 25 of the supplementary counter affidavit dated 08.11.2021 are reproduced herein-below:-

"24.That the matter of the petitioners was examined and the regularization was not found in consonance with Section 33-C of the Act, 1982 and the mandatory conditions, which were to be considered by the Regional Level Committee, were not in fact duly considered in the regularization order. In this respect in Civil Misc. Writ Petition (PIL) No.35090 of 2015 (Rjesh Rai Vs. State of U.P. and others), this Hon'ble Court vide order dated 19.12.2017 issued certain directions, which were to be taken into account while considering the claim of salary by the employees. It has been directed to the Secretary that he shall examine as to whether the appointment of persons claiming salary is within the sanctioned strength of the institution or not, whether the appointment had been made after following the procedure under Law including (a) advertisement of vacancy in the newspaper (b) constitution of selection of committee (c) selection proceedings having been made in accordance with the

procedure applicable and the approval of the competent authority (d) the persons, who appointed, were possessed of the required minimum qualification on the date of selection. It has also been directed that if any or all of the aforesaid conditions are found to be lacking, the Secretary shall not issue any order for payment of salary from the State Exchequer for such persons. After examining the matter of the present petitioners, it transpires that there were no specific finding recorded on these points while regularizing the services of the petitioners. Moreover, the advertisement in the newspapers and consitution of selection committee as per Section of 16-E and 16-F of the Act, 1921 was not done and therefore, the whole selection process was found doubtful.

25. That it is not out of place to mention here that om the basis of judgement and order dated 19.12.2017 passed in the PIL, a government order dated 18.04.2019 was also issued, which ratifies the decision taken by the answering respondents on 23.08.2018."

41. Denying the averments made in supplementary counter affidavit, it has been stated in the supplementary rejoinder affidavit that this Court in judgement dated 16.07.2009 in Writ Petition No.53709 of 2006 has held that the appointment of the petitioners are valid .

42. When the matter was taken up on 08.11.2021, the case was adjourned for 09.11.2021. Learned Additional Advocate General Sri Neeraj Tripathi on 09.11.2021 made a statement that as the objection raised by the respondents have already been rejected by this Court by the judgements passed in various writ petitions and they have attained finality, therefore, the arrears of salary of the petitioners shall be released, but as the sanction is to be obtained from the State Government, some time may be granted. He further placed on record an order dated 09.11.2021 passed by respondent no.2. The order dated 09.11.2021 passed by this Court reads as under:-

"Pursuant to the order of this Court dated 08.11.2021, Director of Education (Secondary), U.P. Lucknow is present before the Court. +

Sri Neeraj Tripathi, learned Additional Advocate General on instruction states that matter has been revisited by the Director pursuant to the order of this Court dated 29.10.2018. He submits that whatever objections, which are being raised by the State against the grant of arrears of salary to petitioners, have already been rejected by this Court by orders in various writ petitions, and those orders have become final as they have not been assailed by the respondent-state in special appeal. Accordingly, he submits that whatever arrears of salary is due to the petitioners, is to be sanctioned at the level of State Government for which some breathing time may be granted to the respondent-state to get the amount sanctioned for payment of the same. The decision in this respect has been taken by the Director on 09.11.2021, copy of which is taken on record.

In view of the aforesaid statement advanced by Sri Neeraj Tripathi, two weeks time is granted to do the needful in the matter.

Put up on 24.11.2021.

The presence of Director of Education (Secondary), U.P. Lucknow is exempted till further orders of this Court."

43. It is pertinent to state that the respondent no.2 in paragraph no.25 of order dated 09.11.2021 stated that the

objections which have been raised with regard to the appointment of the petitioners have been rejected by this Court and has sought sanction from the State Government. When the matter was taken up on 24.11.2021, the learned Additional Advocate General informed the Court that the State Government has decided to prefer Special Appeal against the order of this Court dated 09.11.2021 which was passed on the statement of learned Additional Advocate General which he made on the basis of order dated 09.11.2021 passed by the respondent no.2.

44. In such circumstances, this Court on 24.11.2021 passed an order recording its displeasure in the manner aspersion has been cast upon the Court by making a false statement in the letter dated 18.11.2021 of respondent no.2 that this Court while passing the orders on 08.11.2021 and 09.11.2021 has not considered the order dated 28.10.2021 passed by the Regional Level Committee. The order dated 24.11.2021 runs into several pages, however, relevant paragraph of the order are being reproduced herein-below:-

"7. Alongwith instructions, a letter dated 18.11.2021 addressed to the Special Secretary, Secondary Education, State of U.P, Lucknow is enclosed whereby sanction is sought for payment of salary to the petitioners subject to decision of Special Appeal preferred by the department. Relevant extract of the letter dated 18.11.2021 of the Director of Education (Secondary) U.P. Lucknow is reproduced herein below.

"प्रश्नगत प्रकरण में दिनांक 08.11.2021 एवं 09.11.2021 को पारित मा० उच्च न्यायालय इलाहाबाद के आदेश जिसमें मण्डलीय समिति द्वारा पारित विनियमितीकरण निरस्तीकरण आदेश दिनांक 28.10.2021 को संज्ञान में नहीं लिया गया है, के अनुक्रम में याचीगणों के अवशेष देयक (श्री उमाशंकर मिश्र से०नि० स०अ० का दिनांक 01.08.1995 दिनांक से 30 जून 2013 तक का रू० 35,78511=00 शब्दों में (पैतीस लाख अठहत्तर हजार पाँच सौ ग्यारह मात्र) श्री वेदप्रकाश स०अ० का दिनांक 01.08.1995 से 31.12.2015 तक रू० 50,58,828 =00 (पचास लाख अट्ठावन हजार आठ सौ अट्ठाइस मात्र) श्री मुन्ना लाल तिवारी स०अ० का दिनांक 01.08.1995 से 31.03.2016 रू० 44,22,241=00 (चौवालिस लाख बाइस हजार दो सौ इक्तालिस मात्र) श्री सूर्यकान्त मिश्र, स०अ० का दिनांक 01.08.1995 से 31.03.2016 रू० 44,22,241=00 (चौवालिस लाख बाइस हजार दो सौ इक्तालिस मात्र) के भुगतान की विधिक बाध्यता हो रही है जिसके भुगतान की संस्तुति प्रकरण में विभाग द्वारा योजित हो रही विशेष अपील में पारित होने वाले निर्णय के अधीन की जा रही है।"

8. This Court expresses its distress and anguish about the conduct of Director of Education (Secondary) U.P. Lucknow inasmuch as false fact "प्रश्नगत प्रकरण में दिनांक 08.11.2021 एवं 09.11.2021 को पारित मा० उच्च न्यायालय इलाहाबाद के आदेश जिसमें मण्डलीय समिति द्वारा पारित विनियमितीकरण निरस्तीकरण आदेश दिनांक 28.10.2021 को संज्ञान में नहीं लिया गया है" has been stated in the letter dated 18.11.2021 of the Director of Education (Secondary), UP, Lucknow.

9. It is pertinent to mention that neither on 08.11.2021 nor 09.11.2021 any argument was advanced by learned Additional Advocate General inviting attention of the Court to consider the order dated 28.10.2021. A false statement has been made in the letter only with an intention to cast aspersion upon the Court

in not considering the order dated 28.10.2021 cancelling the regularization of the petitioners. This conduct of the Director of Education (Secondary) U.P. Lucknow amounts to casting aspersion upon the Court which is not expected from an Officer of the rank of the Director of Education (Secondary) U.P. Lucknow and is contemptuous.

10. Perusal of the instructions extracted above shows that instructions are completely vague. However, Sri Neeraj Tripathi, Additional Advocate General states that what he could comprehend from the instructions and letter dated 18.11.2021 of the Director of Education (Secondary) U.P., Lucknow is that it seems that the department has decided to prefer special appeal against the order of this Court dated 09.11.2021, which order is already extracted above.

11. Perusal of instructions extracted above shows that instructions are completely vague.

12. The order of this Court dated 09.11.2021 reveals that same has been passed on the basis of statement made by Sri Neeraj Tripathi, Additional Advocate General based upon the order dated 09.11.2021 of the Director of Education (Secondary), UP, Lucknow which was placed on record. Paragraphs 25 to 27 of the order dated 09.11.2021 of the Director of Education (Secondary), UP, Lucknow are reproduced as under:-

"25- इस प्रकार विभाग द्वारा विनियमितिकरण एवं नियुक्ति के संबंध में जो आधार एवं साक्ष्य मा० न्यायालय के समक्ष प्रस्तुत किए गए उनको मा० उच्च न्यायालय द्वारा अमान्य कर दिया गया, जिस कारण याचीगणों के अवशेष देयक के भुगतान की विधिक बाध्यता उत्पन्न हो रही है। जिला विद्यालय निरीक्षक-मैनपुरी द्वारा याचीगणों के अवशेष अवधि में कार्यरत रहने की पुष्टि हेतु कोई साक्ष्य अद्यतन प्रस्तुत नहीं किया गया है।

26- अशासकीय सहायता प्राप्त माध्यमिक विद्यालय में कार्यरत शिक्षक एवं शिक्षणेत्तर कर्मचारियों के अवशेष देयक भुगतान के संबंध में शासनादेश दिनांक 20.2.2020 में यह उल्लिखित है कि "क्रमांक-13- माननीय न्यायालय द्वारा पारित आदेशों के प्रकरण-

(उपरोक्त क्रमांक 13 में उल्लिखित अवशेषों का भुगतान शासन की पूर्वानुमति से ही किया जाएगा।)

27- इस प्रकार तत्कालीन शिक्षा निदेशक(मा०) के निर्णय दिनांक 23.8.2018 एवं पूर्व में समय-समय पर मण्डलीय समिति द्वारा लिये गये निर्णय/निस्तारण आदेशों को मा० उच्च न्यायालय द्वारा अमान्य करने तथा जिला विद्यालय निरीक्षक-मैनपुरी द्वारा याचीगणों का उपलब्ध कराये गये अवशेष देयकों (श्री उमाशंकर मिश्र से०नि० का दिनांक 01.08.1995, दिनांक से 30 जून 2013 तक का रू०35,78,511=00 शब्दों में (पैतीस लाख अठहत्तर हजार पॉच सौ इग्यारह मात्र) श्री वेदप्रकाश स०अ० का दिनांक 01.8.1995 से 31.12.2015 तक रू०50,58,828=00 (पचास लाख अट्ठावन हजार आठ सौ अट्ठाइस मात्र) श्री मुन्नालाल तिवारी स०अ० का दिनांक 01.08.1995से 31.03.2016 रू०44,22,241=00 (चौवालिस लाख बाइस हजार दो सौ इक्तालिस मात्र) श्री सूर्यकान्त मिश्र, स०अ० का दिनांक 01.08.1995 से 31.03.2016 रू०44,22,241=00 (चौवालिस लाख बाइस हजार दो सौ इक्तालिस मात्र) को शासन को इस अनुरोध के साथ संदर्भित किया जाता है कि कृपया मा० उच्च न्यायालय के उक्त आदेशों के अनुपालन के दृष्टिगत निर्णय लेते हुए अग्रिम कार्यवाही हेतु यथोचित आदेश प्रदान करने का कष्ट करें।

संलग्नकः उक्तवत्।

भवदीय

(विनय कुमार पाण्डेय)
शिक्षा निदेशक(मा०)
उत्तर प्रदेश।

13. The aforesaid conduct clearly reflects how the State authorities are taking the Court so lightly and giving lame excuses at their will not to abide by even the order dated 09.11.2021 of the Director of Education (Secondary), UP, Lucknow and statement given by learned Additional Advocate General on the basis of order dated 09.11.2021 to release the salary due to the petitioners.

14. At this stage, it is pertinent to mention that the Director of Education (Secondary) U.P. Lucknow in its letter dated 18.11.2021 has noted a false statement which has been quoted in paragraph no.7 of this order so as to mislead the State Government to seek permission to prefer the special appeal against the order dated 09.11.2021.

15. In such view of the fact, this Court is compelled to take a very serious note of the situation inasmuch as the manner in which the State authorities are acting and misleading the Court as is evident from various orders extracted above. Accordingly, the Court summons the Additional Chief Secretary (Secondary), UP, Lucknow, the Director of Education (Secondary), UP, Lucknow to appear in person and explain as to how, once the order dated 09.11.2021 has been issued by the Director of Education (Secondary), UP, Lucknow acknowledging the fact that stand of the respondents in refusing to pay salary to petitioners is not sustainable as all objections which are being raised by the respondents has been adjudicated upon by this Court in previous writ petition and have attained finality, and based upon the order dated 09.11.2021 issued by the Director of Education (Secondary), UP, Lucknow; the learned Advocate General got the matter adjourned to complete formalities to process the payment of petitioners, then how the State Government can resile from its stand and decides to prefer special appeal against the order dated 09.11.2021 which was solely based upon the order dated 09.11.2021 of Director of Education (Secondary), UP, Lucknow and on the statement made by Sri Neeraj Tripathi, Additional Advocate General to release payment to petitioners on the basis of said order."

45. The orders passed by this Court, extracted above, reflects unwarranted and obstinate conduct of the respondents in not complying the orders passed by this Court in earlier writ petitions despite the fact the Director of Education in order dated 09.11.2021 admitted in para-25 that the objections with regard to appointment of petitioners being raised in the instant case have been rejected by this Court.

46. The aforesaid facts further reflects that the respondents are hell bent to scuttle the orders passed by this Court in various writ petitions on the same cause of action between the same party and have invited unnecessary litigation which resulted in harassment of petitioners as for one cause of action, the petitioners had to approach this Court by filing at least five writ petitions before the present writ petition, and despite the finding recorded in all those writ petitions by this Court that the appointment of the petitioners are valid, yet they continued to raise same objections again and again in each orders passed by them which have been assailed by the petitioners in various writ petitions, referred above, and they have succeeded in all the writ petitions

47. Now, coming to the merits of the case, the question as to whether the principle of res-judicata are attracted in the

instant case in the light of the orders passed by this Court in Writ Petition No.24305 of 2001 decided on 24.02.2005, Writ Petition No.53709 of 2006 decided on 02.07.2009, Writ Petition No.69975 of 2010 decided on 09.04.2013 and the judgement of this Court dated 12.08.2015 deciding the bunch of writ petitions, leading of which was Writ-A No.62780 of 2013.

48. Now, to appreciate the aforesaid issue, it would be apt to reproduce the orders passed by this Court in the aforesaid writ petitions.

49. The Writ Petition No.24305 of 2001 was filed by the petitioners challenging the order dated 28.02.2001 rejecting the claim of regularization of the petitioners on the ground that the selection was not made as per procedure contemplated in law as the posts were not advertised in two leading newspapers. This Court by order dated 24.02.2005 quashed the order dated 28.02.2001 holding that the objection taken by the Regional Level Committee that advertisement was not made in two leading newspapers, is not sustainable. Relevant extract of the order dated 24.02.2005 is reproduced herein-below:-

"In view of the aforesaid Division Bench judgement, the rejection of petitioner's claim by the Regional Committee on the ground that advertisement was not made in two leading newspaper does not survive, as the advertisement was made in the year 1991, i.e., prior to the date of judgement of the Full Bench in Radha Raizada's case.

Consequently, the impugned order dated 28.02.2021 is not sustainable and is quashed. The writ petition is allowed and a mandamus is issued to the Joint Director of Education to constitute a Committee which will pass appropriate orders for the regularization of the petitioners under Section 33-C of the Act, 1982 within three months from the date a certified copy of this judgement is produced before the respondent no.1."

50. Thereafter, the claim of the petitioner was again considered by the Regional Level Committee who rejected the claim of the petitioners by order dated 17.08.2006 holding that the petitioners' appointment could not have been made as there was a ban imposed by the State Government in respect to the ad hoc appointment.

51. The order dated 17.08.2006 was challenged by the petitioners in Writ Petition No.53709 of 2006 wherein this Court relying upon the judgement of this Court dated 24.02.2005 in Writ Petition No.24305 of 2001 recorded a specific finding that the spirit of the order dated 24.02.2005 is that this Court has found direct recruitment process in the order. This Court further recorded that the appointment of the petitioners were in order. Relevant extract of the order dated 02.07.2009 passed by this Court is reproduced herein-below:-

".....The following conclusions were recorded by the court in its judgement dated 24.2.2005 in above writ petition No.24305 of 2001 (Surya Kant Mishra and others Vs. Joint Director of Education Agra Region Agra and others).

In view of the aforesaid Division Bench judgement, the rejection of petitioner's claim by the Regional Committee on the ground that the advertisement was not made in two leading newspaper does not survive, as the

advertisement was made in the year 1991,i.e. prior to the date of judgement of the Full Bench in Radha Raizada's case.

Consequently, the impugned order dated 28.02.2001 is not sustainable and is quashed. The writ petition is allowed and a mandamus is issued to the joint director of Education to constitute. 1. Committee which pass appropriate orders for the regularization of the petitioners under section 33-C of the Act, 1982 within three months from the date a certified copy of this judgement is produced before respondent no.1 .

The spirit of the order passed by this court is that it has found the direct recruitment process in order. Thus, appointments of the petitioners were in order. The case was not applicable the judgement of the Full Bench in Radha Raizadha's case.

It appears that Regional Committee Agra in its impunged decision dated 17.08.2006 has excluded from consideration the above observations recorded by this Court.

In view of the above, the matter requires consideration by the Regional level Committee. The Regional Level Committee shall call for the record. The petitioner shall place on record the status of the writ petitions which have been mentiond in the order dated 17.8.2006. He shall also place on record the judgement rendered by this court on 24.2.2005 highlighting the observations made by this Court regarding status of initial appointment of the petitioner. The Regional Level Committee shall look into the matter and pass appropriate order within six weeks frim the date of production of a certified copy of this order passed by this court.

Accordingly the writ petition is allowed with above directions. The impugned order dated 17.8.2006 passed by Regional Committee a copy of which is contained as Annexure 1 to the writ petition, is quashed."

52. Again the order dated 24.07.2010 was passed by the Regional Level Committee pursuant to the judgement of this Court dated 02.07.2009 mainly on the ground that the posts in question were not notified to the Commission by the Management, whereas under Section 18 of the Act, 1982, the appointment can only be made if the Commission has failed to make appointment on the post within 60 days from the date posts have been notified to the Commission. Accordingly, it held that the appointment of the petitioners was not as per law, hence, they are not entitled to regularization, which order was again challenged by the petitioners in Writ-A No. 69975 of 2010, which was allowed by this Court on 09.04.2013. In the judgement dated 09.04.2013, the Court expressed its anguish by recording a finding that the official of the high rank i.e., Joint Director of Education, District Inspector of Schools and Principal of the College are unable to comprehend and appreciate the true import of the judgement. The relevant paras of the judgement is reproduced here-in-below:-

"From the aforesaid finding it is manifestly clear that this Court found that appointment of the petitioners was prior to the judgement of Radha Raizada's case (supra) and since the order of Radha Raizada's case (supra) was made prospective therefore, that ground was not in existence.

The Court is at loss to understand that inspite of clear finding recorded by this Court in Writ Petition No. 24305 of 2001 vide order dated 24.2.2005 when the matter was remitted to the Screening

Committee/Selection Committee it rejected on the same ground and petitioners were forced to file another Writ Petition No. 53709 of 2006. Again this Court recorded a finding with reference to the finding of the earlier order of this Court that the spirit of the order passed by this Court is that it has found the direct recruitment process in order. The finding recorded in subsequent judgement of this Court reads as under :-

"The spirit of the order passed by this Court is that it has found the direct recruitment process in order. Thus, appointments of the petitioners were in order. The case was not applicable the judgement of the Full Bench in Radha Raizada's case. It appears that Regional Committee Agra in its impugned decision dated 17.8.2006 has excluded from consideration the above observations recorded by this Court."

The Screening Committee/Selection Committee was again asked to reconsider the matter. However, the Screening Committee/Selection Committee without looking the findings recorded by this Court again third time reiterated the same stand that the advertisement were not made in two newspapers.

As regards the submission of learned Standing Counsel that petitioners were not working at the time of the commencement of the amendment of Section 33-A of the Act, 1982 no such finding has been recorded by the Screening Committee/Selection Committee. The said averment has been made in the counter affidavit. The Supreme Court in a long line of decision has settled the law that the reasons cannot be supplemented by affidavits. Reference may be made to judgement of Supreme Court in ***M.S.Gill and Another v. The Chief Election Commissioner, New Delhi and others reported (1978) 1 SCC 405 and Laxmi Kant Bajpai v. Haji Yaqub and others reported (2010) 4 SCC 81.*** *The said reason is not mentioned in the impugned order.*

The Court is constrained to note that an official of high rank i.e. a Joint Director of Education; District Inspector of Schools and Principal of the College are unable to comprehend and appreciate the true import of the judgements of this Court. In all the earlier judgements specific direction was made to the Screening Committee/Selection Committee to consider the regularization of the petitioners in terms of Section 33-C of the Act, 1982 ignoring the specific directions the Screening Committee/Selection Committee is harping on the same issues which have already been decided by the Court in its earlier orders.

After careful consideration and perusal of the record as well as submission made by respective learned counsel for the parties, I am of the view that the impugned order dated 24.7.2010 (Annexure -1 to the writ petition) is vitiated for the aforesaid reasons. It needs to be set aside. Accordingly, it is set aside.

The matter is remitted to the Screening Committee/Selection Committee again to comply the directions of this Court issued in the order 24.2.2005 passed in Writ Petition No. 24305 of 2001 and order dated 2.7.2009 passed in Writ Petition No. 53709 of 2006 and pass appropriate order within three months from the date of communication of this order strictly in the light of observation made herein above.

Writ petition is allowed."

53. Thereafter, again the claim of the petitioners was rejected by the Regional Level Committee by order dated 04.10.2013, which came to be challenged by the petitioners in separate writ petitions which were clubbed together and decided by a common order dated 12.08.2015,

treating Writ-A No.62730 of 2013 as leading petition. Relevant extract of the said order is reproduced herein below:-

".....Hon'ble Court while deciding the writ petition No. 24305 of 2001 had categorically came into conclusion that no such procedure has been provided under Section 18 of the Act but this direction for making an advertisement in two leading newspapers was given by the Full Bench of this Court in ***Radha Raizada's case reported in 1994 (3) UPLBEC 1551 and subsequently in Ashika Prasad Shukla Vs. District Inspector of Schools, Allahabad and another, 1998 (3) UPLBEC 1722****, a Division Bench of this court held that the direction issued by the Raizada's case (supra) was with prospective in nature and would be applicable in case where the person is appointed subsequent to the decision of this Full Bench and as such the same would not be applicable in the case of the petitioners.Therefore, the first objection initially taken by the regularisation committee does not have any ground to stand and consequently the earlier impugned order dated 28.02.2001 was quashed by this Court with direction to the Joint Director of Education to constitute a committee for regularisation of the petitioners under Section 33-C. Therefore, it is apparent that whatever the objection taken by the respondents had been rejected by this Court while allowing the Writ Petition No. 24305 of 2001. But unfortunately again the respondents have taken a plea while rejecting their claim for regularisation on the ground that the petitioners were not paid salary since 1995, therefore, their claim do not fall under Section 33-C of the Act. The records clearly give an impression that the D.I.O.S. while forwarding the papers on 06th June, 2000 had clearly held that the the appointments of the petitioners were made in between 14.05.1991 to 06.08.1993 and they were working continuously in the institution and subsequently it had also brought on record that the salary of the petitioners were paid on the basis of interim order passed by this Court in the year 1991. Therefore, subsequently, the objection raised by the Regularisation Committee that the petitioners were not paid since 1995 is not sustainable in accordance with the provisions of Section 33-C.*

It is suffice to say that it is not disputed that initial appointment of the petitioner in the institution was in accordance with law. The Accounts Officer submitted a detailed report dated 23.05.2001 stating therein that the petitioners were entitled for the salary as well as for regularisation but unfortunately the records would lead to the conclusion that the claims of the petitioners were rejected on the basis on non-existence grounds and at no point of time the department had taken any decision strictly in accordance with the law but time to time they have changed the ground for rejecting the claim of the petitioners. The statue clearly provides that working of a teacher is essential ingredients for consideration of regularisation and the petitioners' cases also fall under the cut off date but the aforesaid consideration had not been made by the regularisation committee. It is evident from the record that the petitioners were working in the institution and if it is admitted situation that the petitioners were working on the date when regularisation rules came into existence they are entitled to be considered for regularisation. Unfortunately the petitioners inspite of their best effort, their services had not been regularized till date, even though their rights accrued 1992. Inspite of various directions issued by this court their future is

still at stake. In view of the aforesaid facts and circumstances, the order impugned dated 04.10.2013 passed by the Regularisation Committee headed by the Joint Director of Education cannot be sustained and is hereby set aside. The writ petitions are allowed. The matter is remitted to the Regularisation Committee headed by the Joint Director of Education to consider and decide it within two months, in view of the observations made hereinabove."

54. Now, after the order passed by this Court on 12.08.2015, the services of the petitioners were regularized by order dated 30.12.2015.

55. Now in the light of the orders passed in several writ petitions, referred above, whether it is open to the respondents to take objection in respect to legality of appointment of petitioners in the instant writ petition to deny the claim of salary of the petitioners, moreso, when this Court repeatedly in all the aforesaid judgements arising out of the same cause of action has recorded a finding that the appointment of the petitioners are as per law and those judgements have attained finality in the absence of any challenge to them by the respondents.

56. At this stage, it would be apt to refer to the judgement of the Apex Court elucidating the principle of res-judicata. The first judgement on the said point placed by Sri Anil Bhushan is **AIR 1965 SCC 1153 (Gulabchand Chhotalal Parikh Vs. State of Bombay)**. In the said case, the question which came up for consideration before the Apex Court was whether the decision of the High Court on merits on certain matter after contest in a writ petition under Article 226 of the Constitution operates as res-judicata in regular suit with respect to the same matter between the parties. The Apex Court considered the principle of res-judicata enunciated by the Apex Court in the case of ***Daryao's's case, (1962) 1 SCR 574.*** Relevant paras - 53, 54, 60, 61 are reproduced herein below:

"53. In Daryao's Case 1962-1 SCR 574: (AIR 1961 SC 1457) this Court had again dealt with the question of the applicability of the principle of res judicata in writ proceedings. The matter was gone through very exhaustively and the final conclusions are to be found at p. 592. (of SCR): (at pp. 1465-1466 of AIR). We may summarise them thus :

1. If a petition underArt. 226 is considered on the merits as a contested matter and is dismissed, the decision would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution.

2. It would not be open to a party to ignore the said judgment and move this Court under Art. 32by an original petition made on the same facts and for obtaining the same or similar orders or writs.

3. If the petition underArt. 226in a High Court is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, the dismissal of the writ petition would not constitute a bar to a subsequent petition underArt. 32.

4. Such a dismissal may, however, constitute a bar to a subsequent application under Art. 32 where and if the facts thus found by the High Court be themselves relevant even underArt. 32.

5. If a writ petition is dismissed in limine and an order is pronounced in that

behalf, whether or not the dismissal would constitute a bar would depend on the nature of the order. If the order is on the merits, it would be a bar.

6. If the petition is dismissed in limine without a speaking order, such dismissal cannot be treated as creating a bar of res judicata.

7. If the petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition underArt. 32because, in such a case, there had been no decision on the merits by the Court.

54. It can be said with equal force that a regular suit for the determination of the matter which had been decided on merits by the High Court or this Court on a writ petition cannot be given the status of a de facto appeal against the order of the High Court or of this Court. A solemn declaration and order by the Court in its extra-ordinary jurisdiction is not to be set at nought by a Court of ordinary jurisdiction whose decisions are subject to the appellate or revisional jurisdiction of that Court.

60. As a result of the above discussion, we are of opinion that the provisions of s. 11 C.P.C. are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject matter. The nature of the former proceeding is immaterial.

61. We do not see any good reason to preclude such decisions on matters in controversy in writ proceedings under Arts. 226 or 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest. We therefore, hold that, on the general principle of res judicata, the decision of the High Court on a writ petition under Article 226 on the merits on a matter after contest will operate as res judicata in a subsequent regular suit between the same parties with respect to the same matter."

57. In the case of ***Workmen Coachin Port Trust AIR 1978 SC 1283, the Apex Court in para-7*** has detailed the principle of res-judicata, however, in the facts of that case res-judicata was not attracted, para-7 of the judgement is reproduced herein-below:

"7. It is well known that the doctrine of res judicata is codified in section 11 of the Code of Civil Procedure but it is not exhaustive.Section 11generally comes into play in relation to civil suits. <u>But apart from the codified law the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries.</u> The rule of constructive res judicata is engrafted in Explanation IV of section 11 of the Code of Civil Procedure and in many other situations also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order any

matter in issue has been directly and explicity decided the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided."

58. In almost identical facts as in the instant case, the Apex Court in the case of **Neelima Srivatava Vs. State of U.P & Ors., AIR 2021 SC 3884**, has held that once an issue between the parties has been settled by a judgement and it has attained finality interse between the parties, the judgement which has attained finality crystallized the rights of the party, therefore, the decision rendered by the competent court cannot be challenged in co-lateral proceedings, inasmuch as if it is allowed to do so, that would lead to confusion and chaos, and finality of the proceedings would seize to have any meaning. Relevant Paras 32 to 38 are reproduced herein-below:-

"32. The Division Bench of the High Court proceeded as if it was hearing an appeal against the judgment dated 23.01.2006 of the learned Single Judge which had already attained finality. Appeal filed under the Rules of the Court was filed against the judgment dated 15.05.2014 rendered in Writ Petition No. 8597 of 2010. It is a well settled principle of law that a Letters Patent Appeal which is in continuation of a Writ Petition cannot be filed collaterally to set aside the judgment of the same High Court rendered in an earlier round of litigation ignoring the principles of res-judicata and doctrine of finality.

33. By a majority decision in Naresh Shridhar Mirajkar & Ors. Vs. State of Maharashtra & Anr. has laid down the law in this regard as under:-

"When a Judge deals with matters brought before him for his adjudication, he first decides questions, of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the appellate Court."

34. In Rupa Ashok Hurra Vs. Ashok Hurra & Anr., while dealing with an identical issue this Court held that reconsideration of the judgment of this Court which has attained finality is not normally permissible. The decision upon a question of law rendered by this Court was conclusive and would bind the Court in subsequent cases. The Court cannot sit in appeal against its own judgment.

35. In Union of India & Ors. Vs. Major S.P. Sharma & Ors., a three-judge bench of this Court has held as under:-

"A decision rendered by a competent court cannot be challenged in collateral proceedings for the reason that if it is permitted to do so there would be "confusion and chaos and the finality of

proceedings would cease to have any meaning."

36. Thus, it is very well settled that it is not permissible for the parties to re-open the concluded judgments of the Court as the same may not only tantamount to an abuse of the process of the Court but would have far reaching adverse effect on the administration of justice.

37. It is undisputed that in compliance of the judgment of the learned Single Judge dated 15.05.2014 vide order dated 31.10.2015 respondents regularized the services of appellant subject to the outcome of the proceedings in the LPA and the appellant now stand superannuated having attained the age of superannuation after about 33 years of continuous service.

38. In the end, a feeble attempt was made by the learned counsel for the State-respondent to persuade us not to interfere in the matter on the ground that the services of the appellant were terminated vide letter dated 19.05.1986 which was never challenged as such her services stood terminated. We are not ready to accept the proposition canvased by learned counsel for the respondent at this stage for the simple reason that it was open for the State to have advanced this contention before the learned Single Judge in the two Writ Petitions decided vide judgment and order dated 23.01.2006. Once this argument was never made before the learned Single Judge in the proceedings which has attained finality, the respondent cannot be permitted to raise this argument in this appeal."

59. From the reading of the aforesaid judgements, it is clear that the doctrine of *res-judicata* as embodied in Section 11 of Code of Civil Procedure is based on the high public policy to bring about an end to litigation by giving finality to judgements interse parties and save the litigant from harassment second time. In other words, Rule of res-judicata gives finality to a decision arrived at after due contest and after hearing the parties interested in the controversy. The said principle has not only been made applicable to suit but also in other proceedings like writ petitions under Article 226 of the Constitution of India.

60. The Rule of *res-judicata* as engrafted in Section 11 of the Code of Civil Procedure is that if by any judgement and order any matter in issue has been directly and explicitly decided, the decision operates as *res-judicata* and bars the trial of identical issue in a subsequent proceedings between the same parties. The principle of *res-judicata* also come into play when by the judgement and order a decision of a particular issue is implicit in it, i.e., it must be deemed to have been necessarily decided by implication; on existence of such condition, the principle of *res-judicata* on that issue is directly applicable.

61. In view of the doctrine of *res-judicata* as has been elucidated by the Apex Court. Now, this Court proceeds to consider whether in the instant case the principle of *res-judicata* is attracted and bars the respondents from raising any objection with regard to the legality of the appointments of the petitioners.

62. In the instant case, it is not in dispute that four permanent substantive posts came into existence on which the Committee of Management resolved to make appointment, accordingly, the posts were advertised in two newspapers and the petitioners were selected on the basis of quality point marks. The petitioners preferred a writ petition No.18381 of 1992 praying for a writ of mandamus to pay salary of the petitioner in which an interim

order was passed on 22.05.1992 and the petitioners were paid salary from 01.11.1991 to July, 1995, whereafter, salary of the petitioners were stopped by the D.I.O.S., which again was challenged by the petitioners in a writ petition which was dismissed by the Court granting liberty to the petitioners to assail the order of stopping salary in Writ Petition No.18318 of 1992. The petitioners challenged the said order stopping salary in Writ Petition 18381 of 1992 which was disposed of by this Court directing the respondents to consider the claim of the petitioners for salary as well as regularization by judgement and order dated 04.02.1999.

63. The respondents, thereafter, considered the claim of the petitioners for regularization, and rejected it by order dated 28.02.2001 on three grounds, namely, posts were not advertised in two newspapers having wide circulation in the area; requisition was not sent by the Committee of Management to the Commission for making appointment; and reservation criteria have not been followed by the Committee of Management in making appointment.

64. The petitioners preferred a Writ Petition No.24305 of 2001 challenging the order dated 28.02.2001. This Court did not find ground of rejection sustainable in law and quashed the order dated 28.02.2001 by judgement dated 24.02.2005. The judgement of this Court dated 24.02.2005 has attained finality as the same has not been assailed by the respondents in appeal.

65. The respondents in compliance of the order dated 24.02.2005 passed another order rejecting the regularization of the petitioners by order dated 17.08.2006 almost on the same ground on which the order dated 28.02.2001 was passed. This Court by order dated 02.07.2009 again quashed the order dated 17.08.2006 and recorded a finding by placing reliance upon the judgement dated 24.02.2005 that the spirit of the judgement dated 24.02.2005 clearly indicates that this Court finds that the appointment of the petitioners are legal, consequently, this Court recorded a finding that the appointment of the petitioners were in order which is evident from the extract of the judgement dated 02.07.2009 quoted above, which judgement has also attained finality as the same has not been challenged by the respondents in appeal.

66. Thereafter, again the respondents passed an order on 24.07.2010 rejecting the regularization of the petitioners almost on the same ground on which previous orders were passed. In para-5 of the said order, the Regional Level Committee deliberated one of the reason besides other reasons for rejecting the claim of the petitioners that the posts in question was not notified to the Commission. The said ground was found not sustainable by this Court. This Court by the order dated 09.04.2013 quashed the order dated 24.07.2010. The order dated 09.04.2013 extracted above, reveals that this Court expressed anguish about the manner in which the officers of the rank of Joint Director failed to comprehend and appreciate true import of the earlier judgements of this Court.

67. The respondents after the judgement and order dated 09.04.2013 passed a fresh order dated 04.10.2013 rejecting the claim of regularization of petitioners which came to be challenged by the petitioners by separate writ petitions and all the writ petitions were connected and decided by leading Writ-A No.62780 of 2013. The order dated 04.10.2013 was also

passed on the same ground on which earlier orders have been passed. This Court quashed the order dated 04.10.2013 by the judgement and order dated 12.08.2015 extracted above.

68. The finding returned by this Court in judgement and order dated 12.08.2015 discloses that whatever objections were taken by the respondents in respect of appointment of petitioners, had been rejected by this Court while allowing the Writ Petition No.24305 of 2001, yet the respondents continued to take same objection and passed the order rejecting the claim of the petitioners on the same ground which have been rejected by this Court in all the writ petitions challenging the rejection of claim of the petitioners. This fact has also been admitted by the Director of Education in para-25 of the order dated 09.11.2021.

69. Thus, from the finding returned in various writ petitions, referred above, it is manifest that the objections which have been taken in the orders impugned in the instant writ petition in rejecting the claim of the petitioners that the appointment of the petitioners were perse illegal on account of the fact that the posts were not advertised in two newspapers having wide circulation; that the mandatory requirement of Section 18 of Act 1982 that ad hoc appointment could be made by Committee of Management after 60 days period has expired from the date the posts were notified to the Commission; that no financial approval has been granted to the appointment of the petitioners by D.I.O.S., have been rejected by this Court. Therefore, now it is not open to the respondents to raise the same objections in denying the claim of the petitioners which have already been rejected by this Court in previous judgements and orders. It is manifest from the records that all the objections or grounds which have been taken by the respondents in rejecting the claim of the petitioners are the issues directly and expressly involved in the previous writ petitions, therefore, principle of res-judicata bars the respondents in taking same grounds in rejecting the claim of the petitioners.

70. Learned Additional Advocate General has tried to demonstrate from the pleadings of the writ petition that even as per the case of the petitioners, the mandatory requirement of expiry of 60 days period from the date the posts had been notified to the Commission before making ad hoc appointment, had not been complied with by the Committee of Management. He submits that the requisition was sent to the Commission on 22.08.1991 and advertisement was issued on 03.10.1991 and petitioners joined on 20.10.1991. Thus, it is evident that the period of 60 days had not expired between the requisition notifying the posts to the Commission and posts were advertised for appointment.

71. In this regard, it would be apt to refer to the order dated 24.07.2010 passed by the Regional Level Committee, in which in para-5 specific objection was taken by the Regional Level Committee that the posts were not notified to the Commission, and mandatory condition as provided under Section 18 of the Act, 1982 that ad hoc appointment can be made by the Committee of Management after the expiry of 60 days period from the date the posts in question have been notified to the Commission and Commission has failed to make appointment has not been followed by the Committee of Management in

making ad hoc appointment, therefore, the appointment of the petitioners were invalid and they cannot be regularized. The said objection was repelled by this Court in Writ Petition No.69975 of 2010 by the judgement and order dated 09.04.2013. The relevant extract of the order dated 09.04.2013 is already quoted above. The Apex Court in the case reported in **(1977) 3 SCR 428, Uttar Pradesh Vs. Nawab Hussain** has explained the principle of constructive res-judicata. Relevant extract of the judgement is reproduced herein below:-

"Shinghal J., delivering the judgment on behalf of the Court applied the principles of constructive res judicata and held that a suit to challenge the order of dismissal from service after dismissal of the writ petition on merits was not maintainable although a new ground of attack was made out in the suit which had not been taken in the writ petition. This was so on the application of the principle of constructive res judicata. It will be useful to quote a passage from page 431 (of SCR) : (at p. 1683 of AIR) which runs as follows :-

"Reference in this connection may be made to Ex Parte Thompson, (1985) 6 QB 720. There A. J. Stephens moved for a rule calling upon the authorities concerned to show cause why a mandamus should not issue. He obtained a rule nisi, but it was discharged as it did not appear that there had been a demand and a refusal. He applied again saying that there had been a demand and a refusal since then. Lord Denman C.J., observed that as Stephens was making an application which had already been refused, on fresh materials, he could not have "the same application repeated from time to time" as they had "often refused rules" on that ground. The same view has been taken in England in respect of renewed petition for certiorari, quo warranto and prohibition, and, as we shall show, that is also the position in this country."

72. In view of the judgement of the Apex Court in the case of ***Nawab Hussain (supra)*** and the principle of constructive res-judicata, this ground is not open to the respondents to raise it after five round of litigation which had been contested between the parties on the same cause of action. Therefore, this Court is not inclined to test the legality of the arguments raised by the learned Additional Advocate General. Accordingly, this Court finds that the objections which have been taken by the respondents in denying the claim of the petitioners are barred by principle of res-judicata and constructive *resjudicata*, hence, are not sustainable in law.

73. So far as the judgements relied upon by the learned counsel for the respondents are concerned on the point that the procedure contemplated under Section 18 of the Act 1982 has to be scrupulously followed while making ad-hoc appointment. It is no doubt true that the Courts have been consistent in holding that the conditions enumerated under Section 18 of the Act, 1982 has to be followed scrupulously in making ad-hoc appointment, and the procedure for making appointment under Section 18 of the Act, 1982 as contemplated under the First Removal of Difficulties Order 1981 has to be adhered to, but in the instant case these judgements have no application, inasmuch as objections which have been taken in respect to appointment of petitioners have already been rejected by this Court in five writ petitions prior to the present writ petition and this Court has already held the appointment of the petitioners as per law

and finding recorded therein are binding upon the parties and have attained finality interse parties, therefore, it is not open to challenge the appointment of the petitioners, therefore, in such view of the fact this Court is not proceeding to discuss each case relied upon by the learned counsel for the respondents as it would unnecessarily burden the judgement.

74. In regard to the argument of learned Additional Advocate General based upon the judgement of the Apex Court in the case reported in **(2007) 2 SCC 230 Raghunath Rai Bareja & another Vs. Punjab National Bank & others**, law will prevail over equity, it would be apt to mention that the controversy interse party has been settled by five judgements of this Court prior to the present writ petition which have been detailed above, therefore, the question of equity is not involved in the instant case. Thus, for this reason, the arguments of learned Additional Advocate General is misconceived and is not sustainable.

75. Further submission that pure question of law can be raised by **AIR 2010 SC 3817, Greater Mohali Area Development Authority & Others Vs. Manju Jain Others**, it is pertinent to mention that the said principle has also no application in the instant case as this Court has held that the objections which have been taken by the respondents have already been decided by this Court in previous five writ petitions, therefore, the said principle has no application in the instant case.

76. The order dated 28.10.2021 passed by the respondents reviewing its earlier order dated 30.12.2015 passed by Regional Level Committee is not sustainable for one more reason that the Regional Level Committee has no power to review its order as it is settled in law that the review is the creation of statute and authority can exercise the power of review if it is conferred by the statute. In this respect it would be apt to refer to para 11 of the judgement of the Apex Court reported in **AIR 1987 SC 2186, Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidhyalaya, Sitapur (U.P.) and others. Relevant extract of the said judgement is reproduced here-in-below**:-

"It is now well established that a quasi judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice-Chancellor in considering the question of approval of an order ofdismissal of the Principal, acts as a quasi judicial authority. It is not disputed that the provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice- Chancellor. In the circumstances, it must be held that the Vice-Chancellor acted wholly without jurisdiction in reviewing her order dated January 24, 1987 by her order dated March 7, 1987. The said order of the Vice-Chancellor dated March 7, 1987 was a nullity."

77. Further, the order dated 23.08.2018 is not sustainable in law for want of principle of natural justice, inasmuch as the order impugned do not reflect that any notice or opportunity of hearing was afforded to the petitioners before passing the impugned orders.

78. Now, the question arises as to whether this Court can issue a writ of mandamus to pay the entire arrears of

salary to the petitioners since the date of regularization including consequential benefits, it would be appropriate to refer to the judgement of Apex Court in the case of ***Hari Krishna Mandir Trust Vs. State of Maharashtra & Ors., (2020) 9 SCC 356***, wherein the Apex Court has held that in appropriate cases the Court may itself pass an order or give direction to the public authorities or Government which ought to have exercised by the authorities properly and lawfully. Relevant paragraph nos. 100 to 102 of the judgment are reproduced here-in-below:

"100. The High Courts exercising their jurisdiction under Article 226 of the Constitution of India, not only have the power to issue a Writ of Mandamus or in the nature of Mandamus, but are duty bound to exercise such power, where the Government or a public authority has failed to exercise or has wrongly exercised discretion conferred upon it by a Statute, or a rule, or a policy decision of the Government or has exercised such discretion malafide, or on irrelevant consideration.

101. In all such cases, the High Court must issue a Writ of Mandamus and give directions to compel performance in an appropriate and lawful manner of the discretion conferred upon the Government or a public authority.

102. In appropriate cases, in order to prevent injustice to the parties, the Court may itself pass an order or give directions which the government or the public authorities should have passed, had it properly and lawfully exercised its discretion. In Directors of Settlements, A.P. v. M.R. Apparao. Pattanaik J. observed: (SCC p.659, para 17)

"17.....One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus, "Mandamus" means a command. It differs form the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior courts or government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by a statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition (See Kalyan Singh v. State of U.P.). The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law."

(emphasis in original)"

79. In the instant case, six round of litigation have taken place and the claim of the petitioners have been rejected on frivolous grounds, therefore, this Court instead of relegating the matter to the

authorities issues a writ of mandamus directing the respondents to release the salary of the petitioners.

80. Before parting with the judgement, this Court may record that the conduct of the State Officers are malicious, unconscionable, arrogant and lack sense of humanity. The said observation is recorded in the light of facts detailed above that in five writ petitions prior to the present writ petition the issues raised herein were directly and expressly involved and have been settled by this Court, yet the authorities without adopting a lawful approach were hellbent to scuttle the orders passed by this Court.

81. The approach of the respondent Officers are abnoxious and conceited which is fortified from the fact that the Director of Education in its order dated 09.10.2021 have admitted that the objections which have been raised by the Department in the orders impugned, have already been rejected by this Court in various writ petitions and on the basis of the said order, the learned Additional Advocate General made a statement that the Director of Education revisited the matter and found that the claim of the petitioners for salary is genuine and sought time to seek sanction from the State Government for releasing the salary, which has been recorded by this Court in its order dated 09.11.2021 and got the matter adjourned, but despite the statement given by the learned Additional Advocate General seeking time to get sanction from the State Government to release salary of petitioners, the State Government took a somersault and refused to pay the salary of the petitioners. The matter has not ended here only, a false aspersion had been cast upon the Court by the Director of Education in letter dated 18.11.2021, wherein he has made a false statement that the Court has not considered the order dated 28.10.2021 in passing the orders dated 08.11.2021 and 09.11.2021 which fact was a false statement, and this Court passed an order on 24.11.2021 reprimanding the conduct of the Officer in casting aspersion upon the Court. This approach of the State Officers is highly condemanble and has resulted not only wasting precious time of the Court but has resulted in wasting the time of State machinery and putting the heavy financial burden upon State machinery in making unnecessary expenditure in the litigation.

82. In view of the fact stated above, moreso, when the authorities have not even spared this Court in casting aspersion upon it, this Court finds it to be fit case to impose a cost of Rs.5,00,000 (Rs. Five Lacs) upon the State which shall be released to all the petitioners equally within two months. The cost so paid shall be recovered from the erring Officials after enquiry.

83. For the reasons given above, the impugned orders dated **23.08.2018** passed by the Director of Education (Secondary), State of U.P., Lucknow and order dated **28.10.2021** passed during the pendency of the writ petition by the Regional Level Committee are hereby quashed. The respondents are directed to pay the salary and arrears of salary including all the consequential benefits to the petitioners within a period of two months from the date of production of a certified copy of this order.

84. Accordingly, the writ petition is allowed with costs quantified above.

(2022) 9 ILRA 647
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2022

BEFORE

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

Application U/S 482 No. 12670 of 2022

Sanjeet Rathi @ Bhuvnesh Rathi ...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vijai Kumar Tiwari, Sri Amit Kumar Srivastava

Counsel for the Respondents:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973 - Sections 482 & 216 - Indian Penal Code, 1860 - Sections 498A, 304B & ¾ D.P. Act,1961 - alteration of charge-FIR was lodged and after completion of investigation, charge sheet was submitted u/s 498A, 304B & ¾ D.P. Act-Further investigation was conducted in the matter and the supplementary charge sheet was submitted-prior to submission of supplementary charge sheet discharge application was moved which was rejected-However, after submitting the supplementary charge sheet, an application for alteration of charge was moved which was rejected by court below without application of mind-While it is necessary for the Magistrate, to have due regard to both the reports while passing the cognizance order.(Para 1 to 16)

The application is allowed. (E-6)

List of Cases cited:

Luckose Zachariah @ Zak Nedumchira Luke & ors. Vs Joseph Joseph & ors. (2022) LiveLaw SC 230

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

1. In compliance of the order of this Court dated 02.09.2022, Mr. Amit Kumar Srivastava, Advocate, Advocate Roll No.A/A 067/2019, Common Room No.3, Mobile No. 9415653155 is present before this Court along with Mr. Vijai Kumar Tiwari, Advocate, Advocate Roll No.A/V 0108/2012, Chamber/Seat No.1, Mobile No. 9415291367.

2. Mr. Amit Kumar Srivastava, Advocate, Advocate Roll No.0A/A 0578/2012 to be read as Amit Kumar Srivastava-1 and Mr. Amit Kumar Srivastava, Advocate, Advocate Roll No.A/A 067/2019 to be read as Amit Kumar Srivastava-2.

3. As informed by Mr. Amit Kumar Srivastava, Advocate AoR No.0A/A 0578/2012, Mobile No.9415217295 that counsel bearing the same name has misguided his client, using his name and has filed his Vakalatnama in the present case. Explanation was sought from the aforesaid counsels and they informed that the district Court counsel had asked Mr. Vijai Kumar Tiwari, Advocate to engage Mr. Amit Kumar Srivastava-1 as counsel, therefore, he approached him, however, due to the high engagement fees as asked by him, he engaged Mr. Amit Kumar Srivastava-2. When the client approached Mr. Amit Kumar Srivastava-1 then he came to know about engagement of Mr. Amit Kumar Srivastava-2 by Mr. Vijai Kumar Tiwari, Advocate.

4. Mr. Vijai Kumar Tiwari, Advocate has shifted the burden of such mistake upon the district Court counsel as well as the client and both the counsels Mr. Vijai Kumar Tiwari and Mr. Amit Kumar Srivastava-2 tender unconditional apology for the harassment faced by Mr. Amit Kumar Srivastava-1 in such situation. They also submit that they will be cautious in future while accepting the brief from district Court counsels.

5. This Court has come across the situation frequently where counsels bearing the same name, as in the present case, are being cheated by the clients in district Court as well as the counsels bearing the same name is giving brief to some other counsel of similar name.

6. In such situation, conscious effort should be made by Bar Council to do the needful so that the counsel having similar names do not face the difficulty as has been in the present case. For example, numbers may be given to the counsels like Amit Kumar Srivastava-1, 2 and 3 e.t.c. so that the Court and everyone may come to know as to who the counsel is. Thus, Mr. Amit Kumar Srivastava, Advocate AoR No.0A/A0578/2012 will move an application before the Bar Council of Uttar Pradesh to do the needful in this respect.

7. The Chairman of Bar Council of Uttar Pradesh is directed to take appropriate measures to help the counsels bearing the similar names so that such situation, as in the present case, may not be created.

8. The Registrar General of High Court Allahabad is also directed to ensure the compliance of the aforesaid order.

9. Heard Mr. Amit Kumar Srivastava, Advocate AoR No.A/A 0578/2012, learned counsel for the applicant and Mr. Pankaj Srivastava, learned A.G.A. for the State.

10. The application u/s 482 Cr.P.C. has been filed by the applicant with prayer to quash the order dated 28.09.2021 passed by Additional District Judge-5th, Bareilly on the application under Section 216 Cr.P.C. for alter of charge in S.T. No. 118 of 2019, arising out of Case Crime No.569 of 2018, under Sections 498A, 304B I.P.C. & Section 3/4 D.P. Act, P.S. Fatehganj West, District-Bareilly. It has been further prayed to direct the Court below to alter the charge under Section 306 I.P.C. on the ground of supplementary case diary no.35 dated 25.08.2020.

11. Learned counsel for the applicant submits that earlier an F.I.R. was lodged under Sections 498A, 304B and Section 3/4 D.P. Act. After completion of investigation, charge sheet was submitted under Sections 498A, 304B and Section 3/4 D.P. Act on 25.01.2019. However, by order of the S.S.P. concerned, further investigation was conducted in the matter and the supplementary charge sheet was submitted, as is evident from order dated 07.02.2020, placed at page 48 of the application by means of which, supplementary charge sheet regarding the offence under Section 306 I.P.C. has been placed on record.

12. Learned counsel for the applicant further submits that prior to submission of supplementary charge sheet, discharge application was moved which was rejected. However, after coming of the supplementary charge sheet, an application for alteration of charge was moved which has been rejected by the order impugned in an illegal manner and without application

of judicial mind. Learned counsel for the applicant further submits that in view of several judgements passed by Hon'ble Apex Court as well as High Court, while passing the order impugned, the Court concerned should have considered the charge sheet as well as supplementary charge sheet. In support of his submission he has relied upon the judgement of Hon'ble Apex Court passed in **Luckose Zachariah @ Zak Nedumchira Luke and Others Vs. Joseph Joseph and Others reported in 2022 LiveLaw (SC) 230,** where in, it has been held that it is necessary for the Magistrate, to have due regard to both the reports, the initial report which was submitted under Section 173(2) as well as the supplementary report which was submitted after further investigation, in terms of Section 173(8) while passing the cognizance order.

13. Learned A.G.A. could not dispute the correctness of the submissions made by the learned counsel for the applicant and he has no objection if the order dated 28.09.2021 is set aside.

14. This Court feels that Court concerned while passing the order dated 28.09.2021 has not applied its mind and has not considered the aforesaid supplementary charge sheet.

15. In view of the facts and circumstances of the case, the order dated 28.09.2021 passed by Additional District Judge-5th, Bareilly cannot be legally sustained and is set aside and the same is remitted back to him for decision afresh. While deciding the matter afresh, the concerned Court shall pass a reasoned and speaking order, after taking into consideration the charge sheet as well as supplementary charge sheet, in accordance with law, preferably within a period of one month from the date of production of a certified copy of this order.

16. With the aforesaid directions/ observations, this application stands **allowed.**

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

(2022) 9 ILRA 649
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

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

Special Appeal Defective No. 362 of 2022

State of U.P. & Ors. ...Appellants
Versus
Nitin Agnihotri & Ors. ...Respondents

Counsel for the Appellants:
Sri Ramanand Pandey (Addl. C.S.C.)

Counsel for the Respondents:
Sri Arvind Srivastava

A. Service Law – Payment of Salary – Concealment of material facts – U.P. Secondary Education Services Selection Board Act, 1982: Section 21; Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 - A litigant who conceals material facts from the Court, has to be dealt with, has been gone through by Hon'ble the Supreme Court time and again and the consistent opinion is that he is not entitled even to be heard on merits. (Para 6)

Appellants suppressed the material fact that the order dated 15.02.2021 passed by the

management recommending termination of the petitioner's services has been stayed by this Court. As there is material concealment of facts in the present appeal, the same deserves to be dismissed. (Para 4 to 6)

B. A writ petition filed on a subsequent cause of action cannot be dubbed as a second petition. It is also noteworthy that Writ - A No. 12492 of 2021 is by no means a second petition filed by respondent No. 1, which the appellants say into criticism of the impugned judgment passed by the learned Single Judge. Writ - A No. 12492 of 2021 has been filed against a supervening order dated 15.02.2021, which was not in existence until time when the writ petition giving rise to the present appeal, challenging the order dated 31.12.2020 was filed. (Para 8)

Till date, no order determining the employment of respondent No. 1 has been passed by the respondents i.e., enforceable under the law. The respondents, therefore, cannot stop payment of the petitioner's salary and orally ask him not to work or permit him to work but not pay his salary. The impugned order is, therefore, flawless and must be upheld. (Para 9)

Since the appellants have suppressed material facts from this Court, they must be saddled with adequate costs, which we quantify as Rs. 50,000/-. (Para 10)

Special appeal dismissed. (E-4)

Precedent followed:

1. Virendra Kumar Vs U.O.I. & ors., 2022 (2) ADJ 1 (Para 7)

Present special appeal assails judgment and order dated 05.05.2022, passed by learned Single Judge.

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

1. The order dated May 5, 2022 passed by the learned Single Judge has been impugned by filing the present intra-court appeal.

2. Challenge before the learned Single Judge was to the communication dated December 21, 2022 from the Management of Shri Mardan Singh Inter College, Tal Behat, Lalitpur, vide which in view of letter dated November 5, 2020 from the District Inspector of Schools, payment of salary to respondent No. 1 was directed to be stopped with effect from November, 2020. Learned Single Judge allowed the writ petition, quashed the order dated December 31, 2020 passed by the Committee of Management and directed for payment of salary along with interest thereon to respondent No. 1.

3. The stand taken by the learned counsel for the appellants is that the appointment of Respondent No. 1 on compassionate basis was wrong as he had concealed material facts. However, it is not in dispute that no final decision has yet been taken about the appointment of respondent No. 1 as to whether the same is legal or illegal. The proceedings therefor are in process. The effect of passing of order stopping payment of salary to respondent No. 1 is either that he shall not be allowed to work and that too without passing any order or that he shall not be paid salary despite working in the college. Under both the eventualities, the order passed cannot be sustained as there is no direction that respondent No. 1 will not be allowed to work in the college and stoppage of payment of salary is not by way of punishment.

4. What makes matters worse for the appellants is that in the counter affidavit filed before the learned Single Judge, an order dated February 15, 2021 passed by

the Manager/Secretary, Shri Mardan Singh Inter College was brought on record as Annexure No. 9 to show that the management had taken a decision to terminate the petitioner's services with information thereof to the Board in terms of Section 21 of the U.P. Secondary Education Services Selection Board Act, 1982 *(for short "the Act of 1982")* but the appellants have not disclosed in the counter affidavit the fact that the order passed by the management on February 15, 2021 resolving to terminate the services of respondent no. 1 is already under challenge before this Court in Writ - A No. 12492 of 2021, tiled as "Nitin Agnihotri v. State of U.P. and others' wherein this Court has issued notice and stayed the operation of the order dated February 15, 2021 passed by the College management. This fact has also not been disclosed in the affidavit filed in this appeal. In the affidavit filed in support of this appeal, there is an averment to be found in Paragraph No. 14 to the effect that the learned Single Judge, while allowing the writ petition, did not consider the fact that respondent no. 1 has filed a second writ petition, being Writ - A No. 12492 of 2021 against the order dated February 15, 2021 passed by the Committee of Management, where the appellants have filed a counter affidavit, and that petition is pending. It has also been averred in the paragraph under reference that the Appointing Authority has already recommended dismissal of the petitioner on account of illegal appointment under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. In this affidavit also, it has not been stated that the operation of the order dated February 15, 2021 has been stayed by this Court. The averment in Paragraph No. 14 of the affidavit filed in support of the appeal hides more than it says. It suppresses the material fact that the order dated February 15, 2021 passed by the management recommending termination of the petitioner's services has been stayed by this Court.

5. At the hearing of this appeal, the interim stay order dated September 21, 2021 passed by this Court in Writ - A No. 12492 of 2021 was produced by learned Counsel for respondent No. 1. When the learned Standing Counsel appearing for the State was confronted by the said order, he could not deny the fact that the said order had been passed in the writ petition under reference, staying the operation of the order dated February 15, 2021. It is not expected of the State or their Authorities that such a vital fact would be suppressed.

6. As there is material concealment of facts in the present appeal, the same deserves to be dismissed. As to how a litigant who conceals material facts from the Court, has to be dealt with, has been gone through by Hon'ble the Supreme Court time and again and the consistent opinion is that he is not entitled even to be heard on merits.

7. This Court has considered this issue in **Virendra Kumar v. Union of India and others, 2022 (2) ADJ 1** and after going through various judgments of Hon'ble Supreme Court, had dismissed the petition on the ground of concealment of material facts by the petitioner.

8. It is also noteworthy that Writ - A No. 12492 of 2021 is by no means a second petition filed by respondent No. 1, which the appellants say into criticism of the impugned judgment passed by the learned Single Judge. Writ - A No. 12492 of 2021 has been filed against a supervening order

dated February 15, 2021, which was not in existence until time when the writ petition giving rise to the present appeal, challenging the order dated December 31, 2020, was filed. A writ petition filed on a subsequent cause of action cannot be dubbed as a second petition.

9. To sum up, in substance, till date, no order determining the employment of respondent No. 1 has been passed by the respondents that is enforceable under the law. The respondents, therefore, cannot stop payment of the petitioner's salary and orally ask him not to work or permit him to work but not pay his salary. The impugned order is, therefore, flawless and must be upheld.

10. Since the appellants have suppressed material facts from this Court, which are already indicated hereinabove, they must be saddled with adequate costs, which we quantify as ₹50,000/-.

11. As a result, the appeal fails and stands dismissed. The costs of ₹50,000/- shall be deposited by the appellants with the Allahabad High Court Mediation and Conciliation Center within one month from the date of receipt of copy of the order and receipt thereof shall be produced before the Registrar General, which shall be retained on record.

(2022) 9 ILRA 652
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2022

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Writ A No. 427 of 2022

Noorul Huda ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Yakub Ali, Ms. Chhaya Gupta, Ms. Sarita Mishra

Counsel for the Respondents:
C.S.C., Sri Durga Singh, Sri Sanjay Chaturvedi

A. Service Law – Repatriation – Opportunity of hearing - A deputationist indisputably has no right to be absorbed in the post to which he is deputed. However, there is no bar thereto as well. It may be true that when deputation does not result in absorption in the service to which an officer is deputed, no recruitment in its true import and significance takes place as he is continued to be a member of the parent service. **When the tenure of deputation is specified, despite a deputationist not having an indefeasible right to hold the said post, ordinarily the term of deputation should not be curtailed except on such just grounds as, for example, unsuitability or unsatisfactory performance. But, even where the tenure is not specified, an order of reversion can be questioned when the same is mala fide. An action taken in a post-haste manner also indicates malice.** (Para 15)

Record reflects that the petitioner was appointed as District Co-ordinator (Community Mobilization) in the office of District Basic Education Officer, Ballia and joined the said post on deputation on 20.11.2019. The impugned order has been passed by respondent-2 repatriating him to parent department i.e. on the post of Assistant Teacher (Urdu) in Government Inter College, Ballia. Ordinarily a deputationist has no right to continue on the said post but the impugned action of the respondents by passing the impugned order casts stigma to him as the same was passed on the basis of some complaint lodged by the political worker and without affording any opportunity of hearing to the petitioner, even

the copy of the complaint has not been served to the petitioner and the same order cannot be said to be a simplicitor order but punitive in nature. (Para 11, 12)

It is apparent that the petitioner has not been afforded any opportunity of hearing before passing the impugned order, which is totally mala fide. (Para 14, 16)

The impugned order dated 27.11.2021 passed by the respondent No. 2-State Project Director, Sarva Shiksha Abhiyan, State Project Office, Vidya Bhawan, Nishatganj, Lucknow, is quashed. The respondents are directed to pass fresh order in accordance with law after giving adequate opportunity of hearing to the petitioner and after serving a copy of the complaint lodged by the political worker. (Para 17)

Writ petition allowed. (E-4)

Precedent followed:

1. U.O.I. Through Govt. of Pondicherry & anr. Vs V. Ramakrishnan & ors., AIR 2005 SC 4295; (2005) 8 SCC 394

Present petition assails order dated 27.11.2021, passed by State Project Director, Sarva Shiksha Abhiyan, State Project Office, Vidya Bhawan, Nishatganj, Lucknow.

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Ms. Chhaya Gupta, learned counsel for the petitioner, learned Standing Counsel for the respondents-1, 3 & 4 and Sri Durga Singh, learned counsel for the respondent-2.

2. Present writ petition under Article 226 of the Constitution has been filed for quashing the impugned order dated 27.11.2021 passed by the respondent no.2-State Project Director, Sarva Shiksha Abhiyan, State Project Office, Vidya Bhawan, Nishatganj, Lucknow, whereby the petitioner was repatriated to his parental department i.e. Secondary Education, U.P. with immediate effect.

3. The facts giving rise to the present writ petition are as under:

4. The petitioner was initially appointed on the post of Assistant Teacher (Urdu) in Government Inter College, Ballia after due selection and subsequently, on the basis of advertisement issued by respondent-2, he was appointed on the post of District Co-ordinator (Community Mobilization) vide order dated 02.11.2018 on deputation in the office of District Basic Education Officer, Ballia. In the appointment letter, it is mentioned that the said appointment was on deputation for a minimum period of three years and maximum five years.

5. Subsequently, pursuant to the said appointment on deputation, the petitioner joined as a District Co-ordinator (Community Mobilization) at Ballia on 20.11.2019 in the office of District Basic Education Officer, Ballia. Subsequently, on the basis of complaint lodged by one Sri Rajesh Kumar (unionist and B.J.P. worker, Sohaon Ballia) as well as on the basis of recommendation dated 17.11.2021 and 18.11.2021 of respondent no.4-Assistant Director of Education (Basic) Azamgarh Division, Azamgarh, the impugned order dated 27.11.2021 has been passed, whereby the petitioner repatriated to his parental department i.e. Secondary Education, U.P., which is impugned in the writ petition.

6. Learned counsel for the petitioner submits that the impugned order has been passed on the basis of some complaint lodged by the political worker as well as on the basis of recommendation made by the

respondent-4, which is not only punitive in nature but stigmatic and even the impugned order has been passed without affording any opportunity of hearing to the petitioner and without serving any copy of the complaint lodged by the political worker against the petitioner and the same cannot be sustained in the eyes of law.

7. In support of her contention, learned counsel for the petitioner placed reliance upon the judgement of the Apex Court passed in ***Union of India Through Govt. of Pondicherry and Another Vs. V. Ramakrishnan and Others, (2005) 0 Supreme (SC) 1350.***

8. Learned counsel for the petitioner further submits that no inquiry with regard to allegation made in the complaint lodged by the political worker has been conducted.

9. Per contra, learned counsel for the respondent-2 submits that the petitioner does not hold any lien on the post of District Co-ordinator (Community Mobilization), who was working on deputation on the said post and has rightly been repatriated to his original department on the post of Assistant Teacher (Urdu) in Government Inter College, Ballia. He further submits that due to confrontation between teachers association and the petitioner, for smooth functioning of the department work, the impugned order has been passed. There is no illegality or infirmity in the order impugned.

10. I have considered the rival submission so raised by counsel for the parties and perused the record.

11. Record reflects that the petitioner was appointed as District Co-ordinator (Community Mobilization) in the office of District Basic Education Officer, Ballia and joined the said post on deputation on 20.11.2019. The impugned order has been passed by respondent-2 repatriating him to parent department i.e. on the post of Assistant Teacher (Urdu) in Government Inter College, Ballia.

12. Ordinarily a deputationist has no right to continue on the said post but the impugned action of the respondents by passing the impugned order casts stigma to him as the same was passed on the basis of some complaint lodged by the political worker and without affording any opportunity of hearing to the petitioner, even the copy of the complaint has not been served to the petitioner and the same order cannot be said to be a simplicitor order but punitive in nature. Specific averment in this regard has been made by the petitioner in paragraph 28 of the writ petition, which is quoted as under:

"That the reversion of the petitioner is completely arbitrary and in violation of the principles of natural justice insofar as no notice or opportunity of hearing had been given to the petitioner whereas the alleged complaint on the basis of which the impugned order has been passed is a unilateral complaint which had not been enquired into till date."

13. The said paragraph was replied in paragraph 19 of the counter affidavit, in which averment with regard to affording any opportunity of hearing and serving any copy of the complaint to the petitioner has not specifically denied. The said paragraph is quoted as under:

"That the contents of paragraph Nos. 26, 27, 28, 29 and 30 of the writ petition are not admitted as stated, hence are denied.

In reply thereto it is submitted that the action has been taken against the petitioner. It is further submitted that due to confrontation between teachers association and the petitioner for smooth functioning of departmental works, the petitioner has been repatriated to his parent department of Madhyamik Shiksha, U.P. in accordance with law. It is further submitted that normally tenure of deputation is 03 years, however, under special facts and circumstances as well as keeping in view of work interest the tenure of deputation of an employee can be curtailed and the power of the repatriation of an employee on deputation before the prescribed tenure is vested in the answering respondent no.2."

14. From the said paragraphs, it is apparent that the petitioner has not been afforded any opportunity of hearing before passing the impugned order, which is totally malafide.

15. Paragraph 32 of the said judgement relied upon by counsel for the petitioner in ***Union of India Through Govt. of Pondicherry and Another (supra)***, is quoted as under:

"Ordinarily, a deputationist has no legal right to continue in the post. A deputationist indisputably has no right to be absorbed in the post to which he is deputed. However, there is no bar thereto as well. It may be true that when deputation does not result in absorption in the service to which an officer is deputed, no recruitment in its true import and significance takes place as he is continued to be a member of the parent service. When the tenure of deputation is specified, despite a deputationist not having an indefeasible right to hold the said post, ordinarily the term of deputation should not be curtailed except on such just grounds as, for example, unsuitability or unsatisfactory performance. But, even where the tenure is not specified, an order of reversion can be questioned when the same is mala fide. An action taken in a post haste manner also indicates malice."

16. In view of the above, it is clear that the impugned order has been passed against the petitioner without affording any opportunity of hearing and cannot be sustained being stigmatic and is malafide.

17. Accordingly, the impugned order dated 27.11.2021 passed by the respondent no.2-State Project Director, Sarva Shiksha Abhiyan, State Project Office, Vidya Bhawan, Nishatganj, Lucknow, is quashed. The respondents are directed to pass fresh order in accordance with law after giving adequate opportunity of hearing to the petitioner and after serving a copy of the complaint lodged by the political worker.

18. Till such order is passed, the petitioner would be permitted to work on the post of District Co-ordinator (Community Mobilization) in the office of District Basic Education Officer, Ballia and shall be paid arrears of salary, if any, and to pay salary month to month basis regularly.

19. The writ petition is, accordingly, allowed.

(2022) 9 ILRA 655
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 11943 of 2022

C/M Harijan Primary Pathshala, Madhopur, Kasia, Tehsil Kasia, Dist. Kushinagar & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Adarsh Bhushan, Sri Awadh Narain Rai

Counsel for the Respondents:
C.S.C.

A. Education Law – Grant-in-aid – Payment of salary of teachers – Constitution of India: Article 14 - State Government is adopting a pick and choose policy in taking the institutions under grant-in-aid and the action is clearly violative of Article 14 of the Constitution of India. Petitioners have invited attention of the Court to orders dated 21.11.2019 and 16.10.2020 by which the State Government has taken institution in grant-in-aid which are similarly circumstanced and governed by Social Welfare Department. (Para 4)

Rejection of the claim of the petitioners in the facts and circumstances is totally unwarranted. The case of the petitioners is not to be treated as a new case. The State Government has vide order dated 18.5.2017 already taken a decision to take the petitioners' Institution under grant-in-aid. The said order is very much in existence and has not been rescinded. Admittedly, vide orders dated 21.11.2019 and 16.10.2020, the State Government has taken institutions in grant-in-aid which are similarly circumstanced as the petitioners' institution and governed by the Social Welfare Department. There is no reason for the State Government to discriminate against the petitioners and refuse the financial approval having granted the administrative approval as far back as on 18.5.2017. (Para 3 to 6)

Writ petition allowed. (E-4)

Precedent followed:

1. St. of U.P. & ors. Vs Pawan Kumar Dwivedi & ors., 2014 (9) SCC 692 (Para 2)

2. Paripurna Nand Tripathi & anr. Vs St. of U.P. & ors., Special Appeal Defective No. 994 of 2014 (Para 2)

Present petition assails order dated 17.12.2020, passed by Principal Secretary, Social Welfare Department, Government of U.P.

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

1. The writ petition has been filed questioning the order dated 17.12.2020 (Annexure-26) to the writ petition passed by the Principal Secretary, Social Welfare Department, Government of U.P., whereby refusing to accord financial approval for the petitioners' school to be included in the recurrent grant-in-aid list in the absence of any policy/arrangement existing for taking new schools run by the private management in the recurrent grant list. However, the petitioners have been given liberty to apply as per prescribed procedure under scheme floated by the Ministry of Social Justice and Empowerment, Government of India under which grants are being made to residential/non-residential schools through voluntary organizations.

2. Shri Adarsh Bhushan, leaned counsel for the petitioner contends that the petitioner Committee of Management is running an Institution providing primary education from 1st to 5th classes. The permanent recognition to the petitioners' Institution was granted on 5.2.1990. The Institution is governed by Department of Social Welfare, Government of U.P. The Social Welfare Department has issued a Government Order dated 31.3.1994 regarding grant and release of grant-in-aid to basic institutions governed by the Social Welfare Department. The petitioner had earlier approached this Court by means of Writ Petition (C) No. 50838 of 2010. The said writ petition was disposed of by directing the authority concerned to take an appropriate decision regarding bringing the

petitioners' Institution under the grant-in-aid. The claim came to be rejected by the State Government vide order dated 22.2.2011 on the ground that the scheme of the State itself had been discontinued w.e.f. 5.10.2006. The rejection order dated 22.12.2011 was challenged by means of Writ Petition (C) No. 31825 of 2015. This Court vide order dated 3.10.2016 allowed the writ petition, set aside the order rejecting the claim dated 22.12.2011 and directed the State Government to examine the petitioners' claim for being taken on the list of aid keeping in view the observations made by the Apex Court in ***State of U.P. and others versus Pawan Kumar Dwivedi*** and others reported in ***2014 (9) SCC 692*** as well as the Division Bench decision of this Court in ***Paripurna Nand Tripathi and another versus State of U.P. and 20 others, Special Appeal Defective No. 994 of 2014.***

3. The State Government in compliance of the order of this Court dated 3.10.2016 passed an order dated 18.5.2017 taking the petitioners' Institution in grant-in-aid. However, in spite of the order dated 18.5.2017 passed in favour of the petitioners the grants were not released in favour of the petitioners in spite of the fact that the petitioners complied with all the formalities required from it. The petitioners were compelled to approach this Court yet again by means of Writ Petition (A) No. 14997 of 2019 which too was disposed of vide order dated 21.10.2019 requiring the authority concerned to pass final order for payment of salary of teachers taking into consideration the letters dated 3.5.2019 and 10.5.2019. It was further directed that in case there is any legal impediment, the authority concerned shall pass a reasoned order.

4. Learned counsel for the petitioner submits that against the order dated 3.10.2016 passed in Writ-C No. 31825 of 2015, the State Government had filed SLP (Civil) Diary No. 1252 of 2021 before the Apex Court, which was dismissed vide order dated 27.8.2021 and as such, the order dated 3.10.2016 setting aside the rejection of the claim of the petitioners to be brought under the grant-in-aid having been upheld, it was incumbent upon the State Government to accord financial approval. Learned counsel for the petitioners further contends that the State Government is adopting a pick and choose policy in taking the institutions under grant-in-aid and the action is clearly violative of Article 14 of the Constitution of India. The learned counsel has invited attention of the Court to orders dated 21.11.2019 and 16.10.2020 filed as Annexures 30 & 31 to the writ petition by which the State Government has taken institution in grant-in-aid which are similarly circumstanced and governed by Social Welfare Department.

5. Learned Standing Counsel appearing for the State-respondents has tried to justify the impugned order by submitting that in the absence of any existing policy of the State Government to take new schools run by private management and include them in the recurrent grant list, the impugned order is perfectly justified. However, he is unable to refute the argument that similarly circumstanced institutions have been taken under the grant-in-aid as is evident from the orders dated 21.11.2019 and 16.10.2020 which are on record.

6. Having considered the submissions of the learned counsel for the parties and having perused the materials on record, the Court finds that the rejection of the claim of the petitioners in the facts and

circumstances is totally unwarranted. The case of the petitioners is not to be treated as a new case. The State Government has vide order dated 18.5.2017 (Annexure-15 to the writ petition) already taken a decision to take the petitioners' Institution under grant-in-aid. The said order is very much in existence and has not been rescinded. Admittedly, vide orders dated 21.11.2019 and 16.10.2020 (Annexures 30 & 31), the State Government has taken institutions in grant-in-aid which are similarly circumstanced as the petitioners' institution and governed by the Social Welfare Department. There is no reason for the State Government to discriminate against the petitioners and refuse the financial approval having granted the administrative approval as far back as on 18.5.2017.

7. In view of the above, the writ petition succeeds and is ***allowed***. The order dated 17.12.2020 passed by the State Government (Annexure 26 to the writ petition) is set aside. A writ of mandamus is issued to the respondents to accord financial approval and release the grant for payment of salary to the teaching and non teaching staff of the petitioners' institution by passing appropriate orders in this regard within a period of 45 days from service of certified copy of the orders.

(2022) 9 ILRA 658
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.08.2022

BEFORE

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

Application U/S 482 No. 24962 of 2021

Shivam Solanki ...Applicant
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Chandrachud Pandey, Sri Sunil Gupta, Sri Anil Kumar Srivastava, Sr. Adv.

Counsel for the Respondents:
Govt. Advocate, Sri Ishir Sripat

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 323, 504, 506, 427, 386, 376, & 511-Challenge to-charge sheet and summoning order- Non-Compliance of section 155(2) Cr.P.C.-No consistency in the version of informant starting from lodging of the NCR till the submission of chargesheet-Only in the statement u/s 164 Cr.P.C., victim, for the first time, raised her grievance regarding allegation of attempt of being sexually assaulted-The police officer investigated the matter without following the procedure as mandated u/s 155(2) of Cr.P.C.-Moreso, the testimony of the victim was not of sterling quality to believe allegations made against applicant-Though the NCR was lodged but the entire proceedings were initiated without taking prior permission of the concerned Magistrate u/s 155(2) Cr.P.C., the whole investigation against the applicant is illegal-It is settled proposition that if the initial action is not in consonance with law, all subsequent and consequential proceedings would be vitiated-Thus, the entire proceedings is liable to be quashed.(Para 1 to 26)

B. When a non-cognizable offence is reported to the police, they are not empowered to investigate the matter and register an FIR, without compliance of Section 155(2) of Cr.P.C. without obtaining prior permission of the Magistrate concerned. It is only after referring the complaint to the concerned Magistrate and taking permission, thereafter, they can investigate the matter. The statutory safeguards must be strictly followed, since they are conceived in public interest and as a guarantee

against frivolous and vexatious investigation.(Para 9 to 14)

The application is allowed. (E-6)

List of Cases cited:

1. St. of M.P. Vs Mahendra @ Golu (2021) 0 Supreme SC 626

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

3. Gangadhar Narayan Nayak @ Gangadhar Hiregutti Vs St. of Karn. & ors. (2022) 0 Supreme SC 232

4. Tilak Nagar Indus. Ltd & ors. Vs St. of A.P. & anr.. (2011) 15 SCC 571

5. Lokesh T.R. Vs St. of Karn. (2022) SCC Online Kar 973

6. St. of Punj. Vs Davinder Pal Singh Bhullar & ors. (2011) 14 SCC 770.

7. Mangal Prasad Tamoli Vs Narvadeshwar Mishra (2005) 3 SCC 422

8. Raju Vs St. of M.P. (2008) 15 SCC 133

9. Rai Sandeep @ Deepu Vs St. (NCT of Delhi) (2012) 8 SCC 21

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

1. Heard Mr. Chandrachud Pandey, Advocate holding brief of Mr. Anil Kumar Srivastava, learned counsel for the applicant, Mr. Ishir Sripat, learned counsel for the opposite party no.2 and Mr. Amit Singh Chauhan, learned counsel appearing for the State as well as perused the entire material available on record.

2. The present 482 Cr.P.C. application has been filed to quash the charge sheet No.57 dated 20.02.2021 and cognizance/summoning order dated 31.03.2021 as well as the entire prosecution of Criminal Case No.13805 of 2021 (State vs. Shivam Solanki), arising out of Case Crime No.504 of 2020, under Sections 323, 504, 506, 427, 386, 376 and 511 IPC, Police Station-Hariparvat, District-Agra, pending before the court of Chief Judicial Magistrate, Agra.

3. Brief facts of the case are that for the incident dated 26.12.2020 at about 08:00 hrs, NCR was lodged on 27.12.2020 under Sections 323, 504 and 506 IPC alleging therein that daughter of opposite party no.2, namely, Riddhi was called by the applicant at the gate of Ram Nagar Colony, using unparliamentary language, when Riddhi objected the same, the applicant assaulted her. On alarm being raised by opposite party no.2, persons of the locality reached there, where upon the applicant ran away giving threat to kill. On the NCR, so lodged, the Investigating Officer investigated the matter, collecting evidence by means of recording statements, medical and taking note of broken mobile i-phone and converted, the aforesaid NCR into FIR as is evident from Parcha No.52 dated 31.12.2020. Thus, an FIR was registered as Case Crime No.504 of 2020, under Sections 323, 504, 506, 354, 427 of IPC against the applicant. After registration of the FIR dated 31.12.2020, the Investigating Officer has prepared the fard of broken mobile, which belongs to injured. For the first time, on 01.01.2021, the statements of the complainant and victim Riddhi under Section 161 Cr.P.C. was recorded by the Investigating Officer, the statement of the victim under Section 164 Cr.P.C. was recorded on 06.01.2021. During investigation, the Investigating Officer has found that no offence under Section 354 IPC was made out against the applicant and, therefore, he has deleted the

aforesaid section and added sections 354B and 386 IPC on the basis of statement of the victim under Section 164 Cr.P.C. as is evident from C.D. No.48 dated 06.01.2021. Thereafter, the second statement of the complainant, namely, Vishal Wadhwa and injured, namely, Riddhi Wadhawa under Section 161 Cr.P.C. were recorded on 03.02.2021. Subsequently, the charge sheet was submitted on 20.02.2021 against the applicant under Sections 323, 504, 506, 427, 386, 376, 511 IPC, pursuant to which, the applicant has been summoned vide order dated 31.03.2021 in the aforesaid sections.

4. Learned counsel for the applicant, before addressing the Court on merit, has raised a legal submission that Section 155(2) of the Cr.P.C. mandates that no investigation can be conducted against the accused in an offence that is non-cognizable without the express permission of the learned Magistrate, therefore, as the procedure provided under Section 155(2) Cr.P.C. has not been followed in the present case prior to lodging of the FIR, which is mandatory requirement, hence, all consequential proceedings pursuant to the initiation of an illegal action would not be justified in the eyes of law.

5. So far as the merit of the case is concerned, learned counsel for the applicant submits that the applicant has been falsely implicated in the present case. Initially, when the NCR was lodged, there were only allegations of using unparliamentary language and beating the victim and threatening to kill her, whereas without obtaining permission from the Magistrate concerned as is mandatory in under Section 155(2) Cr.P.C., the police has conducted the investigation and lodged the FIR. He further submits that there are no allegation of sexually assaulting the victim in the version of FIR nor any of the statements under Section 161 Cr.P.C. It is for the first time in the statement of the victim under Section 164 Cr.P.C. that the allegation of rape has been alleged by the victim, which appears to be afterthought as the applicant and victim were students, who happened to be friends.

6. Learned counsel further submits that though the incident as alleged is of 26.12.2020 at about 08:00 hrs, the statement of the victim under Section 164 Cr.P.C. was recorded on 06.01.2021, i.e. nearly after one month of the incident, which appears to be tutored one as the allegation with respect to rape were not in any statements, which were recorded earlier. He further submits that prior to submission of charge sheet, from the statement of the victim initially recorded on 01.01.2021 till second statement, the story has been changed every time, therefore, the entire case appears to be a false one. In such circumstances, continuance of proceedings would be abuse of process of law. Therefore, the chargesheet, summoning order as well as the entire proceedings may liable to be quashed.

7. On the other hand, learned AGA as well as learned counsel for the opposite party no.2 could not dispute the facts with respect to mandatory requirement of taking permission from the Magistrate concerned prior to initiating investigation as required under Section 155(2) Cr.P.C. So far as the merit of the case, learned AGA as well as learned counsel for the opposite party no.2 submits that in every crime, there is first, Mens Rea, i.e. intention to commit, secondly, preparation to commit it, and thirdly, attempt to commit it and if third stage, i.e. attempt is successful, then crime

is complete. From the statements as well as evidence collected by the Investigating Officer, offence of attempt to commit rape has been clearly alleged, therefore, the charge sheet has been rightly submitted under Sections 376 and 511 IPC including other sections also, because preparation to commit any offence and completion of the preparation would amount to actual commission of the crime. In support of their submission, they are relied upon the judgment of the Apex Court in the case of ***State of Madhya Pradesh vs. Mahendra alias Golu*** reported in ***2021 0 Supreme(SC) 626***, wherein the Apex Court has held as under:-

"11. It is a settled preposition of Criminal Jurisprudence that in every crime, there is first, Mens Rea (intention to commit), secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage, that is, "attempt' is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law still punishes the person for attempting the said act. "Attempt' is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on the societal values is no less than the actual commission."

8. On the cumulative strength of the aforesaid submissions, learned AGA as well as learned counsel for the opposite party no.2 submits that admittedly, though the offence under Sections 323, 504, 506 IPC wherein the NCR was lodged, is non-cognizable offence, therefore, the investigation without prior permission of the Magistrate, are liable to be quashed. However, seeing the case on merits, prima facie offence under the relevant sections is made out against the applicant.

9. I have considered the submissions made by the learned counsel for the parties and gone through the records of the present application.

10. Before touching the merit of the case, it would be appropriate to deal with legal objection as raised by learned counsel for the applicant regarding permission of Magistrate before proceedings with the investigation for lodging of the FIR in the offences, which are non-cognizable.

11. It is relevant at this juncture to go through provisions of Section 155 of Criminal Procedure Code which are reproduced below:-

"Section 155 Cr.P.C.- Information as to non-cognizable cases and investigation of such cases:-

(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

11. It is abundantly clear from above provisions of Section 155(2) and 155(3) Cr.P.C. that police is competent to investigate non cognizable offence with order of Magistrate and in such investigation the police officer receiving order of investigation may exercise same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case. Thus is clear that charge sheet submitted by police in non-cognizable offence after investigation made in pursuance of Magistrate order stands at par with charge sheet submitted by police in cognizable offence. Where the first information report and the accompanying materials do not disclose the commission of any cognizable offence justifying an investigation by the police officer under section 156(1) of the Code, no investigation of the case can be carried on without the order of the Magistrate in view of the mandate of Section 155(2) of the Code, as has been held by the Apex Court in the case of ***State of Haryana and Ors. vs. Ch. Bhajan Lal and Ors.*** reported in ***1992 Suppl.(1) SCC 335***. The relevant para no.108 of the aforesaid judgment reads as under:-

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

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

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F. I. R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

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

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

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

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

12. When a non-cognizable offence is reported to the police, they are not empowered to investigate the matter and register an FIR, without compliance of Section 155(2) of Cr.P.C. without obtaining prior permission of the Magistrate concerned. It is only after referring the complaint to the concerned Magistrate and taking permission, thereafter, they can investigate the matter, as has been held by the Apex Court in the case of ***Gangadhar Narayan Nayak @ Gangadhar Hiregutti vs. State of Karnataka and Others*** reported in ***2022 0 Supreme(SC) 232.***

13. The Apex Court in the case of ***Tilak Nagar Industries Limited and Others vs. State of Andhra Pradesh and another*** reported in ***(2011) 15 SCC 571,*** has held that the statutory safeguards given under Section 155(2) of the Code must be strictly followed, since they are conceived in public interest and as a guarantee against frivolous and vexatious investigation.

14. The proceedings in non-cognizable offence, cannot be initiated by the police, by registering an FIR, without at the outset seeking the nod of the concerned Magistrate, as has been held in the case of ***Lokesh T.R. vs. State of Karnataka*** reported in ***2022 SCC Online Kar 973.*** The relevant para nos.9 and 18 of the aforesaid judgment reads as under:-

"9. Therefore, when the SHO of the Police Station receives a report regarding commission of non-cognizable offence, it is his duty to enter the substance of the information in the prescribed book and refer the informant to the Magistrate as required under Section 155(1) of Cr. P.C. Thereafter, the jurisdictional Magistrate is required to pass an order permitting the Police Officer to investigate the case as mandated by the provisions of Section 155(2) of Cr. P.C., stated supra. Unless, the Police Officer is permitted by an order of the jurisdictional Magistrate to investigate the non-cognizable offence, the Police Officer does not get jurisdiction to investigate the matter and file a final report or the charge sheet.

18. ..... The provision of Section 155(1) and (2) of Cr. P.C., referred above make it very much clear that the SHO of the Police Station on receiving the information regarding the commission of non- cognizable offence, his first duty is to enter or cause to be entered the substance of such commission in a book maintained by such Officer and then refer the informant to the Magistrate. This is the requirement of Section 155(1) of Cr. P.C. Once the

requisition is submitted to the Magistrate, it is for the Jurisdictional Magistrate to consider the requisition submitted by the SHO of Police Station and pass necessary order either permitting the Police Officer to take up the investigation or reject the requisition. Section 155(2) of Cr. P.C., specifically provides that no Police Officer shall investigate the non-cognizable case without the order of the Magistrate having power to try such case or commit such case for trial. Therefore, passing an "order" by the Magistrate permitting the Police Officer to investigate the non- cognizable offence is an important factor. The word without the order of the Magistrate appearing in sub- Section (2) of Section 155 of Cr. P.C., makes it clear that the Magistrate has to pass an 'order' which means supported by reasons. On the other hand, in number of cases, the Jurisdictional Magistrates are writing a word 'permitted' on the requisition submitted by the Police itself which does not satisfy the requirement of Section 155(2) of Cr. P.C., Such an endorsement cannot be equated with the word 'Order'."

15. Thus reading of sub-section (1) of Section 155 of Cr.P.C. makes it clear that the duty of the SHO, who receives information as to the commission of a non-cognizable offence is only to enter or cause to be entered the substance of the information in the prescribed book and refer the informant to the Magistrate. It is for the informant to approach the jurisdictional Magistrate and seek a direction to the police for investigation. If the Magistrate on being approached by the informant, directs investigation, the Police Officer concerned would get jurisdiction to investigate the matter.

16. In the instant case, undisputedly, there is no such permission having been obtained by the police from the concerned Magistrate as required under Section 155(2) Cr.P.C on receiving credible evidence with regard to applicant having committed a non-cognizable offence, therefore, such proceedings would suffer from illegality. Compliance of Section 155 (2) Cr.P.C. is mandatory and not directory and therefore, investigation and report filed by the police in such case would not be legally sustainable.

17. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. The aforesaid has been held by the Apex Court in the case of ***State of Punjab vs. Davinder Pal Singh Bhullar and others*** reported in ***(2011) 14 SCC 770.***

18. Similarly, the Apex Court in the case of ***Mangal Prasad Tamoli vs. Narvadeshwar Mishra*** reported in ***(2005) 3 SCC 422***, has held that if an order at the initial stage is bad in law, then all further proceedings, consequent thereto, will be non est and have to be necessarily set aside.

19. Meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores. In the present case also, wherein, the entire proceedings have been initiated, without following the mandatory requirement of Section 155(2) of Cr.P.C. to take prior permission of the concerned Magistrate before proceeding with the investigation in the matter. Thus, wherein the initial action of the investigation against the applicant is illegal, all subsequent actions would be vitiated.

20. Ignoring the aforesaid fact that the concerned police officer has investigated

the matter without following the procedure as mandated under Section 155(2) of Cr.P.C., while touching the merits of the case, there is no consistency in the version of informant as well as the victim starting from lodging of the NCR till the submission of charge sheet. It is for the first time, in the statement under Section 164 Cr.P.C., the victim has made allegation of attempt of being sexually assaulted. Thus, in view of law laid down by the Apex Court in the case of ***Santosh Prasad @ Santosh Kumar vs. the State of Bihar*** reported in ***(2020) 3 SCC 443***, the proceedings against the applicant are nothing but an abuse of process of the Court. The statement of the victim should be of sterling quality in order to believe the allegations made by her against the applicant. The Apex Court in the aforesaid case of ***Santosh Prasad @ Santosh Kumar (supra) has considered the case of Raju v. State of Madhya Pradesh***, reported in ***(2008) 15 SCC 133 as well as Rai Sandeep alias Deepu v. State (NCT of Delhi) reported in (2012) 8 SCC 21***, while coming to the conclusion that the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

21. In the case of ***Raju (supra)***, it is observed and held by this Court in paragraphs 11 and 12 as under:-

"11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

22. In the case of ***Rai Sandeep alias Deepu (supra),*** the Apex Court had an occasion to consider as to who can be said to be a "sterling witness". In paragraph 22, it is observed and held as under:-

"22 In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the

expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

23. Thus, from the aforesaid discussions, it is clear, that, before arriving at a conclusion that the offence is made out or not, it is to be seen that the statement of the victim as well as other evidences are of a high quality and unassailable without there being any contradictions, exaggerations and the same should be consistent. In the present case, from narration of the facts in the NCR till submission of charge sheet, there is no consistency and only in the statement under Section 164 Cr.P.C., the victim has, for the first time, raised her grievance regarding allegation of an attempt of being sexually assaulted. The case of the applicant is also to be seen keeping in mind his career as he is student and false allegations against him will cause equal distress, humiliation and damage. Therefore, the case of the informant does not stand on the test of law laid down by the Apex Court in the aforesaid judgments.

24. Considering the facts and circumstances of the case, as noted herein above, and also the submissions made by the counsel for the parties, the court is of the considered opinion that the statutory safeguards as provided under Section 155(2) of Cr.P.C. has not been followed and the testimony of the victim was not of sterling quality to believe the allegations made against the applicant, therefore, the entire proceedings is liable to be quashed.

25. Accordingly, the charge sheet No.57 dated 20.02.2021 and cognizance/summoning order dated 31.03.2021 as well as the entire prosecution of Criminal Case No.13805 of 2021 (State vs. Shivam Solanki), arising out of Case Crime No.504 of 2020, under Sections 323, 504, 506, 427, 386, 376 and 511 IPC, Police Station-Hariparvat, District-Agra, pending before the court of Chief Judicial Magistrate, Agra are hereby **quashed.**

26. The application is, accordingly, **allowed**. There shall be no order as to costs.

27. A copy of this order be certified to the lower court forthwith.

(2022) 9 ILRA 666
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.08.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal Defective No. 11 of 2022
(U/S 372 Cr.P. C.)

Utkarsh Awasthi ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Nitin Kumar Mishra

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law - appeal against conviction - Condonation of delay - Indian Penal Code, 1860 - Sections 147/148/34, 325/149/34, 427/149/34, 436/427/34, 323/149/34 – The Limitataion Act,1963 - Section 5 - "sufficient cause" - Interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation) - If delay has occurred for reasons which does not smack of mala fide, Court should be reluctant to refuse condonation. (para - 18)

Appeal with delay of 2300 days – no explanation regarding delay.

HELD:-Complete careless and reckless long delay on part of appellant which remain virtually unexplained at all. No reason to exercise judicial discretion to justify condonation of delay. Barred by limitation. **(Para -18)**

Criminal appeal dismissed. (E-7)

List of Cases cited:-

1. Collector, Land Acquisition Vs Katiji, 1987(2) SCC 107

2. P.K. Ramachandran Vs St. of Kerala, AIR 1998 SC 2276

3. Shakuntala Devi Jain Vs Kuntal Kumari, AIR 1969 SC 575

4. Privy Council in Brij Indar Singh Vs Kanshi Ram, ILR (1918) 45 Cal 94

5. Vedabai @ Vaijayanatabai Baburao Vs Shantaram Baburao Patil & ors., JT 2001(5) SC 608

6. Pundlik Jalam Patil (dead) by LRS. Vs Executive Engineer, Jalgaon Medium Project & Anr., (2008) 17 SCC 448

7. Maniben Devraj Shah Vs Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157

(Delivered by Hon'ble Shamim Ahmed, J.)

(Criminal Misc. Delay Condonation Application No. 01 of 2022)

1. This criminal appeal has been filed with a delay of 2300 days, as per the report of the stamp reporter.

2. By means of present criminal appeal, the the appellant/ complainant has challenged the impugned judgment and order dated 15.02.2014 passed by learned Additional District and Session Judge, Court No.3, Sitapur, convicting and sentencing the respondents No. 2 to 6 under Sections 147/148/34, 325/149/34, 427/149/34, 436/427/34, 323/149/34 I.P.C. for a maximum punishment of five years with default stipulation in Session Trial No. 437 2007, arising out of Crime No. 134/2002 relating to Police Station Reusa, District Sitapur and acquitting them from the charges framed against them under Sections 307, 504, 506 I.P.C.

3. Heard Sri Nitin Kumar Mishra, learned counsel for the appellant and Sri Aniruddh Kumar Singh, learned A.G.A.-1 for the State and perused the record.

4. Learned counsel for the appellant/applicant submits that the respondent Nos. 2 to 6 are the criminal spirited persons in which Basant Lal, Arvind Pandey, Shobha Ram Pandey and Amrit Lal Pandey have criminal history and they are likely to create disturbance in the peaceful living of the appellant, due to which the family of the appellant is in fear. He further submits that the appellant is waiting for appeal preferred about the inadequacy of sentence but no such appeal has been filed by the State of Uttar Pradesh.

5. Learned A.G.A.-I submits that this appeal has been filed with delay of 2300 days without giving any proper explanation regarding delay.

6. On the query made by this court and the objection raised by the learned A.G.A.-I , learned counsel for the appellant/applicant could not be able to give any proper and satisfactory explanation regarding a long delay of 2300 days in filing this appeal nor any ground has been mentioned in the affidavit filed in support of the delay condonation application.

7. The explanation given in affidavit accompanying delay condonation application filed under Section 5 of Limitation Act, 1963 is neither acceptable nor trustworthy.

8. The expression "sufficient cause" in Section 5 of Act, 1963 has been held to receive a liberal construction so as to advance substantial justice and generally a delay in preferring appeal may be condoned in interest of justice where no gross negligence or deliberate inaction or lack of bona fide is imputable to parties, seeking condonation of delay. In **Collector, Land Acquisition Vs. Katiji, 1987(2) SCC 107**, the Court said, that, when substantial justice and technical considerations are taken against each other, cause of substantial justice deserves to be preferred, for, the other side cannot claim to have vested right in injustice being done because of a non deliberate delay. The Court further said that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

9. In **P.K. Ramachandran Vs. State of Kerala, AIR 1998 SC 2276** the Court said:

"Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds."

10. The Rules of limitation are not meant to destroy rights of parties. They virtually take away the remedy. They are meant with the objective that parties should not resort to dilatory tactics and sleep over their rights. They must seek remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The statute relating to limitation determines a life span for such legal remedy for redress of the legal injury, one has suffered. Time is precious and the wasted time would never revisit. During efflux of time, newer causes would come up, necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The statute providing limitation is founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). It is for this reason that when an action becomes barred by time, the Court should be slow to ignore delay for the reason that once limitation expires, other party matures his rights on the subject with attainment of finality. Though it cannot be doubted that refusal to condone delay would result in foreclosing the suiter from putting forth his cause but simultaneously the party on the other hand is also entitled

to sit and feel carefree after a particular length of time, getting relieved from persistent and continued litigation.

11. There is no presumption that delay in approaching the court is always deliberate. No person gains from deliberate delaying a matter by not resorting to take appropriate legal remedy within time but then the words "sufficient cause" show that delay, if any, occurred, should not be deliberate, negligent and due to casual approach of concerned litigant, but, it should be bona fide, and, for the reasons beyond his control, and, in any case should not lack bona fide. If the explanation does not smack of lack of bona fide, the Court should show due consideration to the suiter, but, when there is apparent casual approach on the part of suiter, the approach of Court is also bound to change. Lapse on the part of litigant in approaching Court within time is understandable but a total inaction for long period of delay without any explanation whatsoever and that too in absence of showing any sincere attempt on the part of suiter, would add to his negligence, and would be relevant factor going against him.

12. I need not to burden this judgment with a catena of decisions explaining and laying down as to what should be the approach of Court on construing "sufficient cause" under Section 5 of Act, 1963 and it would be suffice to refer a very few of them besides those already referred.

13. In **Shakuntala Devi Jain Vs. Kuntal Kumari, AIR 1969 SC 575** a three Judges Bench of the Court said, that, unless want of bona fide of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

14. The **Privy Council in Brij Indar Singh Vs. Kanshi Ram ILR (1918) 45 Cal 94** observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. This principle still holds good inasmuch as the aforesaid decision of Privy Council as repeatedly been referred to, and, recently in State of Nagaland Vs. Lipok AO and others, AIR 2005 SC 2191.

15. In **Vedabai @ Vaijayanatabai Baburao Vs. Shantaram Baburao Patil and others, JT 2001(5) SC 608** the Court said that under Section 5 of Act, 1963 it should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. In the former case consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard and the basic guiding factor is advancement of substantial justice.

16. In **Pundlik Jalam Patil (dead) by LRS. Vs. Executive Engineer, Jalgaon Medium Project and Anr. (2008) 17 SCC 448,** in para 17 of the judgment, the Court said :

"...The evidence on record suggests neglect of its own right for long time in preferring appeals. The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who

are vigilant and "do not slumber over their rights."

17. In **Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157**, in para 18 of the judgment, the Court said as under:

"What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and / or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest."

18. In my view, the kind of explanation rendered herein does not satisfy the observations of Apex Court that if delay has occurred for reasons which does not smack of mala fide, the Court should be reluctant to refuse condonation. On the contrary, I find that here is a case which shows a complete careless and reckless long delay on the part of appellant which has remain virtually unexplained at all. Therefore, I do not find any reason to exercise my judicial discretion exercising judiciously so as to justify condonation of delay in the present case.

19. In the result, the application deserves to be dismissed.

20. Accordingly, the application for condonation of delay is hereby rejected.

Case :- CRIMINAL APPEAL DEFECTIVE U/S 372 CR.P.C. No. - 11 of 2022

Since delay condonation application No. 01 of 2022 has been rejected by this Court vide order of date, therefore, the present appeal is also dismissed as barred by limitation.

(2022) 9 ILRA 670
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 118 of 2019
(U/S 372 Cr.P. C.)

Ajay Gaud ...Appellant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Sri Deepak Singh

Counsel for the Opposite Parties:
Govt. Advocate, Ms. Aarushi Khare, Sri Vinay Khare (Sr. Adv.)

(A) Criminal Law - Maintainability of appeal - Indian Penal Code, 1860 - Sections 147, 148, 149, 302 - The Code of criminal procedure, 1973 - Section 372 - Section 2 (wa) - "victim" - means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged - expression "victim" includes his or her guardian or legal heir - proviso of Section 372 is an exception to the general law - same confers on a victim a right to appeal against acquittal, which is subject to the grant of leave by the Court.(Para -5,7)

Appeal filed by nephew of deceased - under proviso to Section 372 Cr.P.C. - not suffered any loss or injury - not guardian or legal heir either.**(Para -3)**

HELD:-Appellant is nephew of deceased, cannot be taken as a victim. Son of deceased, is alive, therefore, even the second part of the definition as provided in Sub-Section 2 (wa) CrPC would not come into play. **(Para - 9)**

Criminal appeal dismissed as not maintainable. (E-7)

List of Cases cited:-

Manoj Kumar Singh Vs St. of U..P & ors.,_2016 (97) ACC 861

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Vikas Budhwar, J.)

1. Heard Sri Deepak Singh, learned counsel for the appellant-Ajay Gaud and Ms. Aarushi Khare, learned counsel for the respondent no. 2-Smt. Daya Sharma and learned AGA for the State-respondent no. 1 and perused the record.

2. Present appeal has been filed challenging the judgement and order dated 18.5.2019 passed by the Additional Sessions Judge, Court No. 23, Kanpur Nagar in Sessions Trial No. 1027 of 1997 (State vs. Dayaram Sharma and others), arising out of Case Crime No. 112 of 1997, under Sections 147, 148, 149, 302 IPC, P.S. Nazirabad, District Kanpur Nagar.

3. At the very outset, a preliminary objection has been raised by Ms. Aarushi Khare, learned counsel for the accused respondent regarding maintainability of the present appeal on the ground that the present appeal has been filed by Ajay Gaud, who is admittedly nephew of the deceased and is, therefore, not a victim as per Section 2 (wa) of the Criminal Procedure Code (CrPC). Submission, therefore, is that he has no right to file appeal under proviso to Section 372 CrPC as he has not suffered any loss or injury caused to his own body, mind, reputation and property and that he is not the guardian or legal heir either.

4. Replying the same, learned counsel for the appellant sought to argue that the appellant-Ajay Gaud is nephew of the deceased and is one of the witnesses of the incident and therefore, he has a right to file present appeal. He tried to argue the matter on merits at this stage, which we refused to entertain before deciding a preliminary objection.

5. Before we proceed further, it would be appropriate to take note of the word "victim" as provided in Section 2(wa) of the CrPC, which is quoted as under:

*"**2. Definitions-** In this Code, unless the contest otherwise requires-*

(a)....

(b)...

(wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir:

6. The issue as to who would be the victim within the meaning of Section 2 (wa) CrPC need not detain us for long as this definition has been dealt with extensively by Hon'ble Full Bench in the case of ***Manoj Kumar Singh vs. State of UP and others,*** 2016 (97) ACC 861.

7. After considering the definition and the relevant law in detail, in paragraphs 70 and 71 it was held as under:

"*70. From the discussions that have been made above, it is clear that the proviso of Section 372 is an exception to the general law and same confers on a victim a right to appeal against acquittal, which is subject to the grant of leave by the Court. The first part of the definition of 'victim' as given under Section 2 (wa) (i.e. "Victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged), is required to be construed in its literal sense and no liberal interpretation is required, Accordingly, only such person would be treated as "victim', who is the subject-matter of trial being direct sufferer of crime in terms of loss or injury caused to his own body, mind, reputation and property and such loss or injury is one of the ingredient of the offence for which the accused person has been charged and, therefore, any other person cannot be accepted as victim within the first part of Section 2 (wa) for the purposes of maintaining appeal. The second part that is "includes his or her guardian and Legal Heir" would come into play when the actual sufferer is absent or suffers disability.*

71. In other words, victim means the actual sufferer of offence (receiver of harm caused by the alleged offence) and no person other than actual receiver of harm can be treated as victim of offence, so as to provide him /her right to prefer appeal under the proviso of section 372, though, in his or her absence or disability, his "legal heir" or "guardian" would qualify as victim and have a right to appeal. A person who claims himself to be 'guardian' or 'legal heir' of actual victim (direct sufferer), would be able to maintain appeal provided he establishes his claim as such before the court in his application by disclosing his particulars; relationship with the direct sufferer; and the grounds on which such claim of being "legal heir" or "guardian" is based. In the light of the discussion made above, the ratio of Division Bench of this Court in the case of Edal Singh (supra) is in tune with the definition of 'victim' as provided under Section 2 (wa) of the Code of Criminal Procedure. The reference is answered accordingly."

8. Accordingly, it is, therefore, clear that a victim is a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and as such, only such person would be treated "victim" who is the subject-matter of trial being direct sufferer of crime in terms of loss or injury

caused to his own body, mind, reputation and property and such loss or injury is one of the ingredients of the offence for which the accused person has been charged and, therefore, any other person cannot be accepted as victim within the first part of Section 2 (wa) for the purposes of maintaining appeal. It was further held that the second part "includes his or hear guardian and Legal Heir" would come into play when the actual sufferer is absent or suffers disability.

9. From perusal of record, we find that that the deceased has a son Rajesh Jha who was stated to be in Mumbai and was posted as Deputy Commissioner of Customs at the time of incident, therefore, the instant appellant-Ajay Gaud herein, who is nephew of the deceased, cannot be taken as a victim as held by Hon'ble Full Bench in Manoj Kumar Singh (supra). Since Rajesh Jha, son of the deceased, is alive, therefore, even the second part of the definition as provided in Sub-Section 2 (wa) CrPC would not come into play as held by Hon'ble Full Bench in *Manoj Kumar Singh* (supra).

10. Accordingly, present appeal stands dismissed as not maintainable.

11. However, it is made clear that dismissal of the present appeal as not maintainable would not effect the merits of the criminal appeal filed by the accused persons.

(2022) 9 ILRA 673
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 543 of 2022
(U/S 372 Cr.P. C.)

Munna ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Ramanuj Yadav

Counsel for the Opposite Parties:
Govt. Advocate, Sri Nand Kishor Mishra, Shilpa Ahuja

A. Criminal Law – Appeal against acquittal - Criminal Law Amendment Act - Section 7 - Indian Penal Code,1860 - Section 436 - Delay in lodging the FIR and its impact upon the prosecution theory – It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case - Mere delay in lodging the first information report with the police is, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.

Delay in lodging the FIR quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story As a result of deliberation and consultation. **It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.** (Para 22 to 27)

Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the FIR because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits

without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely. (Para 27)

The incident of setting ablaze the house of the informant took place on 12.10.2008, however, the written complaint, which transformed into lodging of the FIR was dated 13.10.2008 at 18:05 hours, despite the fact that PW-2 Vivek son of Keshav and Pappu were present though did not lodge the FIR. **There has been no explanation offered by the prosecution in lodging the FIR after huge delay, particularly when the police station itself was 100 steps from the house of the informant.** (Para 28)

B. It is well settled principle of law that appellate courts hearing the appeal filed against the judgment and the order of the acquittal should not overrule or otherwise disturb the judgment acquittal, if the appellate court does not find substantiate and compelling reasons for doing so. Nonetheless if the trial courts conclusion w.r.t. the facts is palpably wrong if the trial court decision was based on erroneous view of law and the judgment is likely result in grave miscarriage of justice and the approach proceeded towards wrong direction or the trial court has ignored the evidence or misread the material evidence which should have determining the factor in the lis of the matter then obviously the appellate court is right in interfering with the order acquitting the accused. In case two views are possible and the view so taken by the trial court while acquitting the accused is a plausible view then in the backdrop of the fact that there is double presumption of innocence available to the accused then obviously the appellate court should not interfere with the order of acquittal. (Para 7, 8)

This Court finds that the prosecution proceeds on weak footing as not only there is delay in lodging of the FIR, but the other indices for linking the accused for commission of crime is also lacking, particularly of the fact that there are major contradictions in the St.ment of PW-1 and PW-2 as well as the fact that Pappu did not appear in the witness-box and the manner in which investigation has been done and lastly, but not the least, the fact that the four accused as discussed above were in judicial custody, when the said crime was said to have occasioned. (Para 29 to 31)

C. It is well settled that enmity emanating as a motive is two-sided dagger and thus in order to put the motion of motive for conviction, same is to be proved beyond doubt also. Motive cannot be *ipso facto* a ground to hold the accused guilty of commission of crime, particularly when though allegations regarding administering of beating upon the brothers and the family members of the informant has been made, but no document whatsoever has been produced before the Court either showing the nature of the injuries or the lodging of the complaint or FIR against them. (Para 33)

There is no perversity in the order of the Trial Court which is a possible view and the testimony of the prosecution witnesses and the evidences so adduced therein do not point towards in any manner whatsoever for conviction of the accused. In the absence of any perversity or misreading of the evidences so sought to be adduced by the prosecution, this Court has no option but to concur with the judgment of the Trial Court acquitting the accused herein. (Para 32, 34)

Appeal dismissed. (E-4)

Precedent followed:

1. Tota Singh & anr. Vs St. of Pun., (1987) 2 SCC 529 (Para 9)

2. Ramesh Babulal Doshi Vs St. of Guj., (1996) 9 SCC 225 (Para 9)

3. St. of Raj. Vs St. of Guj., (2003) 8 SCC 180 (Para 9)

4. St. of Goa Vs Sanjay Thakran, (2007) 3 SCC 755 (Para 9)

5. Chandrappa & ors. Vs St. of Karn, (2007) 4 SCC 415 (Para 9)

6. Ghurey Lal Vs St. of U.P., (2008) 10 SCC 450 (Para 9)

7. Siddharth Vashishtha @ Manu Sharma Vs St. (NCT of Delhi), (2010) 6 SCC 1 (Para 9)

8. Babu Vs St. of Kerala, (2010) 9 SCC 189 (Para 9)

9. Ganpat Vs St. of Har., (2010) 12 SCC 59 (Para 9)

10. Sunil Kumar Sambhudayal Gupta (Dr.) & ors. Vs St. of Mah., (2010) 13 SCC 657 (Para 9)

11. St. of U.P. Vs Naresh, (2011) 4 SCC 324 (Para 9)

12. St. of M.P. Vs Ramesh (2011) 4 SCC 786 (Para 9)

13. Jayaswamy Vs St. of Karn. (2018) 7 SCC 219 (Para 9)

14. Thulia Kali Vs The St. of T. N., (1972) 3 SCC 393 (Para 22)

15. Apren Joseph @ Current Kunjukunju & ors. Vs The St. of Kerala, (1973) 3 SCC 114 (Para 23)

16. Tara Singh & ors. Vs St. of Pun., 1991 Supp (1) SCC 536 (Para 24)

17. Meharaj Singh Vs St. of U.P., (1994) 5 SCC 188 (Para 25)

18. Thanedar Singh Vs St. of M.P. (2002) 1 SCC 487 (Para 26)

19. P. Rajagopal & ors. Vs St. of T. N. (2019) 5 SCC 403 (Para 27)

Present appeal assails judgment and order dated 03.11.2018, passed by IV Addl. Sessions Judge, District Hamirpur.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal under Section 372 of Criminal Procedure Code, 1973 (in short 'Cr.P.C.'), has been instituted by the appellant against the judgment and order dated 3.11.2018 passed by IVth Addl. Sessions Judge, District Hamirpur, passed in S.T. No. 1 of 2009, arising out of Case Crime no. 672 of 2008, under Sections 436, 120-B IPC, Police Station- Khanna, District Hamirpur, whereby learned trial court has acquitted the accused persons, who are opposite parties nos. 2 to 8.

2. Briefly stated facts shorn off unnecessary details are that the first informant being the appellant Munna son of Late Bhagwan Deen is a resident of village Gyodi, P.S. Khanna, District Hamirpur. As per the prosecution case, on 10.10.2008, one Rajesh Dubey, accused respondent no.7, Ashok Dubey- accused respondent no.8, Chhuttan Singh, accused-respondent no.6, Udai Bhan Singh, accused -respondent no.5, Kishori Sahu, accused - respondent no.2, Rajju Mali- accused-respondent no.3 and Babu Mali- accused - respondent no.4 in connection with certain water dispute indulged in administering beating with the brother and family members of the informant, pursuant whereto the brothers of the informant sustained injuries and they were put to medication in the District Hospital, Hamirpur. Further it has been alleged that on 12.10.2008 at 9:30 hours in the night, the accused-respondent Kishori, Rajju Mali and Babu Mali assembled in front of his house and consigned the house to flames. Pursuant whereto enormous damage occasioned. As per the prosecution version, so contained in the FIR after a period of two days, the nephews of the informant being Vivek and Pappu gave the information regarding putting the house on flames by the aforesaid three accused as

named hereinabove. Accordingly, the informant came back to his house, as he was out-stationed and straightway went to the site of occurrence and on the same day, he reported the matter to the police station Khanna, District Hamirpur and accordingly, the FIR purported to be under Section 436 IPC read with section 7 of the Criminal Law Amendment Act was sought to be lodged being Case Crime no. 672 of 2008. The FIR in question was lodged on 13.10.2008 at 18:50 hours. The FIR was lodged against Kishori Sahu (accused-opposite party no.2), Rajju Mali (accused-opposite party no.3) and Babu Mali (accused - opposite party no.4).

3. Consequent to the lodging of the FIR, investigation was put to motion and investigating officer was nominated who went to the site of occurrence prepared site plan and recorded under Section 161 CrPC. A charge sheet was submitted by the Investigating Officer against the accused-respondents herein purported to be under Sections 436, 120-B IPC read with Section 7 Criminal Law Amendment Act. The matter was committed to the Court of Sessions. The accused pleaded innocent and not guilty.

4. To bring home the charges, the prosecution produced following witnesses, namely:

1.	Munna	PW1
2.	Vivek	PW2
3.	Head Constable Ram Bharose	PW3
4.	S.I. Balbeer Singh (I.O.)	PW4

5. We have heard Sri Ramanuj Yadav, learned counsel for the appellant and Sri Ratan Singh, learned A.G.A. for the State.

6. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

7. The Hon'ble Apex Court in the series of decisions have been consistently mandating that it is well settled principle of law that appellate courts hearing the appeal filed against the judgment and the order of the acquittal should not overrule or otherwise disturb the judgment acquittal, if the appellate court does not find substantiate and compelling reasons for doing so.

8. Nonetheless if the trial courts conclusion with regard to the facts is palpably wrong if the trial court decision was based on erroneous view of law and the judgment is likely result in grave miscarriage of justice and the approach proceeded towards wrong direction or the trial court has ignored the evidence or misread the material evidence which should have determining the factor in the lis of the matter then obviously the appellate court is right in interfering with the order acquitting the accused. However, Hon'ble Apex Court has further held that in case two views are possible and the view so taken by the trial court while acquitting the accused is a plausible view then in the backdrop of the fact that there is double presumption of innocence available to the accused then obviously the appellate court should not interfere with the order of acquittal.

9. The above noted proposition of law is clearly spelt out in umpty number of

decisions, some of them are as under namely:-***Tota Singh and another vs. State of Punjab, (1987) 2 SCC 529, Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225, State of Rajesthan vs. State of Gujarat, (2003) 8 SCC 180, State of Goa vs. Sanjay Thakran, (2007) 3 SCC 755, Chandrappa and others vs. State of Karnataka, (2007) 4 S.C.C. 415, Ghurey Lal vs. State of U.P., (2008) 10 SCC 450, Siddharth Vashishtha Alias Manu Sharma vs. State (NCT of Delhi), (2010) 6 SCC 1, Babu vs. State of Kerala, (2010) 9 SCC 189, Ganpat vs. State of Haryana, (2010) 12 SCC 59, Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra, (2010) 13 SCC 657, State of U.P. vs. Naresh, (2011) 4 SCC 324, State of M.P. vs. Ramesh, (2011) 4 SCC 786, and Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219.***

10. Bearing in mind the judicial pronouncement of the Hon'ble Supreme Court in dealing with the appeals at the instance of the complainant, the present case is to be decided.

11. To begin step by step, the ocular testimony of the prosecution witness is to be meticulously analyzed.

12. PW-1 Munna got himself present in the witness box and according to him, he could identify as he knows all the accused. In his testimony, PW-1 further deposed that on 12.10.2008, his brother Keshav, Ram Kripal, Ram Babu and Smt. Ram Kunwar had gone to fetch water and at that point of time, the accused herein being Rajesh, Ashok, Udai Bhan and Chhuttan indulged in fighting, pursuant whereto injuries were sustained by them and after two days, he received an information through his nephew Vivek, who happens to be PW-2 and another nephew Pappu that the accused Babu, Kishori and Rajju had consigned their house on flames and accordingly, he came back to his house on 13.10.2008 and thereafter got the FIR lodged. In the statement, the occurrence of consigning the house to flames was assigned 8-9 P.M, in the night on 12.10.2008. According to PW-1 Munna, he is a driver, who drives the vehicle of one Sri Aridam Singh. Thus the PW-1 is not an eye-witness to the said occurrence.

13. As PW-2, Vivek son of Keshav presented himself. According to him on the date of the incident, he was 11-12 years studying in Class-IX and he had also narrated the fact that on 10.10.2008, beating was also administered to his relatives by the accused and on 12.10.2008, the accused set the house in flames at 9:30 in the night and the said act was done by the Kishori Sahu, Babu Mali and Rajju Mali and he had given information to his uncle PW-1 after two days. In his cross, PW-2 Vivek has deposed that there is a police station Khanna situate over there, whereat one S.I. and five to six constables are there and when the alleged incident took place, and the police station was just 100 steps from his house and towards the western side. The house of PW-1 is situate just 20 steps.

14. PW-3 Constable being Ram Bharose Tripathi also presented himself as prosecution witness and he proved the prosecution case, as he was the person, who got registered the FIR.

15. S.I. Balbir Singh (I.O.) presented himself as PW-4, who took the statements of the prosecution and on the pointing out of the prosecution witnesses, he prepared the site plan and recorded the statements of prosecution witnesses.

16. As per the prosecution case, PW-1, who happens to be Munna Singh is the

informant, however, he is not present when the alleged offence was said to have been committed, as he was on a different place driving the vehicle while working as a driver. However, according to him, he received information regarding the incident of fire on 13.10.2008 from PW-2 Vivek and Pappu through telephonic call, whereat the accused Babu, Kishori and Rajju were assigned the roles of consigning the house on flames. According to him, he after finishing his work came back to the village and straightway went to the site of occurrence and thereafter proceeded to P.S. Khanna and got the FIR registered on 13.10.2008 at 18:50 hours.

17. Now, a question arises as to why the FIR was not lodged on 12.10.2008 itself by the prosecution witnesses, who witnessed the said occurrence. As per the statement of PW-2 Vivek, he in his testimony has deposed that the fire took place on 12.10.2008 in the night at 9 to 01:30 hours. Further in the cross-examination, PW-2 Vivek has himself further deposed that a police chawki is already stationed wherein there is one S.I. and five to six police constables and on the date of the occurrence, it was 100 steps from his house. No plausible explanation has been offered by PW-2 Vivek as to why the FIR was lodged on 13.10.2008 at 18:50 hours, i.e, on the next day after enormous delay. It has also come on record that the Police Station is quite near and further the fact that there was no obstruction or hindrance so available or the approach towards the Police Station was not accessible.

18. Another factor, which needs to be considered at this stage is the fact that in the deposition of PW-1 Munna, information regarding the consigning of the house on flames was made available to the PW-1 Munna by Pappu also. However, Pappu was not presented as prosecution witness and thus neither his examination-in-chief nor cross-examination was conducted. The said factor also assumes significance, as at that relevant point of time, PW-2 Vivek was studying in Class-IX and he happened to be an interested witness, vis-a-vis commission of crime, so much so it is quite implorable or inconceivable that if somebody's house is put on fire, then the aggrieved party would wait for a day and not promptly lodge the FIR. It has further come on record that the Police Station/ chawki in question was just 100 steps from the house of the informant and thus in all possibilities in case fire occasioned, then the police would have come there as they cannot be a mute spectator in this regard.

19. Even otherwise, in the FIR the incident has been shown to have been committed at 9:30 P.M, on 12.10.2008 as whereas in the statement of PW-1, Munna, the occurrence has been shown to be at 8 to 9 in the night on 12.10.2008. No independent witness whatsoever appeared as a prosecution witnesses so as to prove that the accused had consigned the house of the informant on flames.

20. Moreover records further reveal that though the FIR had been lodged against the accused O.P. no.2 Kishori, accused O.P. no.3 Rajju Mali and accused O.P. no.4 Babu Mali. However, perusal of the statement of PW-1 Munna shows that accused opposite parties 2 to 8 have been shown to have committed crime. It has also come on record that the accused opposite party no.5 Udaibhan, accused O.P. no.6 Chhuttan, accused O.P. no.7 Rajesh and accused O.P. no.8 Ashok were already in

judicial custody at the time when the alleged offence took place. No explanation whatsoever has been tendered by the prosecution, as to why their names surfaced and put to trial in that regard. The said aspect is of great significance as PW-2 Vivek was an eye-witness to the said incident and so far as Pappu is concerned, who is said to be an eye-witness did not enter into the witness box.

21. Looking into the said factors, the issue of delay in lodging of the FIR also assumes significance as normally, delay in lodging of the FIR does not ipso facto becomes a ground to demolish the prosecution case, however, it is one of the indices which itself is to be taken into consideration and assumes significance in the light of the other factors or ingredients in order to put the nail in the coffin for conviction.

22. The Hon'ble Apex Court on the question of delay in lodging the FIR and its impact upon the prosecution theory in the case of ***Thulia Kali Vs. The State of Tamil Nadu, (1972) 3 SCC 393***, has observed as under:-

"The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story As a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained."

23. In the case of ***Apren Joseph Alias Current Kunjukunju and others Vs. The State of Kerala,* (1973) 3 SCC 114,** the Hon'ble Apex Court has observed as under:

"11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr. P. C. As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue unreasonable delay in lodging the F. I. R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the

prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case."

24. In the case of ***Tara Singh and others Vs. State of Punjab*, 1991 Supp (1) SCC 536, t**he Hon'ble Apex Court in paragraph 4 has observed as under:-

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

25. In the case of **Meharaj Singh Vs. State of U.P**., ***(1994) 5 SCC 188,*** the Hon'ble Apex Court has observed as under:-

"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the

FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been 'ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8."

26. In the case of **Thanedar Singh Vs. State of M.P**., ***(2002) 1 SCC 487,*** the Hon'ble Apex Court has observed as under:-

"6. The High Court was of the view that the judgment of the Trial Court was perverse and its approach was unreasonable. The first comment made by the High Court was that the Trial Court did not assign any reason for disbelieving the FIR. The High Court found no infirmity in the FIR having regard to the fact that the part played by the accused appellant was specifically mentioned in the FIR. But, the High Court missed to note the crucial facts adverted to in Para 5.2 (supra) which cast a serious doubt on the correctness of the FIR, especially the time and date of its recording. The learned Sessions Judge particularly adverted to the fact that the prosecution did not produce the original record of police station relating to the receipt and despatch of FIR inspite of an order passed to that effect. Though the Trial Judge was not careful enough in recording a specific finding that the prosecution failed to clear the doubt regarding the date and time of recording the FIR, in sum and substance, that is what the learned Trial Judge purported to say. The observations of the Trial court were not properly understood by the High Court when it proceeded on the basis at paragraph 12 that the Trial court found fault with the delay in lodging the complaint at 9 A.M. on the next morning. But, it is to be noted that nowhere in the judgment, the trial court observed that the complaint having been lodged and recorded at 9A.M. next morning, that itself would tantamount to delay."

27. Yet, in the case of **P. Rajagopal and others Vs. State of Tamil Nad**u ***(2019) 5 SCC 403***, the Hon'ble Apex Court in paragraph 12 has held as under:-

12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely.

28. Noticing the underlying principles of law as laid down in the above noted

judgments, this Court finds that the incident of setting ablaze the house of the informant took place on 12.10.2008, however, the written complaint, which transformed into lodging of the FIR was dated 13.10.2008 at 18:05 hours, despite the fact that PW-2 Vivek son of Keshav and Pappu were present though did not lodge the FIR. There has been no explanation offered by the prosecution in lodging the FIR after huge delay, particularly when the police station itself was 100 steps from the house of the informant.

29. The Trial Court has also considered the provisions contained under Section 436 IPC, which refers to the penal provision with regard to mischief by fire or explosive substance, with intent to destroy house. The Trial Court has also referred to the FIR, according to which the informant's house was completely consigned to flames. As a matter of fact, the entire prosecution story also is under cloud as according to the statement of PW-2 Vivek, he had narrated the entire fact and a site-plan was also prepared by the Investigating Officer. However, as per the site-plan, the point "A', which has been crossed is being shown to have been consigned to flames. This is the back portion of the house of Keshav as only part of portion has been shown to be burnt.

30. The issue can also be seen from another point of angle also that there has been no statement made by any of the prosecution witness as to when any exercise whatsoever was taken to subdue the fire and what was the items which got burnt and at what time, the gate / door was opened and items recovered either burnt or not. Even there is no recovery memo or any inventory so as to suggest as to what type of damage was done. The same also put a big question mark over the investigation so sought to be conducted by the Investigating Officer. Notably, there were no other villagers, who could have been independent witness to have recorded his testimony regarding alleged commission of crime, which could have proved the fact as to whether the accused herein were a part in commission of offence.

31. Analyzing the present case from four-corners of law, this Court finds that the prosecution proceeds on weak footing as not only there is delay in lodging of the FIR, but the other indices for linking the accused for commission of crime is also lacking, particularly of the fact that there are major contradictions in the statement of PW-1 and PW-2 as well as the fact that Pappu did not appear in the witness-box and the manner in which investigation has been done and lastly, but not the least, the fact that the four accused as discussed above were in judicial custody, when the said crime was said to have occasioned.

32. Hence in any view of the matter, applying the principles of law so culled out by the Hon'ble Apex Court in the present case, we find that there is no perversity in the order of the Trial Court is a possible view and the testimony of the prosecution witnesses and the evidences so adduced therein do not point towards in any manner whatsoever for conviction of the accused.

33. So far as, the issue of motive is concerned, the learned Trial Court as discussed the same while holding that the same cannot be ipso facto a ground to hold the accused guilty of commission of crime, particularly when though allegations regarding administering of beating upon the brothers and the family members of the informant has been made, but no document

whatsoever has been produced before the Court either showing the nature of the injuries or the lodging of the complaint or FIR against them. As it is well settled that enmity emanating as a motive is two-sided dagger and thus in order to put the motion of motive for conviction, same is to be proved beyond doubt also.

34. This Court while bestowing anxious consideration on the judgment passed by the Trial Court finds its inability to interfere in the present proceedings as according to this Court the view taken by the Trial Court does not seem to be suffering from any perversity, and this Court further finds that there is no other view ought to be taken, other than the view so taken by the court below. In the absence of any perversity or misreading of the evidences so sought to be adduced by the prosecution, this Court has no option but to concur with the judgment of the Trial Court acquitting the accused herein.

35. Resultantly, present criminal appeal is **dismissed.**

36. Records of the present case be sent back to the concerned court below.

(2022) 9 ILRA 683
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 1767 of 2022

Hanuman & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sachida Nand Tiwari, Sri Murli Dhar Mishra

Counsel for the Respondents:
C.S.C., Sri Arvind Kumar Srivastava, Sri Bhaju Ram Prasad Sharma

Civil Law - U.P. Consolidation of Holdings Act (5 of 1954) - Section 48 - during pendency of the revision u/s 48 of the U.P.C.H. Act, one of the opposite party, Bhagwan Das, died – however, his heirs were not substituted in the revision - the revision was allowed and the matter was remanded back to the Consolidation Officer to decide the objection afresh - Held - Explanation (3) of the Section 48 of the U.P.C.H. Act states that the Deputy Director of Consolidation has wide power to appreciate the evidence etc. & in place of remanding the matter back, he himself can decide the revision on merit after affording the opportunity of hearing to both the parties in accordance of law – Also, allowing the revision without substituting the legal heirs of deceased party in the revision makes the revisional order illegal - matter remanded back to the D.D.C. to decide the revision in accordance with law after substituting the legal heirs of deceased opposite party (Bhagwan Das) (Para 8, 9, 12)

Allowed. (E-5)

List of Cases cited:

1. Chandrama Vs Deputy Director of Consolidation Ballia & ors. (134) RD 555

2. Gajjoo Vs Deputy Director of Consolidation & ors. 1995 R.D. 231

3. Bansi Kanhai Vs Deputy Director of Consolidation U.P. Lucknow & ors. AIR 1967 Allahabad 592

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Murli Dhar Mishra, learned counsel for the petitioners, Sri B.R.P. Sharma, learned counsel for respondent nos.3 and 4 and learned Standing Counsel for respondent nos.1 and 2.

2. With the consent of the parties, writ petition is being heard and decided finally at the admission stage.

3. Learned counsel for the petitioners submitted that in the revision under Section 48 of the U.P.C.H. Act filed at the instance of respondent nos.3 and 4 in which petitioners were opposite parties, was allowed without substitute the heir of deceased- Bhagwan Das and the revision was allowed and the matter was remanded back to the Consolidation Officer for fresh decision. He further submitted that in view of the provisions contained under Section 48 of the U.P.C.H. Act, the Deputy Director of Consolidation himself can decide the revision on merit in place of remanding the matter back to the Consolidation Officer.

4. On the other hand, Sri B.R.P. Sharma, learned counsel for respondent nos.3 and 4 submitted that by the impugned order, the matter has been remanded back to the Consolidation Officer, as such, there is no necessary to substitute the heir of deceased opposite party and entire parties will be heard by the Consolidation Officer while deciding the objection afresh in pursuance of the revisional order, as such, no interference is required.

5. I have considered the argument advanced by learned counsel for the parties and perused the record.

6. There is no dispute about the fact that during pendency of the revision under Section 48 of the U.P.C.H. Act, one of the opposite party- Bhagwan Das has died and his heirs were not substituted in the revision and the revision was allowed by the impugned order and the matter was remanded back to the Consolidation Officer to decide the objection afresh.

7. The provisions of Section 48 of the U.P.C.H. Act is as follows:

"48. Revision and reference. - (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order other than an interlocutory order passed by such authority in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

Explanation (1)- For the purposes of this section, Settlement Officers, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.

Explanation(2)- For the purposes of this section the expression 'interlocutory order' in relation to a case or proceeding, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceeding.

Explanation (3)- The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence."

8. Explanation (3) of the Section 48 of the U.P.C.H. Act specifically states that the Deputy Director of Consolidation has wide power to appreciate the evidence etc., as such, in view of the provisions contained under Section 48 of the U.P.C.H. Act in place of remanding the matter back, he himself can decide the revision on merit after affording the opportunity of hearing to both the parties in accordance of law. This Court in a Case reported in 2017 ***(134) RD 555 Chandrama Vs. Deputy Director of Consolidation Ballia and Others*** has held that order of remand passed by Revisional Court under U.P.C.H. Act is not going to serve any useful purpose except prolonging the litigation.

9. The order passed by the Revisional Court without substituting the heirs of the contesting opposite party is also fatal. This Court in a case reported in 1995 R.D. 231 Gajjoo Vs. Deputy Director of Consolidation and Others has held that allowing the revision without substituting the legal heirs of deceased party in the revision will make the revisional order illegal.

10. In another decision of this Court reported in ***AIR 1967 Allahabad 592 Bansi Kanhai Vs. Deputy Director of Consolidation U.P. Lucknow and Others*** has held that Deputy Director of Consolidation in Revision cannot reject the application for bringing on record the legal heir of deceased respondent on the ground of delay.

11. Considering the provision of Section 48 Explanation (3) of the U.P.C.H. Act as well as the ratio of law laid down by this Court in ***Gajjoo (supra)*** and ***Bansi Kanhai (supra)*** impugned revisional order dated 24.6.2022 appears to be based on wrong assumptions and manifestly illegal.

12. In the result, the writ petition is allowed, impugned order dated 24.6.2022 passed by respondent no.2 i.e Deputy Director of Consolidation, Mahrajganj is set aside. The matter is remanded back to respondent no.2 i.e Deputy Director of Consolidation, Mahrajganj to restore the revision on its original number and decide the same in accordance with law after substituting the legal heirs of deceased opposite party (Bhagwan Das) on the application of the revisionist, expeditiously preferably within a period of four months from the date of production of certified copy of this order before him without granting unnecessary adjournment to the parties.

13. With the above observations, the writ petition is allowed. No order as to costs.

(2022) 9 ILRA 686
APPALLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.09.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SHREE PRAKASH SINGH, J.

Writ A No.182 of 2021

C/M Narpati Singh Inter College Hardoi ...Appellant

Versus

Vipin Kumar & Ors. ...Respondents

Counsel for the Appellant:
SriSantosh Kr. Yadav Warsi

Counsel for the Respondents:
C.S.C., Sri Amit Kumar Gupta,Sri Surendra Pratap Singh

A. Service Law – Appointment – Arrears of Salary - Regulations framed under U.P. Intermediate Education Act, 1921 - Regulation 101 of Chapter III - There is a prohibition for the appointing authority to fill up any vacancy on a non-teaching post without prior approval of the District Inspector of Schools. The appointing authority, in fact, has been injuncted by the said provisions not to fill up any vacancy on a non-teaching post except with the prior approval of the District Inspector of Schools. The said provision simply construed would mean that before issuing appointment order, approval of the District Inspector of Schools (DIOS) is needed. (Para 13)

Recruitment to a class IV post in a recognized aided institution in the State of U.P. is governed by Regulation 101 of Chapter III of the Regulations framed under U.P. Intermediate Education Act. **The said Regulations having been framed under the aforesaid Act are statutory in nature and hence, binding.** Any process of appointment in deviation of such statutory provisions cannot be justified and will in fact not confer any right on any such person, of either being appointed or continued or paid salary of the post concerned. (Para 11, 15)

In the entire writ petition, no document or any other material has been annexed whereby it can be inferred that before issuance of appointment order, any prior approval to the selection/appointment of the respondent Nos. 1 and 2 was accorded by the DIOS. (Para 10, 17)

B. No finding has been returned in the judgment under appeal, passed by learned Single Judge about non-compliance/compliance of the statutory provisions of Regulation 101. (Para 20)

At the time of filing of writ petition learned Single Judge had passed the interim order on 23.09.2002 directing therein the respondents in the writ petition shall pay the salary to respondent Nos. 1 and 2-petitioners and further that they shall be allowed to continue till the next date of listing. (Para 18)

C. There lies a difference between permission/approval required for initiating the process of recruitment/ appointment/selection and prior approval required for appointment. In the first case, approval shall precede the selection process whereas in the second case the approval has to follow the selection process, that is say, prior approval is needed before issuance of the appointment order or before actual appointment is made. (Para 21)

The DIOS passed the order on 19.07.2010 for ensuring compliance of the interim order passed by learned Single Judge on 14.09.2009 coupled with the earlier interim order dated 23.09.2002. In compliance of the said order, the DIOS accorded his approval to the appointment of respondent Nos. 1 and 2 against the vacancies which had occurred on account of superannuation of earlier regular class IV employees, namely, Sunder Lal and Sarwan Lal (on 31.08.2006 and 31.08.2009, respectively). Thus, respondent Nos. 1 and 2 will be entitled

to salary and all other service related benefits with effect from the said date i.e. with effect from 19.07.2010 and not from any prior date. (Para 19, 24)

Therefore, the judgment and order passed by learned Single Judge dated 08.01.2020 passed in WP No. 5223 (S/S) of 2002 is modified by providing that respondent Nos. 1 and 2 shall be entitled to payment of salary with effect from 19.07.2010 i.e. w.e.f. date the DIOS accorded his approval to their appointment. They shall also be entitled to all service benefits only w.e.f. 19.07.2010 and not with effect from any retrospective date. (Para 25)

D. Words and Phrases – *'prior approval' –* Prior approval for appointment as required by Regulation 101 as quoted above, connotes a different meaning and it covers a different exigency. Such prior approval is required to be obtained from the DIOS before the appointment order is issued, meaning thereby before selected person is actually appointed. Such prior approval follows completion of appointment/recruitment/selection process. (Para 16)

Special appeal disposed off. (E-4)

Precedent followed:

1. Dhruv Kumar Pandey & anr. Vs St. of U.P. & ors., 2020 (4) ADJ 599 (Para 21)

Precedent distinguished:

1. Preet Kumar Srivastava Vs St. of U.P. thru' Secondary Edu. & others, 2011 (9) ADJ 591 (Para 6)

2. Kunda Motiram Bodalkar Vs Swami Vivemanand Shikshan Sanstha & ors., (2010) 6 SCC 712 (Para 6)

Present special appeal assails judgment and order dated 08.01.2020, passed by learned Single Judge in Writ Petition No.5223 (S/S) of 2002.

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

&

Hon'ble Shree Prakash Singh, J.)

(Order on application for Condonation of Delay)

1. Having heard learned counsel for respective parties and having gone through the contents of the affidavit filed in support of the application seeking condonation of delay, we are satisfied that delay has sufficiently been explained.

2. Accordingly, application is allowed and the delay in preferring the special appeal is hereby condoned.

(Order on memo of appeal)

3. Heard Sri Santosh Kumar Yadav "Warsi" learned counsel for appellant-Committee of Management of the Institution in question, Sri Surendra Pratap Singh, learned counsel for respondent nos.1 and 2, and learned Standing Counsel for the State-respondents.

4. Under challenge in this intra-court appeal filed under Chapter VIII Rule 5 of the Rules is the judgment and order dated 08.01.2020 passed by learned Single Judge in Writ Petition No.5223 (S/S) of 2002 whereby learned Single Judge has directed that appointment of respondent nos.1 and 2-petitioners shall be treated to have been approved and further that they shall be given arrears of their salary with effect from the date they were given appointment. Learned Single Judge has also observed that all consequential benefits of seniority and promotion shall also be extended to respondent nos.1 and 2 from the date of their appointment.

5. It has been argued by learned counsel for appellant-Committee of

Management of the Institution that in absence of any material to arrive at a conclusion that the very initial appointment of respondent nos.1 and 2-petitioners was made in conformity with the statutory requirement of the then existing Regulation 101 of Chapter III of Regulations framed under U.P. Intermediate Education Act, 1921, the directions issued by learned Single Judge in the judgment and order under appeal are erroneous. He has further argued that non-fulfillment of statutory requirement in the matter of appointment where payment of salary of the incumbent is charged with the State Exchequer, has to be necessarily in conformity with the Rules regulating the conditions of service which will include the recruitment. In this view, submission is that since the very initial appointment of respondent nos.1 and 2 was not lawful, hence the directions issued by learned Single Judge cannot be permitted to be sustained.

6. On the other hand, learned counsel for respondent nos.1 and 2 has submitted that there is no error in the judgment rendered by learned Single Judge for the reason that the same is based on pronouncement of law made by this Court in the case of ***Preet Kumar Srivastava vs. State of U.P. thru' Secondary Edu. & others,*** reported in ***2011 (9) ADJ 591.*** He has further stated that once this Court passed interim order on 14.09.2009 which was complied with by the District Inspector of Schools by passing the order dated 19.07.2010, prior approval of appointment of respondent nos.1 and 2-petitioners will be deemed to have been accorded. He has also relied in this regard upon a judgment rendered by Hon'ble Supreme Court in the case of ***Kunda Motiram Bodalkar vs. Swami Vivemanand Shikshan Sanstha and others***, reported in (2010) 6 SCC 712 and has submitted that once the post is created after sanction by the competent authority, the permission to fill up the same is intrinsic in such sanction/creation of the post. It has, thus, been argued that there was no illegality so far as the appointment of respondent nos.1 and 2 is concerned and accordingly it has been submitted by learned counsel for respondents that the special appeal needs to be dismissed.

7. Learned Standing Counsel has also made his submission and has argued that requirement of Regulation 101 of Chapter III of the Regulations as referred to herein above is a mandatory requirement and in absence of fulfillment of said statutory requirement, the very initial appointment of respondent nos.1 and 2-petitioners cannot be said to be lawful. He has further stated that the order dated 19.07.2010 passed by the District Inspector of Schools was only to ensure the compliance of the order dated 14.09.2009 passed by this Court, however, such compliance, in fact, was subject to final decision of the writ petition and thus learned Single Judge has fell in error in not considering the issue as to whether the appointment of respondent nos.1 and 2 was in accordance with the provisions contained in Regulation 101 or not. His submission is that in fact, since the very initial appointment of respondent nos.1 and 2 was unlawful, the direction issued by the learned Single Judge to treat the said appointment to have been approved, is erroneous.

8. We have considered the submissions made by learned counsel representing the respective parties and have also perused the records available before us on this special appeal.

9. The case put up by learned counsel for respondent nos.1 and 2 before the learned Single Judge by filing Writ Petition

No. 5223 (S/S) of 2002 was that they were appointed on the posts of Orderly and Lab Assistant which are class IV posts, in the institution, namely, Narpati Singh Inter College, Madhoganj, Hardoi. It was also the case of respondent nos. 1 and 2 before the learned Single Judge that after following due process, they were appointed by means of an order dated 20.04.2002, however, since their appointment was not being approved and they were not being paid salary, they instituted writ petition which has been decided by the learned Single Judge by means of the judgment and order which is under appeal before us.

10. In the entire writ petition, no document or any other material has been annexed whereby it can be inferred that before issuance of appointment order, any prior approval to the selection/appointment of the respondent nos.1 and 2 was accorded by the District Inspector of Schools.

11. Recruitment to a class IV post in a recognized aided institution in the State of U.P. is governed by Regulation 101 of Chapter III of the Regulations framed under U.P. Intermediate Education Act. The said Regulations having been framed under the aforesaid Act are statutory in nature and hence, binding. Any process of appointment in deviation of such statutory provisions cannot be justified and will in fact not confer any right on any such person, of either being appointed or continued or paid salary of the post concerned.

12. Regulation 101 of Chapter III of the Regulations as it existed at the relevant point of time is quoted herein:-

101."The appointing authority shall not fill up any vacancy on a non-teaching staff of a recognized aided institution except with the prior approval of the Inspector".

13. From a perusal of the aforequoted provisions of Regulation 101, it is clear that there is a prohibition for the appointing authority to fill up any vacancy on a non-teaching post without prior approval of the District Inspector of Schools. The appointing authority, in fact, has been injuncted by the said provisions not to fill up any vacancy on a non-teaching post except with the prior approval of the District Inspector of Schools. The said provision simply construed would mean that before issuing appointment order, approval of the District Inspector of Schools is needed.

14. In case any vacancy against a non-teaching post in a recognized institution occurs, since the Principal is the appointing authority against a class IV posts, he needs to initiate the selection process in conformity with the Regulations. The said Regulations which existed at the relevant point of time in this case did not require the appointing authority to seek any permission or approval for initiating the process of recruitment/selection/appointment, meaning thereby on occurrence of vacancy against a class IV posts, the Principal could have initiated the process of recruitment by advertising the post, inviting applications etc. and could have proceeded with the selection. The only requirement under Regulation 101 is that before making appointment, approval of the District Inspector of Schools is required.

15. We may indicate at this juncture that there is a rationale for seeking prior approval of appointment from the District

Inspector of Schools. While the District Inspector of Schools accords his prior approval for appointment against any class IV post in a recognized institution, he is supposed to examine the relevant factors like existence of vacancy, application of rule of reservation, whether person proposed to be appointed possessed the requisite qualification, whether process of selection has been fair and all other relevant factors. It is also to be noticed that in the State of U.P. in a recognized government aided institution there is a provision for making appointment on compassionate grounds on the death of an employee working in the institution and as per the said provision in case no vacancy in the institution where the deceased employee used to work exists, it is the District Inspector of Schools who has to explore the possibility of making compassionate appointment of one member of the family of the deceased employee in any other institution. Thus, the provision for prior approval to be accorded by the District Inspector of Schools for appointment has the purpose and in case no prior approval from the District Inspector of Schools is obtained or accorded, the same in our considered opinion, will vitiate the appointment.

16. We have come across various cases where we have found that in the minds of the authorities, management of the institutions and all other concerned there exists a confusion regarding prior approval or permission for initiating the process of appointment and prior approval for appointment. There may be a situation where requirement as given in the Regulations/ Rules may be for seeking prior approval or permission of the authority concerned for initiating the very process of appointment/ selection/recruitment. This would mean that once a vacancy occurs, the appropriate authority concerned needs to be approached seeking its approval/permission to initiate the very process of recruitment/appointment/selection. This prior approval precedes the initiation of process of selection/appointment etc. However, prior approval for appointment as required by Regulation 101 as quoted above, connotes a different meaning and it covers a different exigency. Such prior approval is required to be obtained from the District Inspector of Schools before the appointment order is issued, meaning thereby before selected person is actually appointed. Such prior approval follows completion of appointment/recruitment/selection process.

17. In the instant case, as already noticed above, there is no material to show that prior approval as per requirement of Regulation 101 was accorded by the District Inspector of Schools to the alleged appointment of respondent nos.1 and 2.

18. Having observed as above, we may also notice that at the time of filing of writ petition learned Single Judge had passed the interim order on 23.09.2002 directing therein the respondents in the writ petition shall pay the salary to respondent nos.1 and 2-petitioners and further that they shall be allowed to continue till the next date of listing. However, pursuant to the said order dated 23.09.2002 they were not paid salary and subsequently learned Single Judge passed another interim order on 14.09.2009 expressing his expectation that the respondents in the writ petition shall ensure compliance of the earlier order

dated 23.09.2002 as during last seven years some vacancies might have arisen on account of death/resignation/retirement/ promotion of the employee.

19. In compliance of the said order dated 14.09.2009, an order has been passed by the District Inspector of Schools on 19.07.2010 wherein he has accorded his approval to the appointment of respondent nos.1 and 2-petitioners against the vacancies which had occurred on account of retirement of the regular incumbents, namely, Sunder Lal and Sarwan Lal, who are said to have retired on 31.08.2006 and 31.08.2009, respectively.

20. When we peruse the judgment under appeal passed by learned Single Judge, what we find is that no finding has been returned in the said judgment about non-compliance/compliance of the statutory provisions of Regulation 101. Learned Single Judge has relied upon a judgment in the case of ***Preet Kumar Srivastava (supra).*** However, when we peruse the said judgment, we are of the considered opinion that the said judgment in the case of ***Preet Kumar Srivastava*** does not have any application to the facts of the present case and the same does not come to the rescue of respondent nos.1 and 2 for the reason that the said judgment deals with the approval/permission required for filling up the vacancies, as already clarified above.

21. The view taken by us is supported by a Division Bench judgment rendered by this Court in the case of ***Dhruv Kumar Pandey and another vs. State of U.P. and others,*** reported in ***2020 (4) ADJ 599***. There lies a difference between permission/approval required for initiating the process of recruitment/appointment/ selection and prior approval required for appointment. In the first case, approval shall precede the selection process whereas in the second case the approval has to follow the selection process, that is say, prior approval is needed before issuance of the appointment order or before actual appointment is made. Thus, we are of the opinion that reliance placed by learned Single Judge in the case of Preet Kumar Srivastava (supra) is misplaced.

22. So far as the judgment cited by Sri Surendra Pratap Singh, learned counsel for respondent nos.1 and 2-petitioners in the case of ***Kunda Motiram Bodalkar*** (supra) is concerned, we may observe that the same also does not have any application to the facts of the present case for two reasons; firstly the said judgment has been rendered in the facts of the case, and secondly, the said judgment does not discuss any such provision akin to the provisions contained in Regulation 101.

23. In view of the aforesaid discussion, in our opinion, the judgment and order dated 08.01.2020 passed by learned Single Judge cannot be permitted to be sustained as it is.

24. Having noticed the aforesaid facts and legal position, we may also note that the District Inspector of Schools passed the order on 19.07.2010 for ensuring compliance of the interim order passed by learned Single Judge on 14.09.2009 coupled with the earlier interim order dated 23.09.2002. In compliance of the said order, the District Inspector of Schools accorded his approval to the appointment of respondent nos.1 and 2 against the vacancies which had occurred on account of superannuation of earlier regular class IV employees, namely, Sunder Lal and Sarwan Lal. Thus, in our opinion respondent nos.1 and 2 will be entitled to salary and all

other service related benefits with effect from the said date i.e. with effect from 19.07.2010 and not from any prior date.

25. Accordingly, in view of the aforesaid discussions made, we modify the judgment and order passed by learned Single Judge dated 08.01.2020 passed in Writ Petition No.5223 (S/S) of 2002 by providing that respondent nos.1 and 2 shall be entitled to payment of salary with effect from 19.07.2010 i.e. w.e.f. date the District Inspector of Schools accorded his approval to their appointment. They shall also be entitled to all service benefits only w.e.f. 19.07.2010 and not with effect from any retrospective date. The judgment and order dated 08.01.2020 passed by learned Single Judge is modified to the aforesaid extent.

26. The special appeal is **disposed of** in the aforesaid terms.

(2022) 9 ILRA 692
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.09.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SHREE PRAKASH SINGH, J.

Special Appeal No.387 of 2022

Dr. Ram Manohar Lohia Awadh University & Ors. ...Appellants

Versus

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

Counsel for the Appellants:
Sri Lalta Prasad Misra, Sri Atul Chander Dwivedi, Sri Prafulla Tiwari

Counsel for the Respondents:
C.S.C., Pt. S. Chandra, Sri Sanjay Kumar Singh

A. Civil Law - U.P. State Universities Act, 1973 – Issue - Whether the University has the statutory power to debar a college from acting as an examination center - Held - Section 29 (2) of the Act empowers the Examination Committee to *supervise generally all examinations of the University* & perform various functions as given in its sub-clauses (a) to (d), however functions assigned to the Examination Committee in Sub-clauses (a) to (d) of Section 29 (2) of the Act are not exhaustive - the word *'generally'* in S. 29 (2) empowers the Examination Committee to take all possible actions and steps which are necessary and required for supervising all examinations of the University - S. 29 madates the University to ensure fairness in the examinations at the examination centres – Further Sub-clause (xvii) of Section 21(1) gives ample and all encompassing powers to the Executive Council, the principal executive body of the University, to regulate and determine all matters concerning the Institutes including affiliated and associated colleges etc - If mass copying is reported at an examination center, it becomes the statutory duty of the Examination Committee under Section 29 to debar the college from acting as an examination center (Para 20, 21, 22)

B. Civil Law - Administrative Law - Government order - any Government Order issued by the State Government has to be read only in addition to the statutory authority or power vested in the authorities of the University and not in derogation of the said powers and authority available to the University under the U.P. State Universities Act, 1973 – Court declined to accept the argument that As per Government Order dated 03.01.2020, it is only the State Government, which possesses the authority to pass an order of debarring and not the University authorities

including the Examination Committee (Para 30)

C. Civil Law - Natural Justice - Show Cause notice - show cause notice issued to the College to submit its reply in the matter relating to mass copying, however it did not make any mention of intended action of the University to cancel the College from being the Examination Centre - Held - Examination Controller intimated the College, to be present for personal hearing in the matter relating to mass copying - Although the specific intended action was not explicitly stated, the court concluded that, considering the importance of maintaining the integrity of university examinations, the proceedings following the show cause notice were valid (Para 26)

Allowed. (E-5)

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Shree Prakash Singh, J.)

1. Heard learned counsel for the appellants, learned counsel representing the State-respondents and Dr. Sanjay Kumar Singh, learned counsel representing the respondent Nos. 3 and 4.

2. This intra-court appeal challenges the judgment and order dated 28.07.2022, passed by the learned Single Judge in Writ-C No.122 of 2022, whereby the said writ petition filed by the respondent Nos. 3 and 4 has been allowed and the order challenged therein, dated 22.12.2021 whereby the College in question was debarred from becoming the examination center for the period of six years, has been quashed.

3. Submission of learned counsel for the appellants is that the learned Single Judge while allowing the writ petition filed by the College has not appropriately construed to the provisions contained in the Statute 10.04 of the First Statutes of Dr. Ram Manohar Lohia Avadh University, Faizabad and as such the judgment and order under appeal is not sustainable. It has further been argued that the matter relating to mass copying, as was alleged against the College, was considered firstly by a Sub-Committee and thereafter by the Examination Committee and finally by the Executive Council of the University and hence the finding recorded by the learned Single Judge that there is no specific provision either in the U.P. State Universities Act or in the First Statutes framed by the University to debar a college from acting as examination center, erroneous. It has further been stated on behalf of the appellants that the finding recorded by the learned Single Judge that the decision of the University debarring the College from acting as examination center is without any statutory backing is also erroneous in view of the provisions contained in Section 21 of the U.P. State Universities Act, read with Statute 10.04 of the First Statutes of the University concerned.

4. On the other hand, Dr. Sanjay Kumar Singh, learned counsel representing the College, while supporting the judgment and order passed by the learned Single Judge which is under appeal herein, has argued that as a matter of fact the University authorities did not have any jurisdiction or power to debar the College from acting as examination center in view of the provisions contained in Government Order dated 03.01.2020. It has further been argued by him that there has been no complaint, whatsoever, against the College and that it has all along been functioning as

an examination center without any complaint from any corner. Dr. Singh has also argued that the entire action which ultimately resulted in debarring the College from functioning as an examination center has precipitated on account of malafide on behalf of the University authorities for the reason that in a certain matter the contempt proceedings were instituted by the College against the University authorities. Drawing our attention to Clause 11 of the Government Order dated 03.01.2020, it has been argued by Dr. Singh that only those colleges shall not be assigned to act as an examination center where some report by the officers regarding mass copying has been sent which has necessitated re-examination of the students and where the Examination Committee of the Government has taken a decision to debar. Thus, the submission is that it is the State Government which possesses the authority to pass an order of debarring in terms of the Government Order dated 03.01.2020 and not the University authorities including the Examination Committee. Submission is, thus, that the Special Appeal is liable to be dismissed at its threshold.

5. We have considered the rival submissions made by the learned counsel representing the respective parties and have also perused the record available before us on this Special Appeal.

6. The College, in question, namely, Maa Tilsera Devi P.G. College, Bhasra, Post Office Tanda, District Ambedkar Nagar is a College affiliated to Dr. Ram Manohar Lohia Avadh University and is imparting education upto the Post Graduation level. On 13.08.2021 examination of B.A. III students of Home Science Paper II was being held and the University authorities came to know certain irregularities relating to alleged mass copying indulged in by the students and accordingly a Press Release appears to have been issued by the University on 24.09.2021 whereby it was pronounced that the College has been debarred from functioning as an examination center. The said Press Note dated 24.09.2021 became the subject matter of challenge before this Court in Writ Petition No.26879(MS) of 2021 instituted by the College. The Writ Petition was allowed and the Press Release which was challenged in the said writ petition was quashed. The University authorities were directed to issued a show cause notice and after giving opportunity of hearing to the College, pass a fresh order in accordance with law.

7. Pursuant to the said order dated 23.11.2021 passed by this Court, the Examination Controller constituted a Sub-Committee on 30.11.2021 comprised of 5 members which was chaired by the Professor Rajiv Gaur, Head of the Department of Microbiology in the University. The said Sub-Committee was given instructions to give opportunity of hearing to the College and submit its report.

8. The meeting of the Sub-Committee was convened to be held on 06.12.2021 and a notice to the said effect was also issued by the Examination Controller on 31.11.2021. The College, in question, was also issued a show cause notice on 30.11.2021 whereby the College was required to appear before the Sub-Committee as constituted above and submit its reply in writing as well as orally in the matter relating to mass copying reported in the College concerned.

9. Pursuant to the said notice, the meeting of Sub-Committee was held on 06.12.2021 wherein apart from the members of the Sub-Committee constituted by the Examination Controller on

30.11.2021, the Principal of the College was also present who appended his signature on the attendance sheet after stating therein that apart from written submission made on behalf of the College, he does not have anything to state either in writing or orally. The written explanation submitted by the Principal of the College to the show cause notice, dated 06.12.2021 is also on record at page 59 of the Special Appeal whereby the Principal of the College apologized for the mistakes found and he further stated that College may be pardoned. In the reply, it was further stated that the allegation relating to use of unfair means on the students may also be cancelled and accordingly result of the students may be declared.

10. Thus, from a perusal of the reply given by the College through its Principal before the Sub-Committee in its meeting held on 06.12.2021, it is more than clear that the allegation relating to mass copying on the examination date, namely, on 13.08.2021 was rather admitted by the College and it is on the basis of such admission that the College requested the Sub-Committee members to pardon the College and after clearing the matter relating to use of unfair means by the students, to declare their result. The Sub-Committee accordingly made a recommendation by means of minutes of the meeting held on 06.12.2021 and clearly found that in the College in question there has been mass copying in the Home Science Paper II of B.A. Part III examination held in the main examination, 2021. The Committee also opined that such mass copying is against the academic environment of the University and that such situation may be remedial so that same may not have any adverse impact on the future of the meritorious students of the University.

11. When we peruse the minutes of the meeting of the Sub-Committee, dated 06.12.2021, what we find is that the Committee had not made the aforesaid recommendations only on the basis of admission of the irregularities which occurred on the date of examination i.e. on 13.08.2021 by the College but the Committee members also examined the answer books of the students and found that the seriatim of the answers written by the students is the same in all the answer books and the only difference is that the spellings of certain words used by the students appear to be at variance. The Committee, however, also found that the students by using wrongly spelt words have attempted to convey the same meaning in their respective answers.

12. Accordingly, it is clear that the Committee's finding about indulgence in mass copying is not based solely on the admission of the College; rather it is also based on the scrutiny of the material available before the Committee objectively.

13. The recommendations of the said Sub-Committee, dated 06.12.2021 were placed before the Examination Committee which a statutory body created under Section 29 of the U.P. State Universities Act. The said Examination Committee in its meeting held on 13.12.2021 considered the recommendations made by the Sub-Committee and accordingly took a decision to debar the College in the light of the report available before it, for a period of 6 years. The decision of the Examination Committee was placed before the Executive Council of the University which is the apex decision making body of the University in terms of the provisions contained in Section 21 of the U.P. State Universities Act. The Executive Council

considered the entire matter in its meeting held on 19.12.2021 and approved the decision taken by the Examination Committee for debarring the College in question.

14. In the light of the aforesaid facts and the legal position, when we examine the judgment under appeal before us passed by the learned Single Judge, what we find is that primarily the learned Single Judge has given two reasons for quashing the decision of the University debarring the College in question. The first reason given by the learned Single Judge is that the impugned decision lacks statutory frame work conferring any authority or power upon the University authorities under the U.P. State Universities Act or the First Statutes made thereunder to debar a College from functioning as an Examination Center. The second reason indicated by the learned Single Judge is that the show cause notice which preceded the decision of the University which was challenged in the writ petition did not make clear as to for what purpose the show cause notice was given, that is to say it did not make any mention of intended action against the College.

15. So far as the first reason given by the learned Single Judge for allowing the writ petition is concerned, we may first refer to the provisions of Section 29 of the U.P. State Universities Act. Section 29 provides that there shall be an Examination Committee in the University, the constitution of which shall be as may be provided for in the Ordinances. Sub-section (2) of Section 29 provides that the Examination Committee shall supervise generally all examinations of the University and will have certain functions mentioned therein. Sub-section (3) of Section 29 empowers the Examination Committee to appoint sub-committees and further to delegate one or more persons or sub-committees the power to deal with and decide cases relating to use of unfair means by the examinee. Sub-section (4) of Section 29 empowers the Examination Committee or the Sub-committee to debar an examinee from future examinations of the College under certain conditions.

16. Quoting Sub-section (3) of Section 29, learned Single Judge has observed in the judgment and order under appeal that the said provision only empowers the Examination Committee to take decision relating to use of unfair means by the examinee. Learned Single Judge has also referred to Statute 10.04 of the First Statutes and has observed that under the said provision, the Examination Committee is empowered only to make any place a center of written examination and has thus observed that neither the Statute 10.04 nor Section 29 empowers the Examination Committee to take any decision in relation to debarment of College to function as examination center.

17. When we examine Section 29 of the Act, what we find is that the Examination Committee is a statutory Committee which is to be constituted in accordance with the Ordinances. Sub-section (2) of Section 29 is relevant to be referred at this juncture. It provides that Examination Committee shall supervise generally all examinations of the University. It further provides that it shall supervise all the examinations including moderation, tabulation and perform other functions :

18. Section 29 of the State Universities Act is quoted as under :

"29. Examinations Committee. - (1) There shall be an Examinations Committee in the University, the constitution of which shall be as may be provided for in the Ordinances.

(2) Except as provided in sub-section (2) of Section 42, the Committee shall supervise generally all examinations of the University, including moderation and tabulation, and perform the following other functions, namely :

(a) to appoint examiners and moderators and if necessary, to remove them;

(b) to review from time to time the results of University examinations and submission of reports thereon to the Academic Council;

c) to make recommendations to the Academic Council for the improvement of the examination system;

(d) to scrutinise the list of examiners proposed by the Board of Studies, finalise the same and declare the result of the University.

(3) The Examinations Committee may appoint such number of sub-committees as it thinks fit, and in particular may delegate to any one or more persons or sub-committees the power to deal with and decided cases relating to the use of unfair means by the examinees.

[(4) Notwithstanding anything contained in this Act, it shall be lawful for an Examinations Committee or, as the case may be, for a sub-committee or any person to whom the Examinations Committee has delegated its power in this behalf under subsection (3), to debar an examinee from future examinations of the University, if in its or his opinion, such examinee is guilty of using unfair means at any such examination.]

19. In our considered opinion, the occurrence of word "generally' in Sub-section (2) of Section 29 empowers the Examination Committee to take all possible actions and steps which are necessary and required for supervising all examinations of the University. The affiliated colleges impart education and they are affiliated to the privileges of the University which gives such Colleges a right to make their students appear in the examinations to be conducted by the University and it is only once the students are declared passed in the examinations conducted by the University that they are conferred with Degrees. Accordingly for conferment of the Degree since it is incumbent on the students studying in the affiliated Colleges to have passed the examination, it becomes solemn duty of the University to ensure that examinations are conducted in the most fair manner, otherwise, in case the University fails to conduct its examinations in a fair manner, degrees being conferred on the students will loose their sanctity academically and even otherwise.

20. The functions assigned to the Examination Committee in Sub-clauses (a) to (d) of Sub-section (2) of Section 29 of the Act cannot thus be held to be exhaustive. Similarly the functions such as moderation and tabulation occurring in Sub-section (2) are also not exhaustive for the reason of occurrence of word "generally' in the said provision.

21. In view of the aforesaid discussion, we are of the clear opinion that

setting up of an examination center for ensuring that examinations are held properly and in the most fair manner and ensuring fairness in the examinations at the examination centers are not only the statutory duties cast upon the Examination Committee under Section 29; rather the said provision empowers the Examination Committee to take all such steps which shall ensure fair examinations. In a situation where mass copying by the students at the examination center is reported and it is even admitted by none other than the Principal of the College himself, debarring such College from functioning as an examination center for future examinations becomes the statutory duty cast on the Examination Committee under Section 29 of the U.P. State Universities Act.

22. For the reasons aforesaid, we are of the opinion that it not only that the Examination Committee is statutorily empowered to take such action as debarring the College from functioning as Examination Center under Section 29 but taking such action in such a situation becomes its statutory duty as well.

23. Apart from the above, we may also refer to the provisions contained in Section 21 of the U.P. State Universities Act. Section 21 defines the powers and duties of the Executive Council. The opening phrase in Section 21 says that the Executive Council shall be the principal executive body of the University. It further says that Executive Council shall have certain powers mentioned in the said provision subject to the provisions of the Act. **One of the powers listed in Section 21(1) is "to regulate and determine all other matters concerning the University as well as Institutes, constituent, affiliated and associated colleges in accordance with this Act, the Statutes and the Ordinances".** Thus, Sub-clause (xvii) of Section 21(1) gives ample and all en- compassing powers to the Executive Council not only to regulate but to determine as well all other matters concerning the Institutes including affiliated and associated colleges etc. Conduct of examination, as observed above, by the University is a solemn act and not only solemnity but also the fairness has to be maintained by all measures by the University for the purpose of saving the University's reputation as body imparting education and conferring degrees only to deserving students.

24. In the instant case, the decision taken by the Examination Committee was discussed and accordingly approved by the Executive Council in its meeting held on 19.12.2021 which, in our considered opinion, has the necessary statutory authority to take such decision in terms of the provisions contained in Section 21(1) (xvii) of the U.P. State Universities Act.

25. For the aforesaid reasons, we find ourselves unable to agree with the finding recorded by the learned Single Judge in the judgment and order under appeal herein that the decision of the University authorities to debar the College in question from functioning as an examination center is not backed by statutory authority.

26. So far as the other reason indicated by the learned Single Judge that the show cause notice did not indicate the intended action of the University against the College, is concerned, we may only observe that in the earlier round of the litigation, this Court has already noticed that the College was debarred and

accordingly Press Release was quashed by means of judgment and order dated 23.11.2021 with the direction to the University authorities to issue a show cause notice and give opportunity to the College and then pass fresh order. Even otherwise, if we examine the show cause notice dated 30.11.2021, what we find is that the Examination Controller has intimated the College, of the constitution of the Committee and has also required the College to be present for personal hearing in the matter relating to mass copying. Merely because the intended action was not indicated in so many specific words, in our considered opinion, in this particular case where the sanctity of the university examinations was at stake, it will not vitiate the proceedings drawn consequent upon the show cause notice dated 30.11.2021. Thus, in this respect as well we are not able to find ourselves in agreement with the finding recorded by the learned Single Judge.

27. So far as the allegation of malafide etc. is concerned, once the principal of the College appeared before the Committee and clearly submitted that College has nothing to say orally except what has been stated in the written reply, we do not find any force in such a submission of learned counsel for the College. The reason for our not accepting the submission is that the Principal of the College has neither orally nor in the written reply, dated 06.12.2021 has anywhere taken the plea of malafide and malice against the University authorities and accordingly, in absence of any plea taken by the College in the said reply, such submission cannot be accepted.

28. At this juncture, learned counsel representing the College has stated that as a matter of fact, the endorsement said to have made by the Principal of the College on the attendance sheet, dated 06.12.2021 was made for the reason that the Committee members had applied undue influence and compelled the Principal of the College to give something in writing as they wanted to subside and resolve the matter.

29. We are afraid, we cannot agree with the said submission as well, for the simple reason that there is nothing on record which can even remotely indicate that the Principal of the College after allegedly being coerced or influenced in the meeting held on 06.12.2021 reported such coercion to any authority either in the State Government authority or in the University. For the said reason, the submission made by the learned counsel for the respondents is rejected.

30. Learned counsel representing the College has also relied upon Clause 11 of the Government Order dated 03.01.2020. In respect to the said submission, we are of the considered opinion that any Government Order issued by the State Government has to be read only in addition to the statutory authority or power vested in the authorities of the University and not in derogation of the said powers and authority available to the University under the U.P. State Universities Act, 1973.

31. For the reasons given and the discussions made above, we conclude that the judgment and order dated 28.07.2022 passed by the learned Single Judge is erroneous and hence is not sustainable.

32. Resultantly, the Special Appeal is allowed and judgment and order dated 28.07.2022, passed by the learned Single Judge is hereby set aside. The Writ

Petition, namely, Writ-C No. 122 of 2022, thus, stands dismissed.

33. There will be no order as to costs.

(2022) 9 ILRA 700
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.06.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Misc. Writ Petition No. 7878 of 2022

Iqbal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sunil Kumar Upadhyay

Counsel for the Respondents:
G.A., Sri Ajay Kumar Maurya, Sri H.N. Shukla

Criminal Law- Constitution of India- Article 226- Code of Criminal Procedure, 1973- Section 154- First Information Report-Indian Penal Code, 1860- Sections 376, 354, 323, 504 & 506 I.P.C. and Dowry Prohibition Act- Section ¾- Quashing of F.I.R on basis of Compromise- Marital dispute has been culminated into lodgement of the impugned F.I.R. registered in aforesaid case crime. The petitioners are alleged to have committed the offence under Sections 376, 354, 323, 504, 506 I.P.C, out of those five Sections, Sections 323, 504, 506 I.P.C. are compoundable. Although, Sections 354 read with Section 376 I.P.C. and 3/4 of Dowry Prohibition Act are not compoundable but if the parties wants to live peacefully married life, the same does not make a bar- criminal proceedings of private nature can be quashed under Section 482 Cr.P.C. even if the trial has concluded in conviction, in case, if the parties wants to resolve their dispute, which is not of serious nature and the dispute is not one, which is opposed to public policy. The powers vested under Article 226 of the Constitution are much more than under Section 482 Cr.P.C and therefore by exercising the said powers, this Court can quashed the F.I.R- It is inherent powers of the High Court, in such matters that can be invoked where the Court is satisfied that the parties have willingly decided to bury their dispute- The offence stems out discordance, which is a reason for lodging of the impugned F.I.R, but it is shown that the respondent no.3/first informant decided to give up the case and therefore, as the offence under Section 323, 504, 506 I.P.C. are compoundable, the same are permitted as compounded. So far as the Sections 376, 354 I.P.C. is concerned, it cannot be said that any offence is committed as the victim has not been medically examined and also in view of the fact that once the parties have decided that they do not wish to contest the matter, the F.I.R. ought to have be quashed.

Settled law that where the criminal prosecution arises out of a private or personal dispute, including that arising out of marital discord, the offences are not serious or grave, are not opposed to public policy and the parties have amicably decided to compromise the matter, then under the exercise of it's powers under Article 226 or under Section 482 of the Cr.Pc , the High Court can quash the F.I.R / criminal proceedings even in non-compoundable offences. (Para 4, 6, 8)

Criminal Writ Petition allowed. (E-3)

Judgements/ Case law relied upon:-

1. Jitendra Raghuvanshi & ors. Vs Babita Raghuvanshi & anr.,(2013) 4 SCC 58

2. Rajendra Bhagat Vs St. of Jhar. @ Anr, 2022 Live Law (SC) 34

3. Bitan Sengupta Vs St. of W.B, (2018) 18 SCC 366

4. B.S.Joshi Vs St. of Har., (2003) 4 SCC 675

5. Rajeev Kourav Vs Baisahab MANU 0163 SC 2022

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

1. Heard learned counsel for the petitioners, learned A.G.A. and Sri Ajay Kumar Maurya, learned counsel, who has put in appearance on behalf of the respondent no.3.

2. By way of this petition, the accused-petitioners prays for quashment of the impugned first information report dated 21.04.2022 registered in Case Crime No. 93 of 2022 under Sections 376, 354, 323, 504, 506 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Mainather, District Moradabad and also for staying his arrest in respect of the aforesaid first information report.

3. Learned counsel for the petitioners as well as learned counsel for the respondent no.3 have jointly submitted that the matrimonial discord between the parties have been amicably settled and that the respondent no.3 does not to proceed with the matter. In this regard, short counter affidavit has also been filed by the respondent no.3 and thus the impugned F.I.R. may be quashed.

4. Marital dispute has been culminated into lodgement of the impugned F.I.R. dated 21.04.2022 registered in aforesaid case crime. The petitioners are alleged to have committed the offence under Sections 376, 354, 323, 504, 506 I.P.C, out of those five Sections, Sections 323, 504, 506 I.P.C. are compoundable. Although, Sections 354 read with Section 376 I.P.C. and 3/4 of Dowry Prohibition Act are not compoundable but if the parties wants to live peacefully married life, the same does not make a bar. The Investigation papers has been produced by Counsel for the State, which shows that no offence under Sections 376, 354 I.P.C. is made out against the petitioners.

5. Prima facie, looking to the F.I.R., investigation is continuing, although short counter affidavit filed by the counsel for the respondent no.3 contains the averments that the proceedings initiated by the wife in a very haste manner, which may not be permitted to be carried on, as the matter has been settled between the parties and thus the F.I.R. may be quashed.

6. The Gujarat High Court has recently held that criminal proceedings of private nature can be quashed under Section 482 Cr.P.C. even if the trial has concluded in conviction, in case, if the parties wants to resolve their dispute, which is not of serious nature and the dispute is not one, which is opposed to public policy. The powers vested under Article 226 of the Constitution are much more than under Section 482 Cr.P.C and therefore by exercising the said powers, this Court can quashed the F.I.R.

7. The Apex Court Judgements rendered in the matter of ***Jitendra Raghuvanshi and others Vs. Babita Raghuvanshi and another reported in (2013) 4 SCC 58, Rajendra Bhagat Vs. State of Jharkhand @ Anr, 2022 Live Law (SC) 34, Bitan Sengupta Vs. State of West Bengal (2018) 18 SCC 366, B.S.Joshi Vs.***

State of Haryana (2003) 4 SCC 675 will also enure for the benefit of the present accused-petitioners. The Judgement of this Court, though of single Judge rendered in the matter of ***Pramod and another Vs. State of U.P. and another*** decided on 23.02.2021 will also enure for the benefit of the accused-petitioners. It is inherent powers of the High Court, in such matters that can be invoked where the Court is satisfied that the parties have willingly decided to bury their dispute.

8. It is very clear that the petitioners have prima facie committed the said offence. Perusal of the F.I.R. reveals that the same was registered on the basis that cognizable offence is disclosed and thus there is no force in the contention of learned counsel for the petitioners that no cognizable offence is made out against the petitioners. The fact that the first informant/respondent no.3 as well as the petitioners have compromised the matter before the village peoples, who have also given an affidavit, which are annexed collectively as Annexure-3 to the writ petition. As the first informant/respondent no.3 has not been medically examined by the police and therefore the provisions of Section 376 I.P.C. as alleged cannot be said to be made out. The offence stems out discordance, which is a reason for lodging of the impugned F.I.R, but it is shown that the respondent no.3/first informant decided to give up the case and therefore, as the offence under Section 323, 504, 506 I.P.C. are compoundable, the same are permitted as compounded. So far as the Sections 376, 354 I.P.C. is concerned, it cannot be said that any offence is committed as the victim has not been medically examined and also in view of the fact that once the parties have decided that they do not wish to contest the matter, the F.I.R. ought to have be quashed. The Judgement rendered by Hon'ble Apex Court in the matter of ***Rajeev Kourav Vs. Baisahab MANU 0163 SC 2022*** will also enure for the benefit of the present petitioners.

9. In view of above, the first information report dated 21.04.2022 for the offence committed on 01.10.2021 i.e. before six months, registered in Case Crime No. 93 of 2022 under Sections 376, 354, 323, 504, 506 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Mainather, District Moradabad, is quashed.

10. The petition is allowed.

11. The Police officials shall not take any further steps in the matter.

12. We are thankful to Sri Sunil Kumar Yadav, learned counsel for the petitioners and Sri Ajay Kumar Maurya, learned counsel for the respondent no.4 for rendering their assistance to this Court.

(2022) 9 ILRA 702
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Crl. Misc. Writ Petition No. 7051 of 2022

Manoj Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Pramod Kumar Pandey, Sri Durgesh Kumar Singh, Sri Shyam Singh

Counsel for the Respondents:
G.A., Sri Rajendra Singh

Constitution of India- Article 226- Indian Penal Code, 1860- Sections 419, 420, 467, 468 & 471 - For quashing the impugned First Information Report- The allegations in the First Information Report taken on face value give rise to disputes of pure civil nature- No civil suit has been instituted- The will bequeathing the property upon the petitioner is a duly registered document. The validity of the will is yet to be challenged before the competent court. The mutation proceedings are summary proceedings and does not create any title upon any person, rather, acknowledges the possession of the property and for the purposes of revenue collection- Unless the will is challenged before the competent court, the criminal proceedings has been initiated maliciously to coerce the petitioner to enter into a compromise out side the court. It is a case of pure civil nature given criminal colour with ulterior motive.

Settled law that where the allegations made in the F.I.R disclose a purely civil dispute, and instead of availing the remedy before the competent civil court the criminal proceedings have been instituted maliciously as a tool of coercion and harassment, then such F.I.R deserves to be quashed.

Constitution of India- Article 226- Power to quashment of process and exercise of inherent jurisdiction under Section 482 Cr.P.C. and/ under Article 226 of the Constitution of India is for the purpose that Criminal proceeding ought not to be permitted to be used as weapon of harassment. Hence, the Court is satisfied that Criminal Proceedings amounting to an abuse of process of law or that it amounts to bring pressure upon the accused in exercise of inherent powers, such proceedings can be quashed.

Where apparently the criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused then the same ought not to be permitted to degenerate into weapon of harassment and should be quashed under the exercise of powers under Article 226 of the Constitution of India or Section 482 Cr.Pc. (Para 21, 23, 24, 28, 33)

Criminal Writ Petition allowed. (E-3)

Judgements/ Case law relied upon:-

1. Mitesh Kumar J. Sha Vs St. of Kar., 2021 SCC Online SC 976

2. Prof. RK Vijayasarathy Vs Sudha Seetharam 2019 (16) SCC 739

3. St. of Har. Vs Bhajanlal (1992 Supp (1) SCC 335

4. Indian Oil Corps. Vs NEPC India Ltd. & Ors (2006) 6 SCC 736

5. Kapil Agarwal Vs Sanjay Sharma (2021 5 SCC 524)

6. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maha., 2021 SCC Online SC 315

7. A.P. Mahesh Coop. Urban Bank Shareholders Welfare Asc.Vs Ramesh Kumar Bung, (2021) 9 SCC 4 152

(Delivered by Hon'ble Syed Waiz Mian, J.)

1. At the very outset, learned counsel for the respondent no. 3 submits to decide the instant writ petition, at the admission stage itself, to which learned counsel for the petitioners also expresses his agreement, thus this writ petition is being taken up for its final disposal at the stage of admission.

2. Heard Shri Pramod Kumar Pandey, learned counsel for the petitioners, learned A.G.A. for the State and Shri Rajendra Singh, learned counsel for the respondent no. 3.

3. This Criminal Misc. Writ petition, under Article 226 of the Constitution of

India, has been preferred by the petitioners, Manoj Singh and his wife Sunita Singh, for quashing the impugned First Information Report, stay their arrest, and for restraining the respondents from taking any coercive steps against them, in consequence of impugned First Information Report, having been scribed on 18.04.2022, by the respondent no. 3, Vinod Kumar Singh, at Case Crime No. 69 of 2022, under Sections 419, 420, 467, 468 and 471 I.P.C., Police Station-Chandauli, District-Chandauli.

4. This Criminal Misc. Writ Petition arising out of aforementioned First Information Report. It is alleged in the said First Information 2 that petitioner no. 1 is real brother of the informant and after death of their father in the year 2003 the petitioners, by hatching a conspiracy, executed a forged and fabricated, alleged will, in their name and in Suit No. 1197 of 2021, Rekha Singh vs. Harihar Singh, got mutated their names by the Court of Tehsildar concerned, vide order dated 29.07.2021 and when it came to the knowledge of the respondent no. 3 he lodged the impugned First Information Report. It is also averred in the First Information Report that the attesting witness Shiv Poojan Singh had died on 14.07.2021, whereas, his statement is said to have been recorded on 29.07.2021. The other attesting witness, Prem Prakash, having been shown to have filed his affidavit, affirming therein that he neither filed his affidavit nor has put his signature nor has any knowledge about the alleged will. In view of the objection and affidavits having been filed in the Court of concerned Tehsildar, the exparte mutation order dated 29.07.2021 has been set-aside. 5. Learned counsel for the petitioners mentioned that the alleged will, executed by Shri Harihar Singh, before his death, was in the consideration for their rendered services, care and out of love and affection and the same is valid, genuine and true. 6. Learned counsel for the petitioners states that the impugned First Information Report is being challenged chiefly on the ground that the allegations made therein are false, frivolous and arbitrary and also on the premise that a civil dispute being given a criminal colour by way of registration of First Information Report. It is argued that the validity and authenticity of the will is predominantly and overwhelmingly of a civil nature which needs 3 to be contested before an appropriate forum having jurisdiction.

7. On behalf of the petitioners, certified copy of the First Information Report, presented by the respondent no. 3, against the petitioners, under Section 156 (3) Cr.P.C. in the Court of Chief Judicial Magistrate, Chandauli, affidavits of deponent, Sandeep Kumar Singh, statement of Shiv Poojan Singh, recorded before the Court of Tehsildar, alleged will, judgment and order of Tehsildar, concerned, in connection with Suit No. RST/00799/2020, Rekha Singh vs. Harihar Singh, under Section 34 of Revenue Code, 2006, statement of Prem Prakash Singh, recorded in the said suit have been annexed with the writ petition.

8. Learned counsel for the petitioners in support of his arguments, refers to the judgment of Hon'ble Apex Court, passed in ***Mitesh Kumar J. Sha v. State of Karnataka, 2021 SCC Online SC 976***, wherein which in para no. 47 reads as under;

" Moreover, this Court at innumerable instances expressed its disapproval for imparting criminal color to a civil dispute, made merely to take

advantage of a relatively quick relief granted in a criminal case in contrast to a civil dispute. Such an exercise is nothing but an abuse of the process of law which must be discouraged in its entirety."

9. He further relies upon judgments of Hon'ble Apex Court, in Case of ***Prof. RK Vijayasarathy vs. Sudha Seetharam 2019 (16) SCC 739***, Para 23, ***State of Haryana v. Bhajanlal (1992 Supp (1) SCC 335***, para 102, I***ndian Oil Corps. V. NEPC India Ltd. & Ors (2006) 6 SCC 736***, para 12, ***Kapil Agarwal vs. Sanjay Sharma (2021 5 SCC 524), Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra, 2021 SCC Online SC 315***, and ***A.P. Mahesh Coop. Urban Bank Shareholders Welfare Assn. v. Ramesh Kumar Bung, (2021) 9 SCC 4 152.***

10. Next it is contended that Harihar Singh (since deceased) had bequeathed all his property by way of a registered will dated 23.08.2017, in favour of the petitioners. Further, the will has not been challenged by anyone before any competent authority till date. It is also submitted that respondent no. 3, who is admittedly real brother of petitioner no. 1, was conformably settled as he was running a well established business, hence his father did not transfer any share of his property to him, due to which the petitioners have been falsely implicated in the present criminal proceedings.

11. Learned counsel for the petitioners claims that the will is valid, true and its genuineness, validity and its execution cannot be set aside in instant criminal proceedings because the nature of dispute, with regard to will, is of civil nature. Instead of launching civil proceedings, the respondent no. 3 has preferred to take recourse to criminal proceedings just to harass them or to obtain quick relief as compared to the relief provided in the civil suit.

12. Lastly, the learned counsel for the petitioners advances the argument that in view of the facts and circumstances narrated in the petition, the impugned First Information Report dated 18.04.2022 be quashed, along with further proceedings to ensure fair and proper delivery of justice.

13. Learned A.G.A., who has received notices on behalf of the respondent nos. 1 and 2 but he did not seek time to file his reply or counter affidavit etc. For respondent no. 3 learned counsel argued at length and but has filed written submissions. He denied 5 to file counter affidavit.

14. In the written arguments, on behalf of the respondent no. 3, it is averred that the petitioners are husband and wife and out of the duo, petitioner no. 1 is real brother of the respondent no. 3, whereas, the petitioner no. 2 is his sister in law (Bhabhi). One brother, out of three, had died in the year 2003 survived by his wife namely Rekha Singh, whereas, Harihar Singh, passed away on 11.12.2019. It is further averred that their father lived all his life in Chandauli. Petitioners got an antedated forged Will prepared on 23.08.2017 with the name of the deceased and got executed at Varanasi, introducing marginal witnesses from Mirzapur and thereafter got their names mutated. When this fact came to his knowledge, the mutation order in pursuance of his restoration application was set aside and in that proceeding marginal witnesses appeared but denied the execution of Will, hence, the need of lodging the FIR arose.

15. In the instant petition, the question that arises is as to whether the allegations in the First Information Report taken on face value give rise to disputes of pure civil nature ?

16. Learned counsel for the answering respondent no. 3 refers the said controversy has been settled by the Hon'ble Supreme Court in case of ***Jagmohan Singh vs. Vimlesh Kumar & Ors. .....***Arising out of challenge judgment of this Court. In the written objection relevant para of the same has been quoted as under:

" In this case, it appears that the High Court fell in error in taking an adverse view only because the complainant had not challenged the genuineness of the will by bringing any action in a court of law and 6 further, the respondents had brought a suit for injunction against the complainant.

There can be no doubt that in the civil suit, the burden would be on the plaintiff relying on a will to establish the genuineness of the will on the basis of which relief/ permanent injunction is claimed. However, that does not prevent the accused, who can be defendants in such a civil suit from initiating criminal proceedings on the contention that the will is forged/ fabricated."

Thus the Hon'ble Apex Court was pleased to set aside the order passed by this Court.

17. Learned counsel for the respondent no. 3 has also cited the case of Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra, 2021 SCC online SC 315. The relevant part of the said judgment is as follows: "While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint."

18. Learned counsel for the answering respondent concludes his submissions by stating that since the allegations in the First Information Report disclose prima facie commission of cognizable offences, therefore, present writ petition is not sustainable in law and consequently deserves to be dismissed.

19. We have heard the rival submission of learned for the parties and also perused the record.

20. In Prof. ***R.K. Vijayasarthy vs. Sudha Seetharam, 2019 (16) SCC 739*** the appellants has instituted a civil suit for the recovery of Rs. 20 Lakhs from the respondents, thereafter the first respondent filed complaint against her ex son in law (son of 7 appellant). The first respondent filed the complaint against the appellants six years after the date of the alleged transaction and nearly three years after the filing of the suit, interim injunction was granted by the Court, without quashing the criminal proceedings till civil suit was decided. In the said case impugned judgement and order of High Court was set aside and the criminal complaint case was quashed.

21. In the instant petition no civil suit has been instituted.

22. In State of ***Haryana vs. Bhajan Lal (1992) Supp (1) SCC 335)***, in the political rivalry between the respondent no. 1 Bhajan Lal and Devi Lal, both belonged to two rival political parties and on account of political rivalry resulted initiation of number of criminal cases and counter cases. On the presentation of complaint, by

the respondent no. 2, the then Station House Officer, registered a case on the basis of the allegations in the Complaint under Sections 161 and 165 I.P.C. and Section 5 (2) of Prevention of Corruption Act No. 21 of 1987. Against the said First Information Report, respondent no. 1 filed a writ petition under Articles 226 and 227 of the Constitution of India, seeking issuance of writ of certiorari for quashing the First Information Report and also a writ of prohibition restrain the authorities from further proceedings with the investigation. High Court concluded that the allegations did not constitute cognizable offence hence granted the relief as prayed for.

23. Hon'ble Apex Court held that the order of the High Court quashing the First Information Report in question viewed from any angle cannot be sustained both on the question of law and facts. Consequently, that part of the judgment of High Court quashing 8 the First Information Report was set aside.

24. Hon'ble Supreme Court has categorized the cases, wherein, the extraordinary powers under Article 226 can be exercised. The power under Section 482 Cr.P.C. can be exercised by the High Court either to prevent abuse of process of any Court or otherwise to secure the ends of justice. Out of seven categories of cases, second category is to the fact that where the allegations in the First Information Report and other material do not disclose the cognizable offence justifying the investigation by a police officer. The First Information Report could be quashed to secure the ends of justice.

25. In ***Indian Oil Corps vs. NEPC India Ltd. & Ors. (2006) 6 Scc 736***, the petition on behalf of the appellant, Indian Oil Corporation was preferred under Section 482 Cr.P.C. for quashing the criminal complaint. In that petition disputes were pertaining to breach of contract besides criminal complaint. The respondent Indian Oil Corporation had already sought injunction reliefs and money degrees.

26. The High Court by a common judgment had allowed both the petitions and quashed two complaints. The said order of the High Court was challenged in the above stated citations before the Hon'ble Apex Court.

27. Present petition preferred along with the aforesaid judgments. Because the petition before the Hon'ble Apex Court was preferred under Section 482 Cr.P.C., whereas, the present petition, in this Court, has been preferred under Article 226 of the Constitution of India. 9

28. Hon'ble Supreme Court also held that power to quashment of process and exercise of inherent jurisdiction under Section 482 Cr.P.C. and/ under Article 226 of the Constitution of India is for the purpose that Criminal proceeding ought not to be permitted to be used as weapon of harassment. Hence, the Court is satisfied that Criminal Proceedings amounting to an abuse of process of law or that it amounts to bring pressure upon the accused in exercise of inherent powers, such proceedings can be quashed.

29. In ***A.P. Mahesh Coop. Urban Bank Shareholders Welfare Assn. v. Ramesh Kumar Bung (2021) 9 SCC 152***, the Hon'ble Apex Court has held that High Court is permitted to pass an interim order under Section 482 Cr.P.C., in the nature impugned herein, in only exception of cases with caution and circumspection,

giving atleast brief reasons and further held that the grant of such relief by High Court was granted in proper amendment with detail reasons therein. In the matter before the Hon'ble Apex Court, there was a dispute of civil which was sought to be converted into criminal case. The Hon'ble Supreme Court stayed the further proceeding including the arrest. It was observed that more than the allegations in dispute are different turfs, such as sometime persons, who raise such dispute manage to camouflage their real motive.

30. In ***Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra, 2021, SCC online SC 315***, the Apex Court held that by giving brief reasons, the High Court would be justified in even staying the further investigation, by way of an interim order. It is also laid down that misuse of criminal proceedings is not unknown and the criminal law cannot be set into motion as a matter of 10 course and therefore to take away the inherent powers of the High Court would not be in the larger public interest also.

31. Hon'ble Apex Court in ***Kapil Agrawal and others vs. Sanjay Sharma (221) 5 SCC 524 and Indian Oil Corporation vs M/S Nepc India Ltd., & Ors. reported in (2006) 6 SCC 736,*** laid down that inherent jurisdiction under Section 482 Cr.P.C. and/or under Article 226 of the Constitution is designed to achieve solitary purpose that criminal proceedings ought not to be permitted to degenerate into weapon of harassment. It was also opined when the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused, in exercise of inherent powers, such proceedings can be quashed.

32. In the given facts, it is pleaded by the petitioner the informant (Vinod Kumar Singh) alleged that his brother Manoj Singh accused/petitioner had fraudulently obtained a will from their father Harihar Singh on the basis of forged documents. It is further alleged in the FIR that the petitioner was driven by greed to inherit the property, consequently, mischievously got the entire property transferred in the name of his wife Sunita Singh and their Bhabhi Rekha Singh wife of their deceased brother. It is further alleged that pursuant to the registered sale-deed the court of Tehsildar Sadar Chandauli had directed mutation of the name of the petitioner and the other beneficiary under the will. It appears that on an application moved by the complainant the order mutating the name of the petitioner has been withdrawn and the matter is pending. It is under the afore-noted facts the present FIR came to be lodged through an application filed under Section 11 156(3) Cr.P.C. alleging fraud and misrepresentation in obtaining the will, as well as, the mutation order.

33. On specific query, learned counsel for the respondent/complainant submits that the will bequeathing the property upon the petitioner is a duly registered document. The validity of the will is yet to be challenged before the competent court. The mutation proceedings are summary proceedings and does not create any title upon any person, rather, acknowledges the possession of the property and for the purposes of revenue collection.

34. In the circumstances learned counsel for the petitioner is justified in submitting that unless the will is challenged before the competent court, the criminal proceedings has been initiated maliciously to coerce the petitioner to enter into a

compromise out side the court. It is a case of pure civil nature given criminal colour with ulterior motive.

35. Having regard to the facts and circumstances of the case, the FIR dated 18 April 2022 lodged by the third respondent registered as Case Crime No. 69 of 2022 under Section 419, 420, 467, 468, 471 IPC, P.S. Chandauli, District Chandauli is hereby quashed with liberty to the aggrieved party to take recourse before the competent court with regard to the validity of the will.

36. The writ petition is, accordingly, allowed.

37. No order as to cost.

(2022) 9 ILRA 709
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.09.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Matter Under Article 227 No. 34234 of 2019

Subhash Chandra Chaturvedi ...Petitioner
Versus
IVth Addl. Session Judge/Spl. Judge/E.C. Act Lko & Ors. ...Respondents

Counsel for the Petitioner:
Ram Kumar Srivastava, Mohd. Aslam Khan, Rajeev Singh

Counsel for the Respondents:
Gaurav Tripathi, Manoj Kumar, Sridhar Awasthi

Civil Law - The Constitution of India, 1952- Article 227- It is well settled that the power under Article 227 is one of judicial superintendence which cannot be used to upset conclusions of facts, however erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could have ever reached them- There is no justification for the High Court to substitute its view for the opinion of the Authorities /Courts below as the same is not permissible in proceedings under Article 226/227 of the Constitution. This Court cannot interfere with the findings of fact recorded by Courts below unless there is no evidence to support the findings or the findings are totally perverse. As long as they are based upon some material which is relevant for the purpose, no interference is called for. Even on the ground that there is yet another view which can reasonably and possibly be taken, the High Court cannot interfere- This Court having considered the facts as pleaded by the petitioner and the private respondents in this petition and the facts and Law as appreciated by the learned Trial Court and the Appellate Court, does not filed any perversity in the appreciation of facts by the two learned Court below or any infirmity in the law as appreciated in the orders impugned.

Where concurrent findings of facts have been recorded by the courts below, then the same cannot be interfered by the High Court under its supervisory jurisdiction unless the said findings of fact are either based on no evidence or are absolutely perverse. (Para 41, 73, 75)

Petition rejected. (E-3)

Case law/ Judgements relied upon/ discussed:-

1. Lawyers Cooperative Housing Society Ltd. Agra Vs Shri Krishna Grah Nirman Samiti Limited & ors.2002 (2) Allahabad Rent Cases 415

2. Raja Ram Gupta Vs Firm Jaiswal Iron and Steel Works & ors., 1980 AWC 110

3. Smt. Vinod Rani Lamba & anr. Vs Baburam Yadav ,2017 (135) RD 427

4. Smt. Sudesh & ors. Vs A.D.J. & ors. 2006 (1) ARC 387

5. G.P. Srivastava Vs R K Raizada & ors.2000 (3) SCC 54

6. Ashraf Vs Kailash Prasad & anr. 2016 (34) LCD 3096

7. Puwada Venkateswara Rao Vs Chidamna Venkata Ramana AIR 1976 Supreme Court 869

8. Auto Cars Vs Trimurti Cargo Movers (Pvt.) Ltd. 2018 (140) RD 411

9. Smt. Sahzavin Vs A.D.J. Alld, 2013 SCC online Allahabad 13500

10. D.N. Banerjee Vs PR Mukherjee, AIR 1953 SC 58

11. Waryam Singh Vs Amarnath AIR 1954 SC 215

12. Shalini Shyam Shetty Vs Rajendra Shankar Patil 2010 (8) SCC 329

13. Garment Craft Vs Prakash Chand Goel 2022 SCC Online SC 29

14. Gurcharan Singh Vs Sujit Singh 2014 (2) SCC 140

15. Sunil Poddar Vs U.B.I, 2008 (2) SCC 326

16. Parimal Vs Veena @ Bharti 2011 (3) SCC 545

17. St. of M.P Vs Heera Lal & ors. 1996 (7) SCC 523

18. Rahul S Shah Vs Jinendra Kumar Gandhi & ors. 2021 (6) SCC 418

19. St. of M.P Vs Hira Lal & Ors.(1996) 7 SCC Page 523

20. Sunil Poddar Vs U.B.I, 2008 (2) SCC 326

21. Sulaiman Vs IV A.D.J., Muzaffarnagar ,1998 (2) JCLR 1052

22. Deepak Banerjee Vs Smt. Lilavati Chakraborty AIR 1987 Supreme Court 2055

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

1. This petition under Article 227 has been filed challenging the order dated 22 May 2006 which is an ex-parte decree in Regular Suit No.294 of 2013: Smt. Shashi Mishra and others versus Subhash Chandra Chaturvedi, and also the Order passed on application under Order IX Rule 13 dated 27.05.2009 rejecting the same, and the order passed in Appeal thereafter dated 27.11.2019; with a further prayer directing the Trial Court not to proceed in Execution Case No. 15/2007.

2. It is the case of the petitioner in his petition that his father was residing in Khasra No. 2188/2/3 Village Kanausi by raising a hut over it. Later on the petitioner built a two room house in 1986 and when the land came under Nagar Nigam it was allotted House No. 561/234 New Sindhu Nagar, P.S. Krishnanagar, Lucknow and he has been paying house tax to the Nagar Nigam since August 1986. One Rajendra Malviya filed Regular Suit No.49/1994 against Om Prakash Mishra the predecessor in interest of the private respondents, for possession and demolition, alleging therein that land of Khasra No. 2188/2/3 Village Kanausi belonged to him, and that Om Prakash Mishra had forcibly built his house over it. During the pendency of the Suit Rajendra Malviya executed a sale deed of the land in dispute in favour of Om Prakash Mishra on 09.11.1995. Consequently, the Suit was dismissed on 06.02.2009.

3. Om Prakash Mishra constructed a house adjacent to the house of the petitioner and the Nagar Nigam allotted House No. 561/232 in New Sindhu Nagar, PS Krishna Nagar, Lucknow. Om Prakash Mishra and others started creating disturbance in the peaceful possession of the petitioner over his House No. 561/234 and therefore the petitioner filed Regular

Suit No. 144/1999 in the Court of Civil Judge (Havali) Lucknow. When Om Prakash Mishra could not succeed in his design, Shashi Misra his daughter in law and his sons filed Regular Suit No. 294/2003 praying for a decree of eviction and damages to the tune of Rs.32,000/- with interest on 28.07.2003, in the Court of Civil Judge (Senior Division) Malihabad, Lucknow. In the said Suit the petitioner was arrayed as a defendant and a wrong house number was mentioned namely House No. 561/232 - A , New Sindhu Nagar. The opposite parties managed to get an ex-parte decree on 22.05.2006 on the ground that summons were served on the defendant through publication and he had not appeared nor filed his written statement.

4. On coming to know of the ex-parte decree the petitioner filed paper number 60 C Application under Order IX Rule 13 CPC along with affidavit for setting aside ex parte decree dated 22.05.2006. In the affidavit the petitioner stated that he was the owner of House No. 561/234 New Sindhu Nagar, Lucknow and that the Respondents with a view to usurp the house had mentioned the wrong address and no service of summons was affected upon him. The petitioner had never refused to take notice/summons and if there was any evidence of receiving such notice the same was forged. The newspaper in which allegedly the notice was published was also not circulated in the area he resided.

5. The Learned Trial Court rejected the application on the ground that knowledge of the Suit was derived by the petitioner through another Suit and on such presumption treated notice to be served on the petitioner.

6. It has been submitted that Rule 17, Rule 19 -A and Rule 20 of Order V CPC were violated.

7. Against the order 27.05.2009 the petitioner preferred Miscellaneous Civil Appeal No. 81 of 2009: *Subhash Chandra Chaturvedi versus Shashi Misra and others*, in the Court of District Judge which was also rejected on 7.11.2009 by the Appellate Court. The Appellate Court observed that under Proviso to Order IX Rule 13 C.P.C., since the petitioner had knowledge about the pendency of Regular Suit No. 294 of 2003 in the Court of Civil Judge (Senior Division), Malihabad, Lucknow, the ex-parte decree could not be set aside even on the ground of any irregularity in the service of summons. The petitioner could not show any title to the property in dispute. Moreover, the Petitioner was still residing in House No. 561/232A and not in House No.561/234.

8. In the Short Counter Affidavit filed by the Opposite Parties No. 2 to 7, it is the case of the private respondents that Om Prakash Misra the respondent no. 6, and the predecessor in interest of all the other private respondents, had constructed a house adjacent to the property of Malviyas and it was numbered 561/232, New Sindhu Nagar, and he entered into negotiations with Rajendra Malviya for transfer of 3200 ft.^{2} of Khasra Plot No.2188/ 2/3 of land towards the front of house constructed by Om Prakash Misra. Om Prakash Mishra had already been in possession of such part of land and had constructed two rooms, one tin shed covered kitchen, one small bathroom and one small latrine on the said land belonging to the Malviyas. Rajendra Malviya however filed a Suit for Declaration, Demolition and Injunction before the Court of Munsif Lucknow namely R.S. no. 81/1994 against Om Prakash Mishra in respect of such land. During pendency of the said suit the plaintiff, Rajendra Malviya, approached

Om Prakash Mishra for settlement of the matter and obtained permission from the Court to transfer 3200 ft.² of land in favour of Om Prakash Mishra by executing a sale deed in his favour. The Court of X Addl District Judge allowed such Application on 20.05.1995, in MCA No. 81/1994. The Sale deed was executed on 04.11.1995 for 3200 ft.² of land, part of Khasra No. 2188/2/3 in Village Kanausi which was already in occupation of Om Prakash Mishra since 1984 and on which he had raised constructions. There were certain mistakes / inaccuracies in the Sale deed dated 04.11.1995 and a Supplementary Sale deed dated 19.09.1996 was executed by Shri Rajendra Malviya later on. The constructions made on such 3200 ft.² of land were assessed by the Nagar Nigam Lucknow on 10.06.1996 and given New No. 561/232-A. The answering respondents have been depositing House Tax and other taxes as required by the Nagar Nigam with regard to House No. 561/232 and House No. 561/232A.

9. It has been further stated that the petitioner is a distant relative of the private respondents and in the 1980s he had approached the Respondent No.6 for a place to live. Initially he was accommodated with the private respondents in their own House No. 561/232. Later on Om Prakash Mishra had constructed the two-room set on part of Khasra 2188/2/3 belonging to Malviyas and the petitioner was given license to live in the said premises. The petitioner in order to usurp the property of the answering Respondents had filed Regular Suit No. 144 of 1999 claiming to be the owner in possession of House No. 561/234, New Sindhu Nagar, Lucknow and praying for Permanent Injunction to restrain Om Prakash Mishra the defendant from dispossessing the petitioner.

10. A Written Statement was filed by Om Prakash Mishra to the effect that the plaintitff was living as a licensee in the house of Om Prakash Mishra and in paragraph 10 it was categorically mentioned that the petitioner had no title whereas the sons of Om Prakash Mishra had title and had filed the suit for possession against the plaintiff in the court of Civil Judge, Malihabad, Lucknow as a Regular Suit No. 294/2003 which was fixed for hearing on 08.08.2003. A Replication was filed by the plaintiff/ petitioner where in paragraph 5 he had admitted to having knowledge of such Suit for eviction being filed against him and pending in the Court of Civil Judge, Malihabad Lucknow. Later on the petitioner moved an application for withdrawal of Regular Suit No. 144 of 1999, and by an order dated 16.11.2017 the Court of Additional Civil Judge (Senior Division) Lucknow, allowed such application with special cost of Rs.10,000. Om Prakash Mishra had revoked the license of the plaintiff/ petitioner but the petitioner failed to vacate the house and Smt. Shashi Misra widow of Vimal Kishore Mishra along with other sons of late Om Prakash Mishra had filed the Suit for eviction and in the Plaint in Regular Suit No. 294 of 2003 in paragraph 16 a mention was made of Regular Suit No. 144 of 1999 being filed by the petitioner against them.

11. In Regular Suit No. 294 of 2003 the Trial Court passed an order on 28.07.2003 for registration of the suit and fixed the date of 24.09.2003 for filing of written statement and the date of 01.10.2003 for framing of issues. Summons were issued. On 01.10.2003 the plaintiffs were directed to take steps both ways within seven days. The Process Server had tried to serve summons upon the petitioner on 19.10.2003. He was not available in the

house. His wife read the summons and returned the same to the Process Server saying that she cannot accept it as her husband was not in the house. She refused to let the Process Server affix the summons on the main door of the house. The Process Server recorded these developments in the presence of two witnesses of the locality SarvaShri Shiv Shankar Shukla and Radheshyam Shukla. Thus summons were duly served under Order V Rule 15 CPC. A Copy of the report of the Process Server is annexed as C.A. 11 to the Short Counter Affidavit.

12. Even Notice by Registered Post was offered by the Postman to the family member of the petitioner who refused to take the envelope and the Postman returned the same with the endorsement "*Lene Se Inkar kiya Preshak Ko wapas ho*". A copy of the endorsement on the envelope written by the Postman is annexed as annexed C.A. 12 to the Short Counter Affidavit.

13. On 18.12.2003 the plaintiffs filed application under Order V Rule 20 C.P.C. numbered as paper No.C-19. The Court allowed the said application and directed steps to be taken for publication within seven days. It is the case of the private respondents that there was no option with the plaintiffs to select a newspaper. The office of the concerned court gets the summons published in a newspaper in a routine manner at the cost of the plaintiffs. Cost was deposited by the plaintiffs and the summons were accordingly published in the daily newspaper *"Aaj ki report"* published from Lucknow on 11.01.2004. It is a newspaper circulating in the locality of the petitioner.

By an order dated 17.02.2004 in Regular Suit No. 294 of 2003, the Trial Court treated the summons to be duly served upon the defendant through publication under Order V Rule 20 CPC, and directed the matter to proceed ex parte.

14. Thereafter the matter was heard and evidence taken ex parte, and decreed on 22.05.2006, directing the petitioner to vacate the property in dispute within two months and to hand over possession to the plaintiffs and to pay cost / damages of Rs.32,000/- for illegal occupation thereof along with interest at the rate of 8% till actual handing over of possession.

15. Being aggrieved by the ex-parte judgement and order dated 22.05.2006, the petitioner filed an application under Order IX Rule 13 C.P.C. on 26.07.2006 by saying that the summons were not served upon him. The answering respondents filed their objections on 04.11.2006 wherein mention was made of paragraph 10 of the Written Statement filed in Regular Suit No. 144 of 1999 and paragraph 5 of the Replication where the petitioner had admitted that he had knowledge of Regular Suit No. 294 of 2003 having been filed and being fixed for hearing on 08.08.2003 in the court of Civil Judge (Senior Division) Lucknow. The objections of the private respondents also relied upon the report of the Process Server paper No. D - 17 /1 and publication of summons in the newspaper on 11 January 2004.

16. It has been submitted that the petitioner had made manipulation in the record of Regular Suit No. 144 of 1999 pertaining to the Court of Civil Judge (Havali) Lucknow by interpolating the word "not" in paragraph 5 of the Replication and he applied for certified copy of the Replication on 10.10.2007 and filed the certified copy of the interpolated

Replication in the Court of Trial judge through covering application dated 24.10.2007. However, even before such interpolation could be made the private respondents had already obtained a certified copy of the Replication on 13.07.2006. The private respondents filed their Objections on 29.10.2007 specifically mentioning manipulation made by the petitioner in the Replication.

17. The Court of Civil Judge (Senior Division) Malihabad, Lucknow rejected the application under Order IX Rule 13 CPC on 27.05.2009, by observing that the petitioner had knowledge of the pendency of Regular Suit No. 294 of 2003, through Written Statement filed by the answering respondents in Regular Suit No. 144 of 1999 as was admitted by the petitioner in the Replication filed in Regular Suit No. 144 of 1999. The Trial Court also categorically recorded at internal page 3 of the order that the counsel for the petitioner had made submissions that in paragraph 5 of the Replication the word "not" had been mentioned so as to buttress the point that he did not have knowledge of the pendency of Regular Suit No. 294 of 2003, but the Trial Court rejected such argument by saying that the petitioner had full knowledge about the pendency of Regular Suit No. 294 of 2003, but he chose wilfully not to participate in the proceedings which indicated gross negligence on his part.

18. In the Rejoinder Affidavit filed by the petitioner is is stated that he is the owner of House No.561/234 New Sindhu Nagar since 1981 which is built upon Gram Sabha land Khasra No.2193/3(sa) and not upon Khasra No.2188/2/3 Village Kanausi. The house was assessed for the first time on 21.08.1986 and he has been paying House Tax ever since. The respondents had sent notice of Regular Suit No.294 of 2003 at the wrong address mentioning the same as House No.561/232 -A. In fact House No.561/232 and House No.561/232 - A are both one and the same where the private respondents reside and therefore they were able to manage the report of the Process Server and the Postman. Since incorrect address of his house was shown it cannot be said that the petitioner was ever served in accordance with Order V CPC. Also, the publication in "Aaj Ki Report' which is not a widely circulated newspaper in the area where the petitioner is residing did not comply with the provisions of Order V Rule 20 CPC.

19. It has also been stated that Rajendra Malviya had filed Suit for Declaration, Demarcation and Injunction against Daya Shankar Agnihotri and Om Prakash Mishra in respect of 3200 Sqft. of land of Khasra No.2188/2/3 Village Kanausi in collusion with the defendants, and the Regular Suit No.49 of 1994 has been dismissed by the Civil Judge (Junior Division), South, Lucknow on 06.02.2009 as Rajendra Malviya failed to prove his ownership over the land in dispute. In case Rajendra Malviya had no ownership over the land in dispute, then subsequent purchaser that is the private Respondent Nos.2 to 7 also have no right. The house of the petitioner exists over Gram Sabha Land No.2193/3-(sa) and the private respondents are trying to dispossess the petitioner in the garb of sale deed of land Khasra No.2188/2/3.

20. It has also been mentioned in Paragraph-10 of the Rejoinder that when the private respondents had filed Caveat Application to oppose the present petition they had shown House No. 561/234 New Sindhu Nagar, as the address of the

petitioner which makes it evident that the private respondents know the correct address of the petitioner and had deliberately mentioned incorrect address in Regular Suit No.294 of 2003 so that notice could not be served upon the petitioner and the petitioner was unable to oppose the said suit which was decreed ex parte.

21. In the Supplementary Counter Affidavit filed by the private respondents it has been mentioned that the petitioner has failed to file any copy of any Sale Deed or Title Deed to indicate the ownership of House No.561/234. In the Khatauni of 1383-1388 Fasli of Khasra No.2193/3-(sa) there is no mention of the petitioners' name as the land belongs to the Gram Sabha/Nagar Nigam. Khasra No.2193/3 -(sa) has no concern with the dispute as the house in dispute is situated on Khasra No.2188/2/3. The petitioner had fraudulently shown an incorrect House Number in the self assessment of House tax and this fact has been found in the enquiry made by the Nagar Nigam Lucknow on the complaint made by the private respondents. It has come out in the proceedings initiated by Nagar Nigam Lucknow that there is no House No.561/234. In fact it is House No. 561/232 where the private respondents reside and House No.561/232-A, where the petitioner resides. House No.561/232 has been given a new number later on by the Nagar Nigam as House No.561/389, which is recorded in the name of sons of Om Prakash Mishra. The petitioner is still residing in House No. 561/232-A, belonging to the private respondents.

22. In the Supplementary Rejoinder Affidavit filed by the petitioner on 27.01.2020, the facts as mentioned in the Rejoinder Affidavit earlier have been reitereated and it has been stated that the house of the petitioner is situated on Gram Sabha Land 2193/3-(sa) in Village Kanausi and was assessed in the year 1986 while the so-called Sale Deed of land purchased from Malviya brothers by the private respondents is of the year 1995 for part of Plot No. 2188/2/3 at Kanausi . It is clear from the same that the property purchased by the Respondents is some other property and has no concern with the house of the petitioner which is numbered as 561/234. True copies of House Tax bills of various years of House No. 561/234 in the name of Subhash Chandra Chaturvedi have been filed as Annexures to the Supplementary Rejoinder Affidavit.

23. The parties have filed second supplementary counter affidvait and second supplementary rejoinder affidavit, but this Court finds it unnecessary to refer to the same as they merely reiterate whatever has been said in their pleadings earlier.

24. It has been argued by the learned Senior Counsel appearing for the petitioner that the notice that was published in newspaper "Aaj ki Report" cannot be said to be a proper notice as it relates to date of filing objections on the application for Interim Injunction in Regular Suit No. 294 of 2003 as 10.02.2004, and date of disposal of such objections as 17.02.2004, and only mentioned that in case of failure to appear and file Objections, the application for Interim Injunction shall be heard and decided ex parte.

25. It has been argued by Sri Mohammed Arif Khan that the newspaper Aaj ki Report is an evening newspaper which is not known to be circulated in the locality where the disputed house is situated, hence it cannot be said that due compliance had been made of Order V Rule 20. He has

referred to C.A. 11 which is the Process Server's Report which states that he had gone to the House No. 561/232-A, New Sindhu Nagar, where he found Usha Chaturvedi wife of the defendant/petitioner and tried to serve a copy of the application for stay upon her on 19.10.2003, but after reading the same it was returned by her saying that her husband was not in the house and when the Process Server tried to affix it she did not allow him to do so and such refusal was in the presence of two witnesses.

26. The Learned counsel for the petitioner has also placed reliance upon a Coordinate Bench decision in ***Lawyers Cooperative Housing Society Limited Agra Vs. Shri Krishna Grah Nirman Samiti Limited and others reported in 2002 (2) Allahabad Rent Cases 415***; where the Coordinate Bench considered the provisions of Order V Rule 20 and Order IX Rule 13 and the Second Proviso added by way of amendment in 1976. The Court considered the fact that the Second Proviso to Rule 13 of Order IX C.P.C. was added by U.P. Amendment in C.P.C. by a notification dated 24.07.1976, prior to the C.P.C. Amendment Act of 1976, and it provided that "no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiffs claim." This Court observed that when the Second Proviso was added by the Allahabad notification prior to the C.P.C. Amendment Act 1976 and the Second Proviso added by the C.P.C. Amendment Act 1976 are compared, it would appear that the words "or but for his wilful conduct would have known the date of hearing", occurring in the Allahabad Amendment were purposely omitted by the C.P.C. Amendment Act of 1976. In the Proviso added by the C.P.C. Amendment Act of 1976, the satisfaction of the Court should be that the defendant had the notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. The said words added in the newly added Second Proviso clearly indicates that the Court should satisfy itself that the defendant had notice of the date of hearing and sufficient time to appear and answer the plaintiff's claim. The Second Proviso added by the Allahabad Amendment prior to the 1976 Amendment Act only required satisfaction of the Court about the knowledge of the defendant regarding the pendency of the Suit and then the defendant had to satisfy that but for his wilful conduct, he could not have known the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim. It appeared that the absolute right conferred upon the defendant by the main Rule to have the ex-parte decree set aside in a case where the summons were not duly served, in the State of U.P., had been curtailed. According to the law prevailing in this State this right ceased to be available to the defendant where the defendant knew or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim. Accordingly, this Court in the case of ***Raja Ram Gupta Vs. Firm Jaiswal Iron and Steel Works and Others, 1980 AWC 110***; had observed that in a case where summons have not been duly served upon the defendant and the exact date of hearing is not known to the defendant but he comes to know of the proceeding well in time and he can easily find out the date and put in appearance and answer the plaintiff's claim, but without any justification fails to

take steps to find out the date of hearing, the only conclusion which can be drawn would be that but for his wilful conduct he would have known the date of hearing in sufficient time so as to enable him to appear and answer the plaintiff's claim. However, with the amendment in the C.P.C. notified by Act No. 104 of 1976 the legislative intent is clear.

27. The plaintiff had argued that the objection of the Applicant in a proceeding before the Assistant Housing Commissioner simply indicated that Suit No. 103 of 1983 between the parties in respect of the land in Suit was pending in the Court of Civil Judge Agra. There was nothing in the other side's objection to indicate about the date of hearing of the Suit. This showed that by receiving the above objection the defendant had "no notice of the date of hearing of the Suit". Moreover irregularity in the service of summons is a condition precedent for the applicability of the above Second Proviso to Order IX Rule 13. It meant that for the applicability of the Proviso it must be proved that there was service of summons, but the summons were not duly served. The Coordinate Bench observed that Irregularity is something different from illegality. Irregularity contemplates defective procedure and non-compliance of the prescribed formalities which cannot be of substantial nature. Illegality on the other hand connotes contravention of the Statute which may in some cases result in the action becoming void. Illegality contemplates an action forbidden by law while irregularity is mere defect in the procedure. If this basic difference in the two expressions is kept in mind the expression "irregularity" in the service of summons occurring in the Proviso added to Order IX Rule 13 would mean the defect in following the procedure prescribed for service of summons, such as, non-fixation of the copy of the summons at the outer door of the defendants' house in case of his refusing to take the summons. However, if the Court finds that the defendant was not served at all then it would be another case altogether. The Court observed that the newspaper "Aaj ka Hungama" in which the summons were allegedly published was not a daily newspaper, and had no circulation in the locality in which the defendant was last known to have actually and voluntarily resided or carried on business or personally worked for gain. As such, for taking the benefit of Rule 20 Subrule 1-A Order V C.P.C., the plaintiff had to prove that service by advertisement was affected in a daily newspaper. If the newspaper was not "daily newspaper" it was against the provisions of the above Rule and amounted to illegality in the service of summons. Therefore service by advertisement in the newspaper was not in accordance with the law and therefore illegal.

28. The Coordinate Bench of this Court had held that there was no service of summons on the defendant at all and it was not the case of irregularity in service of summons. Consequently, the Second Proviso added by the C.P.C. Amendment Act 1976 was not applicable to the case. The trial Court having found that there was no service at all was justified in allowing the application under Order IX Rule 13 C.P.C. and setting aside the ex parte decree.

29. The learned counsel for the petitioner has also placed reliance upon ***Smt. Vinod Rani Lamba and Another Vs. Baburam Yadav*** by a Coordinate Bench of this Court reported in ***2017 (135) RD 427***; where in almost in similar circumstances, an application under Order IX Rule 13

C.P.C. was rejected by the Trial Court. The petitioner filed Appeal which was also rejected by the Additional District Judge and then writ petition was filed in this Court challenging the two orders. The Court observed that it was admitted that there was no personal service of summons and service of summons had been effected through publication, which is a substituted service. Within the meaning of Explanation to Article 123 of the Limitation Act, it is not a due service. On the basis of publication, the presumption regarding service was made.

30. The learned counsel for the petitioner has also placed reliance upon a Coordinate Bench decision is ***Smt. Sudesh and Others Vs. Additional District Judge and Others, 2006 (1) ARC 387***, where this Court observed that merely because in some other case against the husband of one of the petitioners, some mention of the pendency of the present Suit was made in a written statement, the same would not amount to sufficient service of summons on the petitioners and that the Trial Court and the Appellate Court had taken a very technical view of the matter. The endeavour of the Court of law should be to decide the case on merits after giving sufficient opportunity to the parties and hearing them.

31. The Counsel for the petitioner has also placed reliance upon ***G.P. Srivastava Vs. R K Raizada and others reported in 2000 (3) SCC 54***, where the Supreme Court observed that an ex-parte decree passed against the defendant can be set aside upon satisfaction of the Court that the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the Suit was called on for hearing. In a case where the defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not malafide or intentional. It was observed that for the absence of a party in the case the other side can be compensated by adequate costs and on such other terms and conditions as were deemed proper by the Trial Court and the lis decided on merit.

32. Learned counsel for the petitioner has also placed reliance upon ***Ashraf Vs. Kailash Prasad and Another, 2016 (34) LCD 3096***, where a Coordinate Bench of this Court observed that the Trial Court had erred in law in drawing a presumption of service merely on the basis of address mentioned in the carbon copy of the notice. The plaintiff had stated that notice upon the defendant had being served by registered post, a copy whereof was placed on record. Such copy showed only the name of the addressee and there was no address mentioned in the said receipt. Service of notice was denied by the defendant but the Court below had drawn a presumption on the basis that the letter was sent by Registered Post with the correct address mentioned on the Registered letter by the plaintiff. This Court observed that no doubt once registered letter has been sent which mentioned the correct address of the addressee, the Court will be entitled to draw a presumption regarding due service of that notice vide Illustration (E) and (F) of Section 114 of the Indian Evidence Act 1872; but the presumption of service of a letter sent by Registered Post can be drawn only when it is shown that the Registered letter contains a complete and correct address of the addressee, and unless this much is shown the question of presumption even in respect to a letter sent by Registered Post would not arise. Once the addressee denies the receipt/service of

Registered letter the plaintiff has the onus to show that it was sent mentioning the correct and complete address of the addressee and actually served upon or received by the addressee or he refused to receive the same though sought to be served upon him by the postal agent. The Court observed that if a notice has been sent by the landlord by Registered Post and it is received back with an endorsement made by an official of the Post Office namely Postman that it was refused by the addressee, presumption of service upon the addressee shall be drawn unless the tenant proves that the letter was never offered to him by the Postman and endorsement made thereon is not correct. The tenant's mere denial would not be sufficient in such a case and he will have to prove his case by adducing relevant evidence. Such denial can be done by making a statement on affidavit and in such a case onus would then shift on the landlord to prove that refusal was by the tenant which he can show by summoning the Postman and adducing his oral evidence. However the Court observed that sometimes from the conduct of the tenant or other circumstances his denial even if on oath, can justifiably be disproved by the Court without having the Postman examined as was observed by the Supreme Court in the case of Anil Kumar Vs. Nanak Chandra Verma AIR 1990 Supreme Court 1215.

33. A Bench of three judges of the Supreme Court in ***Puwada Venkateswara Rao Vs. Chidamna Venkata Ramana AIR 1976 Supreme Court 869***, had held that the presumption stood rebutted on its denial. In this case the petitioner had denied the service of summons or knowledge of the Suit, thus on denial, the presumption stood rebutted and burden shifted upon the plaintiff/ respondent to prove that the summons were served upon them but the plaintiff/ respondent could not lead any evidence in this respect. This judgement has been followed subsequently in a Rama Rao Vs. Raghunath Patnaik 2007 (68) ALR 464, State of West Bengal Vs. EITA India Ltd AIR 2003 Supreme Court 4126, VS Krishnan and others Vs. Messers Westfort High-Tech Hospital Limited 2008 (3) SCC 363, and M.S. Madhusudhanan and Another Vs. Kerala Kaumudi Private Limited and Others 2004 (9) SCC 204.

34. The learned counsel for the petitioner has also relied upon judgement rendered by the Supreme Court in ***Auto Cars Vs. Trimurti Cargo Movers (Private) Limited reported in 2018 (140) RD 411***; where the Supreme Court considered Section 27 of the CPC which deals with issuance of summons to defendants. It requires summons to be issued to the defendants in the manner prescribed. It referred to the Appendix-B Process No.1 issued by the Trial Court and the Supreme Court observed that:-

"there is a specific column in the summons where "day, date, year and time" for the defendant"s appearance is required to be mentioned. The legislature while prescribing the format for summons in the CPC wished to enable the defendant to answer the suit filed against him/her on specific information being given to him. Under Order V Rule 20 (3) when service is affected by way of publication by the orders of the Court, the Court has to fix "time for appearance of the defendant", as the case may require. In our opinion this does not dispense with the requirement of mentioning the actual day, date, year and time for the defendant's appearance in the court, because it is prescribed in format.....being a statutory requirement

prescribed in law (Code) it cannot be said to be an empty formality. It is essentially meant for the benefit of the defendant because it enables the defendant to know the exact date, time and place to appear in the particular court, in answer to the suit filed by the plaintiff against him. If the specific day, date, year and time for the defendant's appearance in the court concerned is not mentioned in it the summons, though validly served on the defendant by any mode of service prescribed under Order V, it will not be possible for him/her to attend the court for want of any fixed date given for his/her appearance".

The Court observed in Paragraph 27 -

"27. The object behind sending the summons is essentially threefold - first, it is to apprise the defendant about the filing of case by the plaintiff against him; second, to serve the defendant with the copy of the plaint filed against him; and third, to inform the defendant about the actual day, date, year, time and the particular Court so that he is able to appear in the court on the date fixed for his/her appearance in the said case and answer the suit either personally or through his lawyer".

35. The Court observed that the service of summons on the defendant without mentioning there in a specific day, date, year and time cannot be held as "summons duly served" on the defendants within the meaning of Order IX Rule 13 of the Code. In other words, such summons and the service affected pursuant thereto cannot be held to be in conformity with Section 27 read with the statutory format prescribed in Appendix-B (Process 1 and 1A) and Order V, Rule 20 (3) of the Code.

The Supreme Court further observed in paragraph 34 and 35 :-

"34. It is for this reason we are of the considered opinion that the appellant (Defendant No.1) was able to make out a ground contemplated under Order IX Rule 13 of the Code for setting aside the ex parte decree.

35. Once the appellant (Defendant No.1) is able to show that "Summons were not duly served on him "as prescribed under Section 27 read with Appendix-B (Process 1A) and Order V, Rule 20 (3) of the Code then it is one of the grounds for setting aside the ex parte decree under Order IX Rule 13 of the Code. In our view, the appellant (Defendant No.1) is able to make out the ground."

36. On the basis of aforesaid judgements rendered by this Court and Supreme Court, the learned counsel for the petitioner has argued that as is evident from the plaint itself, the House number of the petitioner had been wrongly mentioned. Since the House number had been wrongly mentioned the Process Server could not have approached the correct House for delivery of summons. The Process Server in his report has mentioned the name of the wife of the petitioner and also of two witnesses i.e. the neighbours of the petitioner belonging to the same locality but but such report has been managed by the respondents through extraneous means. It has also been argued that the alleged registered letter tried to be served upon the petitioner by the Postman cannot be said to be duly served even though repeated endorsements have been made thereon by the Postman that he had gone to the House of the defendant but he could not meet the defendant who had gone out on duty and that on one occasion there was a clear refusal to accept notice/summon, have also been managed. Since incorrect address was

shown on the Registered letter it cannot be said that the petitioner was duly served.

37. It has also been argued by Shri Mohammed Arif Khan that the publication in a newspaper which is published in the evening and which is not widely circulated in the locality in which he resides does not conform to Order V Rule 20 of the C.P.C. Moreover, such notice was published only indicating the date time and place for appearance of the defendant for filing objections against the application for temporary injunction. Such publication cannot be said to have given definite information to the defendant to enable him to appear and plead his case before the court concerned. There was not only an Irregularity in service of notice but also an illegality which cannot be condoned and the Learned Trial Court as well as the appellate court failed to appreciate the difference between irregularity and illegality when they relied upon the Second Proviso to Order IX Rule 13 of the Code (as amended in the State of UP.).

38. It has also been argued by the learned counsel for the petitioner that the averments made in the counter affidavit by the respondents regarding the correct House number and whether it was 561/234 or 561/232 - A , could only be decided after the application for Condonation of Delay in filing the Recall application was allowed and the matter was heard on merits by giving proper opportunity of hearing to the defendant by the Trial Court. The Trial Court prejudged the whole issue when it observed that the applicant had no right to be heard as he could not produce any documentary evidence regarding the title of the House in dispute.

39. It has also been argued on the basis of paragraph 5 of the Replication that it is evident from the language used that the word "not' was missed out and it was a typographical error which was corrected by hand and the sentence would not be complete or make sense at all without the addition of the word "not" and bare reading of Paragraph 5 of the replication would show that there was a denial of any notice having been received with regard to the pendency of Regular Suit No. 294 of 2013.

40. In response to the arguments made by Sri Mohd. Arif Khan, learned Senior Advocate, on merits of this case and on the law as stated hereinabove, the learned senior counsel for the respondent Sri Sudeep Seth has pointed out the limited jurisdiction that this Court exercises under Article 227 of the Constitution. He has referred to the Coordinate Bench decision in the case of ***Smt. Sahzavin Vs. Additional District Judge Allahabad, 2013 SCC online Allahabad 13500***. This Court observed in a similar matter that when both the Courts below have recorded concurrent findings of fact, unless the findings are shown to be perverse or contrary to record resulting in grave injustice to the petitioner, the High Court exercising a restricted and narrow jurisdiction under Article 226/227 would not be justified in interfering with the same. Under Article 227 of the Constitution the scope of judicial review is limited only to remove manifest and patent errors of law and jurisdiction. The Court does not act as an Appellate Authority. It is the duty of the High Court to keep the inferior Courts and Tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner, but this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the

Court or Tribunal. It is restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice where grave injustice would be done unless the High Court interferes.

41. The Supreme Court in the case of **D.N. Banerjee Vs. PR Mukherjee, AIR 1953 SC 58**; and in the case of ***Waryam Singh Vs. Amarnath AIR 1954 SC 215;*** and several other decisions rendered thereafter, were referred to by the Coordinate Bench to say that it is well settled that the power under Article 227 is one of judicial superintendence which cannot be used to upset conclusions of facts, however erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could have ever reached them. The Supreme Court in the case of Ajaib versus Sirhind Cooperative Marketing cum Processing Service Society Limited, observed that there is no justification for the High Court to substitute its view for the opinion of the Authorities /Courts below as the same is not permissible in proceedings under Article 226/227 of the Constitution. This Court cannot interfere with the findings of fact recorded by Courts below unless there is no evidence to support the findings or the findings are totally perverse. As long as they are based upon some material which is relevant for the purpose, no interference is called for. Even on the ground that there is yet another view which can reasonably and possibly be taken, the High Court cannot interfere. In Union of India versus Rajendra Prabhu, the Supreme Court held that the High Court in exercise of its extraordinary powers under Article 227 of the Constitution cannot reappreciate the evidence nor it can substitute its subjective opinion in place of the findings of the authorities below.

42. In ***Shalini Shyam Shetty Vs. Rajendra Shankar Patil 2010 (8) SCC 329***, the Supreme Court said that the power of interference under Article 227 is to be kept to the minimum to ensure that the wheels of justice do not come to a halt and the fountain of justice remains pure and unpolluted. In order to maintain public confidence in the functioning of the Tribunal/ Courts subordinate to the High Court, it should be exercised only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority.

43. The learned counsel for the respondent has also placed reliance upon ***Garment Craft Vs. Prakash Chand Goel 2022 SCC Online Supreme Court 29*** where the Supreme Court observed in paragraph 18 that the High Court while exercising supervisory jurisdiction does not act as a Court of First Appeal to re-appreciate, reweigh all the evidence or facts upon which the determination and the challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusions, for that of the inferior Court or Tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set aside grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The relief under Article 227 should be given sparingly and only to ensure that there is no miscarriage of justice.

44. The learned counsel for the Respondents has also placed reliance upon judgement of the Supreme Court rendered in ***Gurcharan Singh Vs. Sujit Singh 2014 (2) SCC 140***, where it observed that if both

the Courts below have placed reliance upon cogent facts, there is no reason to set aside such concurrent findings.

45. Shri Sudeep Seth Learned Senior Advocate has emphasised that this Court while sitting in limited jurisdiction under Article 227 of the Constitution cannot overturn findings of fact recorded by two learned Court's below unless they are found to be perverse. He has also pointed out that the petitioner has alleged that the Process Server's report and that of the Postman were obtained by the private respondents through collusion but has not submitted any evidence along with his application under Order IX Rule 13 CPC to say that such reports were false and fabricated. Once notice is sent on the correct address of the defendant and it is received back with the endorsement of either "not met" or "refused to receive" it shall be taken that notice has been duly served upon the defendant. The defendant has to prove that such notice was actually not served by getting the Postman or the Process Server examined in the witness box which was not done by the petitioner. No request for cross-examination of the Postman or of the Process Server was made to the Trial Court. It has also been argued that the petitioner has resorted to repeated misrepresentation and has interpolated the Court's record the reply submitted by him in his Replication and this Court sitting in Extraordinary jurisdiction must be strict in dealing with such unscrupulous litigants.

46. Learned counsel for the respondents has placed reliance upon ***Sunil Poddar Vs. Union Bank of India 2008 (2) SCC 326***, where the Supreme Court was considering the Appeal arising in a case related to Recovery of Debts Due to Banks and Financial Institutions Act 1993. It observed that there are limited grounds to set aside an ex-parte decree. It observed that non-service of summons cannot be a ground where the defendant had notice of the date of hearing and sufficient time to appear and answer the claim. The learned counsel for the Respondents has placed reliance upon paragraph 16 to 23 where the Supreme Court had observed that once the bank had got the summons published in the newspaper, whether the appellants were subscribers of the said newspaper or had read it became irrelevant. "*It is immaterial whether the appellants were subscribers of the said newspaper and whether they were reading it. Once a summons is published in the newspaper having wide circulation in the locality, it does not lie in the mouth of the person sought to be served that he was not aware of such publication as he was not reading the said newspaper.*" The Supreme Court considered Order IX Rule 13 as it was originally enacted in the C.P.C. Of 1908, and observed that under original Rule 13 of Order IX of the Code, when the decree had been passed ex parte against the defendant who satisfied the Court that summon was not duly served upon him, the Court was bound to set aside the decree. It was immaterial whether the defendant had knowledge about the pendency of the Suit or whether he was aware as to the date of hearing and he failed to appear before the Court. The Law Commission considered that aspect and the expression (enacted in the Code of 1908) and observed that under original Rule 13 of Order IX of the Code, when the decree had been passed ex parte against the defendant who satisfied the Court that summon was not duly served upon him, the Court was bound to set aside the decree. It was immaterial whether the defendant had knowledge about the pendency of the suit or whether he was aware as to the date of hearing and yet did

not appear before the Court. The Law commission considered that aspect and the expression "Duly served" in its 27th Report and observed that

"...under Order IX Rule 13 if the Court is satisfied either that the summons had not been served, or that the defendant was prevented by sufficient cause from appearing et cetera, the ex-parte decree should be set aside. The two branches of the Rule are distinctive and the defendant, whatever his position may be in respect of one branch, is entitled to the benefit of the other branch if he satisfies the Court that he has made good his contention in respect of the other branch. Now cases may arise where there has been a technical breach of the requirements of due service, though the defendant was aware of the institution of the Suit. It may well be, that the defendant had knowledge of the Suit in due time before the date fixed for hearing, and yet apparently he would succeed if there is a technical flaw. - - - at present the requirements of the Rules regarding service must be strictly complied with, and actual knowledge (of the defendant) is immaterial. There may not be many decisions which hold that even where there has not been due service, yet the decree can be maintained, if the defendant knew the date of hearing) - - - The matter was considered exhaustively by the Civil Justice Committee, which recommended a provision that a decree should not be set aside for mere irregularity. Local Amendments made by several High Courts (including Allahabad, Kerala, Madhya Pradesh, Madras and Orissa) have made a provision on the subject, though there are slight variations in the language adopted by each. Such a provision appears to be useful one, and has been adopted on the lines of the Madras amendment."

47. The Supreme Court in Sunil Poddar (supra) also referred to the Law Commissions 54th report which reiterated that the broad object in Amendment of Order IX Rule 13 is "*to ensure that a decree shall not be set aside merely on the ground of irregularity in service, if the defendant had knowledge of the decree...".*

48. The Supreme Court observed in ***Sunil Poddar (Supra)*** that accepting the recommendations of the Law commission Order IX Rule 13 was amended with effect from 01.02.1977, and the Proviso added now says that no Court shall set aside the decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. The Supreme Court observed in paragraph 23 thus-

"it is therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintive. Once these two conditions are satisfied, an ex-parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward the ground of nonservice of summons for setting aside ex parte decree passed against him by

invoking Rule 13 of Order IX of the Code".
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49. The learned Senior Counsel for the Respondents has placed reliance upon ***Parimal versus Veena @ Bharti 2011 (3) SCC 545***; where the Supreme Court has referred to the Second Proviso added by way of amendment in Order IX Rule 13. It observed in paragraph 16 of its judgment that in order to determine the application under Order IX Rule 13 C.P.C. the test that has to be applied is "

50. It considered the question of presumption of service by Registered Post and burden of proof and observed in paragraph 17 of Parimal Vs. Veena @ Bharti (Supra) that:-

"17. This Court after considering a large number of its earlier judgements in Greater Mohali Area Development Authority versus Manju Jain 2010 (9) SCC page 157; held that in view of the provisions of Section 114 illustration (F) of the Evidence Act 1872, and Section 27 of the General Clauses Act 1897, there is a presumption that the addressee has received the letter sent by Registered Post. However, the presumption is rebuttable on a consideration of evidence of impeccable character. A similar view has been reiterated by this Court in Sunil Kumar Sambhu Dayal Gupta (Dr) Vs. State of Maharashtra 2010 (13) SCC 657."

It observed in paragraph 18 further:-

"In Gujarat Electricity Board Vs. Atmaram Sungamal Poshani 1989 (2) SCC 602; this Court has held as under:

"8. There is presumption of service of a letter sent under Registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the Registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party, challenging the factum of service."

The provisions of section 101 of the Evidence Act provide that the burden of proof of the fact rests on the party who substantially asserts it, and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgement in its favour. Section 103 provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in issue."

51. The Supreme Court further observed that *"...in case the matter does not fall within the four corners of Order IX Rule 13 C.P.C., The Court has no jurisdiction to set aside an ex parte decree. The manner in which the language of the Second Proviso to Order IX Rule 13 C.P.C. has been couched by the legislature makes it obligatory on the Appellate Court not to interfere with an ex-parte decree unless it meets the statutory requirement."*

52. The learned counsel for the Respondents has also placed reliance upon ***State of Madhya Pradesh Vs. Heera Lal***

and Others 1996 (7) SCC 523, where the Supreme Court observed that if the notice is returned with the postal remarks "Not available in the house", "house locked" and "shop closed" it must be deemed that the notices have been served on the respondents.

53. The learned counsel for the respondents has placed reliance upon ***Rahul S Shah Vs. Jinendra Kumar Gandhi and others 2021 (6) SCC 418***, where the Supreme Court observed that the remedies provided for preventing injustice are actually being misused to cause injustice, by preventing a timely implementation of the orders and execution of decrees. It has referred to several of its judgements where it recommended appropriate amendments in the Code of Civil Procedure to ensure that process of adjudication of a Suit be continuous from the stage of initiation to the stage of securing relief after execution proceedings. The Supreme Court in the aforementioned decision gave several directions in Para 42 and observed that the High Courts should amend and update all the Rules relating to execution of decrees made under the exercise of its power under Article 227, of the Constitution of India and Section 122 C.P.C. within one year of the date of its order, with an endeavour to expedite the process of execution with the use of information technology tools and until such time that the Rules are brought in existence the directions given by it in Para 42 would remain enforceable.

55. Having heard the learned counsel for the parties this court has gone through the ex- parte decree dated 22.05.2006 and the order passed on the application for Recall under Order IX Rule 13 dated 27.05.2009, and also the order dated 27.11.2019 passed in Appeal. All these orders have been challenged in this petition under Article 227 of the Constitution; a further prayer being made for directing the Trial Court not to proceed further in Execution Case No.15 of 2007 (Smt. Shashi Mishra versus Subhash Chandra), and for a direction to the Trial Court, the Civil Judge (Senior Division), Malihabad Lucknow to provide opportunity of filing written statement in Regular Suit No.294 of 2003 on deposit of cost as this Court finds appropriate by way of compensation to the plaintiff.

56. This Court finds it inappropriate to discuss the merits of The ex-parte decree as the petitioner has not yet challenged the same in First Appeal and any observations on the merits of the ex parte Decree by this court may prejudice the case of the petitioner in his challenge to the same as and when he files the Appeal. This Court shall only briefly discuss the facts as mentioned in the ex-parte decree in so far as they relate to service of notice of Regular Suit No.294 of 2003 upon the defendant.

57. In the decree dated 22.05.2006 the facts have been firstly narrated as mentioned in Short Counter Affidavit by the private respondents, thereafter the judgment refers to the defendant having been a distant relative of the Plaintiff No. 6 being given a license to live in House No.561/232-A in 1985. When the plaintiffs came to know of a suit being filed for Permanent Injunction by the defendant against them the license was revoked, the defendant had orally assured them that he had no intention to forcibly occupy the house in dispute but intended to vacate it in a matter of three years as by then he would certainly make arrangements for living

somewhere else. However, even after a lapse of three years the defendant had not vacated the premises and the plaintiffs had orally requested him to vacate the House in question or else to pay Rs.2000 per month as damages. Since there was a temporary injunction in favour of the defendant in the Regular Suit No.144/99 filed by him against the plaintiffs he had no intention to vacate the premises in question and therefore the plaintiffs were compelled to file the Suit for Eviction and for Damages.

58. The Learned Trial Court at internal page 3 of its judgement refers to summons having been issued to the defendant through Registered Post which had returned with the endorsement of the defendant having refused to receive the same. Ultimately substituted service by way of publication was done, however the defendant did not appear nor filed written statement hence, on 17.02.2004 the court had decided to proceed ex parte. The Trial Court thereafter referred to documentary evidence filed along with the plaint including the permission granted by the Additional District Judge dated 20.05.1995 to the erstwhile owner to sell off a portion of Khasra No. 2188/2/3 admeasuring 3200 Sqft. and to the Plaintiff No.6 to raise construction thereon. The Trial Court thereafter referred to Registered Sale Deed dated 04.11.1995 and the Supplementary Sale Deed and extract of relevant Khatauni for the year 1409 to 1414 Fasli for village Kanausi, wherein the plaintiffs name had been recorded as Bhoomidhar with Transferable Rights and the assessment order for House tax for House No. 561/232-A, New Sindhu Nagar, Kanpur Road by Nagar Nigam Lucknow.

59. Having satisfied itself from documentary evidence that the plaintiffs were the owners of House No.561/232-A, as also on the basis of affidavit filed by Om Prakash Misra in support of the plaint, the Trial Court had decreed the suit as aforesaid.

60. In the order dated 27.05.2009 on the Recall application moved by the Petitioner the Learned Trial Court has referred to the contents of the application for Recall supported by affidavit. The application stated that the Applicant petitioner lived in House No.561/234 New Sindhu Nagar, Lucknow and the plaintiffs wished to usurp the house. The Applicant petitioner filed Regular Suit No.144/1994 before the Civil Judge (Junior Division), Havali, Lucknow, for permanent injunction against the plaintiffs. The Plaintiff No.6 was instrumental in getting his daughter-in-law to file Regular Suit No.294 of 2003 for Eviction and Damages fraudulently showing the wrong House Number namely House No.561/232-A, New Sindhu Nagar, as address of the applicant petitioner. No notice was ever served regarding Regular Suit No.294 of 2003 on the applicant petitioner either through Registered Post or through process server of the court as wrong House number was intentionally mentioned as address of the defendant in the said Suit.

61. Also, the newspaper in which publication was made of notice of said suit was not circulated in the locality in which the applicant petitioner lives and therefore he could not derive any knowledge in time to appear and answer the plaintiffs claim. The applicant petitioner came to know of the decree dated 23.05.2006 only on 03.7.2006 when a third person told him about some Suit having been filed in which a decree had been obtained by Sri Om Prakash Mishra and others against him.

62. The private respondents herein filed their objections the Recall Application and the Application for Condonation of Delay in which they stated that both notice through Registered Post and summons through Process Server were duly served. Also publication was made in a newspaper determined by the Trial Court itself. It was also stated that in Regular Suit No.144 of 1994 a written statement was filed in August, 2003 in which mention was made of pendency of Regular Suit No.294 of 2003. Replication was filed by the applicant petitioner in the said Suit No.144 of 1999 which showed that he had knowledge the pendency of Regular Suit No. 294 of 2003.

63. The applicant petitioner denied the objections and the Trial Court there after took into account documentary evidence filed along with application for Recall by the applicant petitioner and the objections filed to it by the private respondents. The Learned Trial Court referred to the Written Statement in Regular Suit No.144/999 filed as Paper number C 15-1, and also the certified copy of the Replication filed therein, Paper No.C 26/2-5; and after comparing the two came to the conclusion that without reading the contents of Paragraph 10 of the Written Statement which mentioned the pendency of Regular Suit No.294/2003, the answer given in the Replication in Paragraph-5 could not have been given. The Learned Trial Court referred to the two conditions mentioned in Order IX Rule 13 CPC wherein it was provided that the applicant must satisfy the Court that the Summons had not been served on the defendant, or that the defendant having been served could not appear to answer the plaintiffs claim for reasons beyond his control. Then it referred to the Proviso added by way of amendment in Order IX Rule 13 which clearly stated that in case the Court is satisfied that the defendant had knowledge of the date of hearing in the Suit and despite such knowledge failed to appear, the ex-parte decree would not be set aside only because there was irregularity in the service of summons. The Trial Court thereafter referred to the applicant petitioner's admission that a Written Statement was filed by the private respondents in Regular Suit No. 144 of 1999 and that it mentioned clearly in Paragraph-10 that the Suit No.294 of 2003 was pending in the court of Civil Judge (Senior Division), Malihabad, Lucknow. The Trial Court referred to Replication and also the fact that although the applicant petitioner may have stated therein that he had no knowledge of the Suit No.294 of 2003 because he had not been served notice; It was of little or no relevance because the very fact that mention had been made about its pendency in the Written Statement meant that he had sufficient knowledge of pendency of Regular Suit No.294 of 2003. The Learned Trial Court thereafter referred to judgement of the Supreme Court in the case of *J. P. Srivastav Vs. R.K. Raizada reported in AIR 2000 Supreme Court 1221* where the Supreme Court had observed that ordinarily a liberal approach should be adopted while considering an application under Order IX Rule 13 but if the Court is convinced that the applicant had wilfully not attended the hearing of the case then such an application cannot be allowed. The Applicant has to prove before the court that his absence was not deliberate or malafide. The Trial Court had relied upon judgement rendered In 1981 AWC (Revenue) 45 Smt. Soora versus Mewalal rendered by the Allahabad High Court, and also 1977 AWC 528; wherein the very same observations had

been made by the High Court that if the applicant had knowledge of pendency of suit and the date of hearing therein and wilfully did not appear in the same, then it should not recall the ex-parte decree. The Trial Court considered the record relating to Regular Suit No.294 of 2003 and the order passed therein on 17.02.2004, where service of notice on the defendant was found sufficient, and the court had directed to proceed ex parte. It therefore came to the conclusion that the applicant petitioner's reliance upon judgement rendered In *Sudesh Versus Additional District Judge and Others reported in 2006 (1) ARC 387, and Lawyers Cooperative Housing Society Versus Krishna Grah Nirman Samiti reported in 2002 (2) ARC 415*, was misconceived. The Trial Court therefore rejected the application in its order dated 27.05.2009.

64. In the Appeal filed against such order the applicant petitioner again reiterated his entire argument regarding wrong address of his house being mentioned in the notice and in the summons and that neither the Process Server nor the postman ever met the wife of the petitioner and there was no refusal to accept notice. The appellant also reiterated his argument regarding newspaper "Aaj ki Report" not being widely circulated in the locality in which he lived.

65. The Appellate Court referred to judgements cited on behalf of the petitioner namely *Smt. Vinod Rani Lamba Vs. Baburam Yadav and Others reported in 2017 (135) RD 427, and Lawyers Cooperative Housing Society Limited Agra Vs. Shri Krishna Grah Nirman Samiti Limited reported in 2002 (2) ARC 415*; that the burden lay upon the plaintiff to prove that summon was duly served upon the defendant, once the defendant denies its service upon him. The petitioner argued that service through registered post or substituted service through publication in newspaper cannot be deemed to be sufficient service as the application filed under Order V Rule 20 CPC by the plaintiff was not duly supported by affidavit. It also noted the argument raised by the counsel for the petitioner that the written statement mentioned the date fixed in Regular Suit No.294 of 2003 as 08.08.2003 whereas the written statement itself was filed only on 29.08.2003 therefore it could not be said that sufficient time was available to the defendant to appear and assist the Court in Regular Suit No.294 of 2003. The petitioner had placed reliance upon judgement rendered in *Sudesh Vs. Additional District Judge and Others (supra)*. The Appellate Court also referred to the records which revealed that the Process Server had submitted a service report on 28.08.2003 referring to summons sent through Court, Document Nos.D-15/12D- 15/4 and also D/17; wherein the Process Server had noted that summon was served upon the wife of the defendant Smt. Usha Chaturvedi who had refused to take the same. Effort was made to affix the same on the house which was also not permitted by Smt. Usha Chaturvedi and local residents Radhe Shyam Shukla and Shiv Shankar Shukla had witnessed the whole incident. The Appellate Court also referred to the Registered Post Envelope available on the record as Paper No.D/18 which noted initially the addressee having not been met and thereafter of the refusal to accept. The Appellate Court also considered the argument regarding wrong address having been shown of the house of the defendant and also the newspaper "Aaj ki Report" having no circulation in the locality.

66. However, the Appellate Court referred to the judgement rendered by the Supreme Court in ***State of Madhya Pradesh Vs. Hira Lal and Others reported in (1996) 7 SCC Page 523***, wherein the Supreme Court had observed that any endorsement by the Postman/Process Server of "not met' and "shop being found closed', should be treated to amounting to sufficient service. The Appellate Court also referred to the argument raised by the appellant petitioner that the word 'not' mentioned in Paragraph-5 of his Replication in Regular Suit No.144/1999, showed that he had no knowledge of pendency of Regular Suit No. 294 of 2003.

67. The Appellate Court referred to the judgement rendered in ***Sunil Poddar Vs. Union Bank of India reported in 2008 (2) SCC 326***, and its para 23 as aforesaid.

68. The Appellate Court also referred to judgement rendered by this Court in ***Sulaiman Vs. IV Additional District Judge, Muzaffarnagar reported in 1998 (2) JCLR 1052***, where it was observed - -

"Order IX Rule 13 in the Second Proviso provides that no court shall set aside the decree passed ex parte merely on the ground that there has been any irregularity in service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim. Therefore, the absence of service of summons would not be a ground to set aside ex parte decree if the Court is satisfied that the defendant had notice of the date of hearing of the case and had sufficient time to appear and answer the plaintiffs claim.."

69. The Appellate Court has framed two issues namely; (i) whether the Appellant/Defendant had notice of date of hearing in Regular Suit No. 294/2003? (ii) whether the appellant defendant had sufficient time available to appear and answer the plaintiff's claim in Regular Suit No. 294/2003?

70. The Appellate Court referred to the Process Server's report and mention of local residents Shivshankar Pandey and Radheshyam being present at the time when he had served a notice on Smt. Usha Chaturvedi, wife of Subhash Chandra Chaturvedi. The lady had read the notice and returned it saying that her husband was not at home and she could not accept it. She had also prevented the Process Server Mohammed Salim from affixing the notice on the door of the house in question. As against this report of Process Server, Smt. Usha Chaturvedi had not filed any affidavit denying its content.

71. Also the Appellate Court referred to the envelopes of Registered letter available on the record which showed endorsement by the Postman of "*not met*' and *"refusal to accep*t'. Again, the publication was also found to have been made in a daily newspaper and substituted service having been found sufficient by the Trial Court in its order dated 17.02.2004.

72. The Appellate Court also referred to documentary evidence filed with respect to Written Statement in Regular Suit No.144 of 1999 and Replication filed therein. It referred first to the certified copy of the Replication having been obtained by the private respondents on 14.07.2006 and the second certified copy of the Replication being obtained by the appellant petitioner on 10.10.2007 and the interpolation made therein. It referred to the contents of Paragraphs 22 and 23 of the Written Statement and the contents of Paragraph 13

of the Replication and came to the conclusion that it was apparent that the defendant had sufficient notice of pendency of Regular Suit No.294 of 2003. The argument that the defendant could not have sufficient time as the Written Statement was filed on 29.08.2003 and mentioned the date fixed in Regular Suit No.294 of 2003 being 08.08.2003 was noted by the Appellate Court but rejected on the ground that the defendant had notice of pendency of Regular Suit No.294 of 2003 at least on 29.08.2003 and had also filed his Replication on 16.10.2003.; the Trial Court had eventually proceeded ex-parte only on 17.02.2004, and had the defendant been careful enough he could have immediately approached the Trial Court after service of Written Statement upon him on 29.08.2003 , and made an honest effort to file a Written Statement therein. Also, publication in the newspaper was done on 11.01.2004 and the order to proceed ex-parte was only made on 17.2.2004 and the Suit decreed two years later on 22.5.2006. Having dealt with all the arguments of the Appellant petitioner on facts and law it rejected the Appeal.

73. In ***Deepak Banerjee Vs. Smt. Lilavati Chakraborty AIR 1987 Supreme Court 2055***, the owner of the premises sought to evict the tenant on ground of subletting a part of the premises. The court observed that in order to prove tenancy or sub tenancy two ingredients had to be established, firstly, the tenant must have exclusive right of possession or interest in the premises or part of the premises in question, and secondly, that right must be in lieu of payment of some compensation or rent. The lower courts had given concurrent findings of fact that there was creation of subtenancy without considering essential ingredients necessary for such finding to be recorded against the tenant. The High Court refused to interfere with the findings of fact. The Supreme Court observed that it normally does not interfere with finding of fact but if a finding is manifestly unjust it cannot be allowed to perpetuate injustice.

74. The Supreme Court observed in Paragraph 13 of its judgement thus:-

"It is true that normally this Court is too reluctant to interfere with the concurrent findings of fact. But if the essential ingredients necessary for a finding of fact have not infact been found by the Court below, then this Court is bound to examine the question where in justice or wrong is done. In Variety Emporium Versus VRM Mohammed Ibrahim Naina reported in AIR 1985 Supreme Court 207 Chandrachud CJ, observed that concurrent findings of lower courts have relevance on the question whether Supreme Court should exercise its jurisdiction under Article 136 of the Constitution to review a particular decision. That jurisdiction has to be exercised sparingly. But, that cannot mean that injustice must be perpetuated because it has been done two or three times in a case. The burden of showing that a concurrent decision of two or more Courts or Tribunals is manifestly unjust lies on the appellant. But once that burden is discharged, it is not only the right but the duty of the Supreme Court to remedy the injustice. As there is no finding of exclusive possession nor of any payment of money in exchange of the user of the part of the premises the finding of subletting cannot in law be upheld."

75. This Court having considered the facts as pleaded by the petitioner and the private respondents in this petition and the

facts and Law as appreciated by the learned Trial Court and the Appellate Court, does not filed any perversity in the appreciation of facts by the two learned Court below or any infirmity in the law as appreciated in the orders impugned. The petition being devoid of merit is ***dismissed***. The interim order granted earlier by this Court is ***vacated***.

(2022) 9 ILRA 732
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.06.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Misc. Writ Petition No. 7685 of 2022

Mohar Pal & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Harikesh Kumar Gupta

Counsel for the Respondents:
G.A.

Criminal Law- Constitution of India- Article 226- Indian Penal Code, 1860- Sections 420, 406 &120B- Code of Criminal Procedure, 1973- Section 4 & 5- Applicability of Sections 4 and 5 of the Cr.P.C.- Offence alleged to be committed under the Negotiable Instrument Act-It is not a matter which falls under the Negotiable Instrument Act- The provisions of Section 4 of Cr.P.C. read with Section 5 relate to procedure where commission of offence under the Special Act. In the present case, the informant has invoked the criminal jurisdiction and not the jurisdiction under Section 138 of the Negotiable Instrument Act and therefore, Section 5 cannot be made applicable. Proceedings under the Indian Penal Code would be governed by the Criminal Procedure Code only and therefore, the provisions of Section 5 of Cr.P.C. and 468 Cr.P.C. read with contours for invoking Article 226 of the Constitution will not permit us to interfere in the investigation as prima facie, facts go to show that the ingredients of Section 406, 420 and 120-B IPC are made out against the accused.

Where the offences under the Indian Penal Code are prima facie made out then the same would be proceeded under the CrPc and not under any Special Act hence, Sections 4 & 5 of the Cr.Pc will not be applicable.

The FIR cannot be said to be belated as Sections 420, 406, 120B India Penal Code permits lodgment of the FIR within a period as prescribed by Section 468 Cr.P.C- In that view of the matter, the registered case cannot be said to be such which is beyond the period of limitation and that there is a abuse of process of law.

As the imputed offences prescribe punishments that are not barred by Section 468 of the CrPc, hence it cannot be said that the F.I.R is belated or beyond the period of limitation. (Para 6, 8, 10, 11, 12)

Criminal Writ Petition Rejected with costs. (E-3)

Judgements/Case law relied upon:-

1. Noorulla Khan Vs Karnataka State Pollution Control Board, AIR 2021 SC 3438

2. St. of A.P. Vs Gourishetty Mahesh ,2101 (6) SC 588

3. St. of Telangana Vs Habib Abdullah Ilahi, 2017 2 SCC 779

4. Neeharika Infrastructure Pvt. Ltd. v. St. of Maha., AIR 2021 SC 1918

5. St. of Maha. Vs Pankaj JagshiGangar, AIR 2022 SC 114

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

1. Heard learned counsel for the petitioner and learned counsel for the State.

2. By way of this petition, the accused-petitioners pray for quashment of the impugned first information report dated 25.02.2022 in Case Crime No. 120 of 2022 under Sections 420, 406, 120B India Penal Code (I.P.C.), Police Station Sungarhi, District Pilibhit and also for staying their arrest in respect of the aforesaid first information report.

3. Both the petitioners have alleged to have committed what can be said to be offences under Sections 420, 406, 120B of IPC.

4. The allegations in the FIR are very categorical that the first informant is aged about 28 years and he is doing business. The petitioner no.1, namely, Mohar Pal and the petitioner no.2, namely, Suresh have also into business. The first informant moved to the Magisterial Court, who after verifying the facts, issued direction to the police officer to investigate and took cognizable case as the informant had get machines on concessional rates by the petitioner no.1. The bank transaction of Rs.2,03,280/- from the bank of the informant was made to the petitioner, Mohar Pal. Despite the money being given by way of bank account, no machine was supplied to the informant. This itself shows the culpable mind of the accused Mohar Pal and therefore, the complainant has alleged commission of offence under Section 420, 406, 120B IPC. Thereafter, Kamlesh Singh to whom the money was also sent, issued a cheque after deducting commission. The amounts could not be realized and therefore, the informant again requested both the accused along with his brother but they have locked the premises and are not available. On 22.06.2021, a first information was given to the Superintendent of Police, Pilibhit but no action was taken and therefore, the informant moved the Court which has directed investigation as it is prima facie found that cognizable offence has been committed by the accused.

5. It is submitted by learned counsel for the petitioners that the alleged incident occurred on 25.08.2020 but the FIR was lodged on 25.02.2022 without any proper explanation. It is further submitted by learned counsel for the petitioners that Sections 4 and 5 of the Cr.P.C. would be applicable as according to the petitioner's counsel, the offence alleged to be committed under the Negotiable Instrument Act

6. These facts go to show that it is not a matter which falls under the Negotiable Instrument Act as sought to be canvassed by learned counsel for the petitioners. The provisions of Section 4 of Cr.P.C. read with Section 5 relate to procedure where commission of offence under the Special Act. In the present case, the informant has invoked the criminal jurisdiction and not the jurisdiction under Section 138 of the Negotiable Instrument Act and therefore, Section 5 cannot be made applicable.

7. Sections 4 and 5 Cr.P.C. read as follows:-

"4 Cr.P.C. Trial of offences under the Indian Penal Code and other laws.-

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

"5 Cr.P.C. Saving.- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

8. Recently the Apex Court in **Noorulla Khan Vs. Karnataka State Pollution Control Board, AIR 2021 SC 3438,** has held that Section 5 of Cr.P.C. applies to the proceedings under the Special Act. The Act specifies certain procedural justice and protection. Proceedings under the Indian Penal Code would be governed by the Criminal Procedure Code only and therefore, the provisions of Section 5 of Cr.P.C. and 468 Cr.P.C. read with contours for invoking Article 226 of the Constitution will not permit us to interfere in the investigation as prima facie, facts go to show that the ingredients of Section 406, 420 and 120-B IPC are made out against the accused. The actus reus is also prima facie proved to dupe the informant.

9. The decision of the Apex Court in **State of Andhra Pradesh Vs. Gourishetty Mahesh [2101 (6) SC 588]** read with the recent judgments in **State of Telangana vs. Habib Abdullah Ilahi, 2017 2 SCC 779, Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra, AIR 2021 SC 1918 and State of Maharashtra v. Pankaj Jagshi Gangar, AIR 2022 SC 114,** will not permit this Court to interfere in the Article 226 of the Constitution of India.

10. The FIR cannot be said to be belated as Sections 420, 406, 120B India Penal Code permits lodgment of the FIR within a period as prescribed by Section 468 Cr.P.C. which reads as follows.

468. Bar to taking cognizance after lapse of the period of limitation.

(1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub- section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) six months, if the offence is punishable with fine only

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.]

11. Therefore, it cannot be said that the offence lodged is belated.

12. In that view of the matter, the registered case cannot be said to be such

which is beyond the period of limitation and that there is a abuse of process of law.

13. Accordingly, the petition is devoid of merit and is **dismissed** with the costs of Rs.5,000/- as Sections 4 and 5 of Cr.P.C. cannot be made applicable to the facts of this case as we have elaborately discussed that the complainant/informant has not invoked the provisions of the special Act (N.I. Act) but the alleged commission of offences punishable under the Indial Penal Code triable as per procedural law i.e. Criminal Procedure Code, the investigation cannot be quashed.

(2022) 9 ILRA 735
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters U/A 227 No. 115 of 2022

Braj Bhushan Lal Awasthi ...Petitioner
Versus
Smt. Urmila & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dharmendra Kumar Singh

Counsel for the Respondents:
Sri Shobhit Saxena, Sri Kirti Kumar

Civil Law- Code of Civil Procedure, 1908- Order VI Rule 17 of CPC- Amendment application dismissed on the ground of delay- In compliance of order of High Court, Court below has proceeded to decide the suit and accordingly, evidences of both the parties were closed and matter was listed for final argument. At this stage, petitioner-plaintiff has preferred amendment application, which was rejected vide impugned order dated-Once the Court has granted liberty to file second amendment application, there is no occasion for the petitioner-plaintiff to wait for three years when the suit was listed for final hearing and also, in the mean time, he himself has filed Civil Misc. Writ-C No. 12630 of 2013 before this Court for early disposal of suit. In fact, it is nothing but an attempt to linger on the proceeding by filing such amendment application, therefore, Court below has taken right view that it is nothing but an attempt to raise the complexity in the matter and allowing the amendment application would change the nature of case based on those facts which were very well in the knowledge of petitioner-plaintiff since the date of filing of suit- Intention of petitioner-plaintiff is not fair in filing amendment application. On one hand, petitioner-plaintiff himself has filed writ petitions for early disposal of suit and on the other hand, he has taken chance to linger on the proceeding by filing amendment application at a very belated stage- While dealing such situation where amendment application is filed at a very belated stage, it is required to be seen as to whether it has been filed with clean hand, bonafide intention or only with intention to delay the proceedings and if the second one is found, no interference is required as the present case is.

Where the Court finds that the amendment application has been filed at a highly belated stage for merely lingering the suit, changing the nature of the suit and for oblique motives then the same is liable to be rejected on this ground. (Para 18, 19, 20)

Petition accordingly rejected. (E-3)

Case Law/ Judgements relied upon/ discussed:-

1. Smt. Anju Vs Satish Kumar 2018 (127) ALR 557 (cited)

2. St. Bank of Hyderabad Vs Town Municipal Council; 2007 (1) SCC 765 (cited)

3. B K Mittal Vs Sakya Centre Society & ors.; 2010 LawSuit(Utt) 1559 (cited)

4. Mount Mary Enterprises Vs M/s. Jivratna Medi Treat Pvt. Ltd.; 2015 0 Supreme(SC) 89 (cited)

5. Mahila Ramkali Devi & ors. Vs Nandram (D) Thr. Lrs. & ors.; 2015 0 Supreme(SC) 438(cited)

6. Rameshkumar Agarwal Vs Rajmala Exports Pvt. Ltd. & ors..; 2012 0 Supreme(SC) 270 (cited)

7. Prithi Pal Singh & anr Vs Amrik Singh & ors.; 2013 0 Supreme(SC) 158

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for petitioner and Sri Kirti Kumar Nirkhi, learned counsel for opposite party.

2. Present petition has been filed seeking following reliefs :-

"(I) Set aside the order dated 01.12.2021 passed by the 3rd Additional District Judge, Kanpur Dehat in Civil Revision No. 25/2013 (Braj Bhushan Vs. Smt. Urmila Devi and others) as well as order dated 11.07.2013 passed by Additional Civil Judge (Senior Division), Kanpur Dehat.

(II) Direct the court below to allow the amendment application (paper No. 289-Ka) dated 08.04.2013 filed by the petitioner before the Trial Court."

3. Learned counsel for petitioner submitted that plaintiff-petitioner has filed Original Suit No. 2 of 1993 along with interim injunction application in the year 1993 for cancellation of sale deed, which was rejected vide order dated 08.02.1994. Against the said rejection order, plaintiff-petitioner preferred Appeal No. 173/1994. During the pendency of appeal, plaintiff-petitioner has filed amendment application for amending the plaint. The said appeal as well as amendment application was rejected. Against both the orders, plaintiff-petitioner has preferred Writ Petition No. 28148 of 1998 before this Court, which was dismissed vide order dated 17.09.2010. However, liberty was given to the plaintiff-petitioner to file amendment application before the Court below. It is next submitted that in compliance of order dated 17.09.2010, plaintiff-petitioner has filed amendment application in Original Suit No. 2 of 1993 under Order VI Rule 17 read with Section 151 CPC on 08.04.2013. In amendment application, he has clarified the facts and also brings on record certain new facts, which was not in his knowledge at the time of filing of plaint. Opposite party has also filed objection and trial Court vide order dated 11.07.2013 has dismissed the amendment application on the ground of delay. Aggrieved by the order dated 11.07.2013, plaintiff-petitioner has preferred Civil Revision No. 25 of 2013 before the District Judge on 15.02.2014, which was also dismissed vide order dated 01.12.2021 without considering the facts of the case. Hence the present petition.

4. Learned counsel for petitioner submitted that plaintiff-petitioner has challenged the orders dated 01.12.2021 as well as 11.07.2013 basically on the ground that under Order VI Rule 17 of CPC, amendment application may be allowed at any stage of proceedings and the same cannot be rejected only on the ground of laches. Such dismissal order preclude the plaintiff-petitioner from justice. It is next submitted that while rejecting the amendment application, it is required on the part of Court below to see as to whether it is filed with ill intention or with clean hands. Court below was also required to see as to whether in case of rejection of amendment application, either of the

parties would suffer from injustice or not, therefore, in the larger interest of justice, ignoring the delay, amendment application has to be allowed. In support of his contention, he has placed reliance upon the judgment of Apex Court passed in the matter of ***Prithi Pal Singh & another vs. Amrik Singh & others; 2013 0 Supreme(SC) 158*** decided on 13.02.2013 and submitted that amendment application may be allowed even at the second appellate stage. Further, he has placed reliance upon the judgment of ***Rameshkumar Agarwal vs. Rajmala Exports Pvt. Ltd. & Ors.; 2012 0 Supreme(SC) 27***0 decided on 30.03.2012 and submitted that while considering the amendment application filed under Order VI Rule 17 of CPC, it is required on the part of Court below to take liberal view. In the matter of ***Mahila Ramkali Devi and others vs. Nandram (D) Thr. Lrs. and others; 2015 0 Supreme(SC) 438*** and ***Mount Mary Enterprises vs. M/s. Jivratna Medi Treat Pvt. Ltd.; 2015 0 Supreme(SC) 89*** decided on 30.01.2015, Apex Court has held that if amendment application has not been filed with malafide intention, it is required on the part of Court below to take liberal view. He further submitted that in the matter of ***B K Mittal vs. Sakya Centre Society and others; 2010 LawSuit(Utt) 1559*** decided on 17.09.2010, High Court of Uttaranchal has also taken same view and held that amendment application cannot be rejected on the ground of delay, in case there is no injustice.

5. Learned counsel for petitioner further submitted that it is undisputed that original suit was filed in the year 1993 and provisions of CPC i.e. Order VI Rule 17 was amended vide Civil Procedure (Amendment) Act, 2002 (hereinafter referred to as "Act, 2002') which came into force w.e.f. 01.07.2002. Rule 16(1)(b) of Act, 2002 provides that provisions of rules, 5, 15, 17 & 18 of Order VI of the First Schedule as omitted or, as the case may be, inserted or substituted by Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and by Section 7 of this Act shall not apply to in respect of any pleading filed before the commencement of section 16 of the Code or Civil Procedure (Amendment) Act, 1999 and section 7 of this Act. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matter of **State Bank of Hyderabad vs. Town Municipal Council; 2007 (1) SCC 765.**

6. Sri Kirti Kumar Nirkhi, learned counsel for opposite party has vehemently opposed the submissions of learned counsel for petitioner and submitted that first of all, amendment application was rejected on the ground that amendment application so filed was not in accordance with Order VI Rule 17 of CPC, which provides that amendment can only be allowed prior to commencement of trial and further, after due diligence, if plaintiff-petitioner could not produce relevant facts. He also submitted that while dismissing Writ-C No. 28148 of 1998, though this Court has given liberty to the plaintiff-petitioner to file amendment application, but also directed the Court below to decide the appeal expeditiously and dispose of the Suit No. 2/1993 at the earliest. It is next submitted that intention of this Court was very much clear that the suit has to be decided at the earliest, but without any reason, after delay of more than three years, petitioner-plaintiff has filed amendment application again. Court below has rejected the same with clear cut finding of fact that evidence in the said suit is closed and matter is listed for argument. Further, in the amendment

application, nowhere it is mentioned that amendment so required in the plaint, relevant facts are not known to the plaintiff-petitioner earlier. Therefore, Court below has rightly rejected the amendment application alongwith finding of fact not denied by the plaintiff-petitioner.

7. It is next submitted that not only this, earlier this Court vide order dated 17.09.2010 passed in Writ-C No. 28148 of 1998 has directed the Court below to decide the suit within one year. The said order was never produced before the Court below. Lastly, it is submitted that undisputedly, suit is pending since, 1993. Rejection of first amendment application has attained finality in the year 2010 with liberty to the plaintiff-petitioner to file fresh amendment application and also there was direction of this Court to decide the suit at the earliest, but no amendment application has been filed for more than three years. Therefore, there is no illegality in the order dated 01.12.2021 passed by Court below. He next submitted that plaintiff-petitioner has also filed Civil Misc. Writ-C No. 12630 of 2013, which is not disclosed in the affidavit and in that petition too, direction was issued by this Court vide order dated 08.03.2013 to decide the suit within six months. In support of his contention, he has placed reliance upon the judgment of this Court passed in ***Smt. Anju vs. Satish Kumar 2018 (127) ALR 557*** and submitted that ingredients of Order VI Rule 17 of CPC is required to be fulfilled, meaning thereby amendment application can only be allowed in case facts are not brought into the knowledge of plaintiff-petitioner even after due diligence at the time of filing of suit.

8. I have considered the rival submissions of learned counsels for parties and perused the provisions of CPC applicable in the present matter as well as judgments relied upon.

9. Issue before the Court is as to whether in light of Order VI Rule, 17 of CPC, up to what stage, amendment application may be allowed and what would be the consequences of delay in filing of amendment application. For ready reference, Order VI Rule 17 is quoted below:-

"17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

10. Learned counsel for the petitioner submitted that in case of amendment, Apex Court and this Court has taken consistent view that amendment application may be allowed even at second appellate stage and court below is required to take liberal view. He has placed reliance upon the judgment of Apex Court in the matter of ***Prithi Pal Singh (Supra).*** Relevant paragraphs of the said judgment is quoted below:-

"Shri P.S. Patwalia, learned senior counsel appearing for the Petitioners argued that even though this Court granted leave to Respondents No. 2 to amend the

plaint, the learned Single Judge should have dismissed the second appeal as barred by time because the amendment was filed much after expiry of the limitation. He further argued that while dismissing the second appeal, the learned Single Judge did not consider the amendment made in Section 15 of the Act by Haryana Amendment Act No. 10 of 1995 and on this ground alone the impugned judgment is liable to be set aside.

12. In our opinion, there is no merit in the submissions of the learned Counsel. A reading of the order passed by this Court shows that the application for amendment filed by Respondent No. 2 was allowed without any rider/condition. Therefore, it is reasonable to presume that this Court was of the view that the amendment in the plaint would relate back to the date of filing the suit. That apart, the learned Single Judge has independently considered the issue of limitation and rightly concluded that the amended suit was not barred by time."

11. He has also placed reliance upon the judgment of Apex Court in the matter of ***Rameshkumar Agarwal (Supra)***. Relevant paragraphs of the said judgment is quoted below:-

"9. In Rajkumar Gurawara (Dead) through L.Rs v. S.K. Sarwagi and Co. Pvt. Ltd. and Anr.; (2008) 14 SCC 364, this Court considered the scope of amendment of pleadings before or after the commencement of the trial. In paragraph 18, this Court held as under:

"...It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation...."

10. In Revajeetu Builders and Developers v. Narayanaswamy and Sons and Ors. (2009) 10 SCC 84, this Court once again considered the scope of amendment of pleadings. In paragraph 63, it concluded as follows:

"Factors to be taken into consideration while dealing with applications for amendments

6 3 . On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money; (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

11. It is clear that while deciding the application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary

amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order 6 Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations."

12. He further placed reliance upon the judgment of Apex Court in the matter of ***Mahila Ramkali Devi (Supra)***. Relevant paragraphs of the said judgment is quoted below:-

17. The application for amendment of plaint filed by Appellant No. 1 to make Appellant Nos. 2 to 5 fall under Class XVII of the Madhya Pradesh Land Revenue Code was rejected by learned Single Judge of the High Court on the ground that the same would change the nature of the suit which was filed 40 years ago, as the claim was made solely on the basis of Will and not on the basis of inheritance. The High Court allowed the appeal vide the impugned judgment as the Appellants had no locus standi to file the suit as Ajuddhibai could not have transferred her interest through a Will. Hence, present appeal by special leave by the Plaintiffs.

19. It appears thus while disposing of the appeal, the High Court has not gone into the amended plaint. By amendment, the Plaintiff-Appellant not only sought to add the names of Dinesh, Satish, Sanjay and Rajendra sons of Baijnath Prasad Saxena in the category of Plaintiffs, but also sought to make necessary amendment in paragraph 3 of the plaint. The averment sought to be incorporated in paragraph 3 of the plaint by amendment is reproduced hereunder:

"Vikalp me yadi vasiyatnama vaidya na mana jave to be Ajudhibai ke karibtar varies vadini ke ladke Rajendra, Dinesh, Satish aur Sanjay hi hai jo abhi nabalig hai aur yeha dava unke hito ko represent karte huai unki maliki ke adhar par bhi prastut hai. Vadini ke dekh-rekh me ladke rahte hai. Garj yahe hai ki har halat me prativadigan ki koi swatva v mukable vadini avam uske ladke nahi hai. Aur vadini vivadagrast aaraji ka kabja apne tatha ladkon ko aur se pane ki patra hai."

As translated in English "In alternative, if the will is not held valid, yet the Plaintiff's sons Rajendra, Dinesh, Satish, Sanjay, who at present are minors are near relations of Ajudhibai and this suit is submitted to represent their interests on basis of their ownership. The sons live in care of Plaintiff meaning thereby in every condition there is no right of Defendants competing Plaintiff. And the Plaintiff herself and on behalf of her sons is entitled to get possession of the suit land."

20. It is well settled that rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. The Court always gives relief to amend the pleading of the party, unless it is satisfied that the party applying was acting malafide or that by his blunder he had caused injury to his opponent which cannot be compensated for by an order of cost.

21. In our view, since the Appellant sought amendment in paragraph 3 of the original plaint, the High Court ought not to have rejected the application."

13. He next submitted that Apex Court has taken the same view in the matter of ***Mount Mary Enterprises (Supra)***. Relevant paragraphs of the said judgment is quoted below:-

7 . In our opinion, as per the provisions of Order 6 Rule 17 of the Code of Civil Procedure, the amendment application should be normally granted unless by virtue of the amendment nature of the suit is changed or some prejudice is caused to the Defendant. In the instant case, the nature of the suit was not to be changed by virtue of granting the amendment application because the suit was for specific performance and initially the property had been valued at Rs. 13,50,000/- but as the market value of the property was actually Rs. 1,20,00,000/-, the Appellant-Plaintiff had submitted an application for amendment so as to give the correct value of the suit property in the plaint.

8. It is also pertinent to note that the Defendant had made an averment in para 30 of the written statement filed in Suit No. 1955 of 2010 that the Plaintiff had undervalued the subject matter of the suit. It had been further submitted in the written statement that the market value of the suit property was much higher than Rs. 14 lacs. The Defendant had paid Rs. 13.5 lacs for the said premises in the year 2002 when the said premises had been occupied by a tenant bank.

Even according to the Defendant value of the suit property had been undervalued by the Plaintiff in the plaint. If in pursuance of the averment made in the written statement the Plaintiff wanted to amend the plaint so as to incorporate correct market value of the suit property, the Defendant could not have objected to the amendment application whereby the Plaintiff wanted to incorporate correct value of the suit property in the plaint by way of an amendment. The other contention that the valuation had already been settled cannot also be appreciated since the High Court has held that the said issue was yet to be decided by the trial Court.

9. The main reason assigned by the trial court for rejection of the amendment application was that upon enhancement of the valuation of the suit property, the suit was to be transferred to the High Court on its original side. In our view, that is not a reason for which the amendment application should have been rejected. With regard to amendment of plaint, the following observation has been made by this Court in the case of North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (D) by

L.Rs. ; (2008) 8 SCC 511:

"1 6 . Insofar as the principles which govern the question of granting or disallowing amendments Under Order 6 Rule 17 Code of Civil Procedure (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 Code of Civil Procedure postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil and Ors.; (1957) 1 SCR 595 which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions:

(a) of not working injustice to the other side, and

(b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs.

10. In our opinion, on the basis of the aforestated legal position, the amendment application made by the Plaintiff should have been granted, especially in view of the fact that it was admitted by the Plaintiff that the suit property was initially undervalued in the plaint and by virtue of the amendment application, the Plaintiff wanted to correct the error and wanted to place correct market value of the suit property in the plaint."

14. He further placed reliance upon judgment of High Court of Uttaranchal passed in ***B K Mittal (Supra)*** in which Court has held that amendment application cannot be rejected on the ground of laches. Relevant paragraphs of the said judgment is quoted below:-

7. The purpose of Order VI, Rule 17 of the Code of Civil Procedure is to allow either party to amend their pleadings in such manner and on such terms as may be just. The power to allow the amendment is not only discretionary but is also wide and could be exercised at any stage of the proceedings in the interest of justice. The Supreme Court in a catena of decisions has consistently held that the Court should adopt a liberal approach and allow a party to take all kinds of stand which they may choose and that the Court should not adopt a hyper-technical approach. The Supreme Court held that a liberal approach should be adopted and, as far as possible, amendment should be allowed, especially, when the other side could be compensated with cost.

8. In the light of the aforesaid, the Court finds that the Plaintiff had taken a plea that the extract of the sale-deed was read by him which he noted and, subsequently, when he got hold of the copy of the sale-deed, he filed the amendment application seeking the relief for declaration that the said sale-deed should be declared void. Since the essential facts had already been stated in the plaint, the Court below should have allowed the amendment and should not have taken a view that the amendment sought was barred by limitation. The question whether the relief sought to be incorporated in the plaint was barred by limitation or not was a question of fact which was required to be adjudicated and, for that purposes, a necessary issue was required to be framed. At the stage of considering the amendment, such question could not have been adjudicated since this Court is of the opinion that it was a question of fact which required evidence."

15. So far as facts of the case are concerned, it is undisputed that after rejection of Original Suit No. 2 of 1993, petitioner-plaintiff has filed appeal and during the pendency of appeal, he has filed amendment application for amending the plaint, which was also rejected. Against both the orders, petitioner-plaintiff has preferred Writ Petition No. 28148 of 1998 before the this Court, which was dismissed vide order dated 17.09.2010 with liberty to the plaintiff-petitioner to file amendment application before the Court below. It is also undisputed that while dismissing the writ petition, this Court has also directed to decide the appeal expeditiously and dispose of Original Suit at the earliest. Instead of filing amendment application forthwith, petitioner-plaintiff has filed amendment application on 08.04.2013 i.e. almost about three years after closing of evidence and when the case was listed for final argument. Now the question is as to whether such amendment application may be entertained by the Court below or not.

16. There is no doubt on this point that Apex Court has taken consistent view that amendment application may be allowed at the second appellate stage, Court is required to take liberal view and further amendment application would not be rejected on the ground of delay, in case delay is bonafide without any ill intention.

17. There is also no dispute on this point that as per Act, 2002, amended provisions would not be applicable to the pending pleadings, but it is required to be seen as to whether purpose of filing of amendment application is bonafide or only to delay the proceedings.

18. Now, issue before the Court is to decide under which circumstances, amendment application may be allowed even if it has been filed at a very belated stage. In the present case, it is undisputed that liberty was given to petitioner-plaintiff to file fresh amendment application coupled with this fact that there was also direction of this Court to decide the appeal as well as suit at the earliest. Not only this, in Writ-C No. 28148 of 1998, this Court vide order dated 17.09.2010 had directed to decide the suit within one year, which is not disclosed. Apart that, petitioner-plaintiff himself has filed Civil Misc. Writ-C No. 12630 of 2013, which which was disposed of vide order dated 08.03.2013 with direction to the Court below to decide the suit within six months, which is also not disclosed in the present petition. In compliance of order of High Court, Court below has proceeded to decide the suit and accordingly, evidences of both the parties were closed and matter was listed for final argument. At this stage, petitioner-plaintiff has preferred amendment application, which was rejected vide impugned order dated 01.12.2021.

19. This Court is of the firm view that once the Court has granted liberty to file second amendment application, there is no occasion for the petitioner-plaintiff to wait for three years when the suit was listed for final hearing and also, in the mean time, he himself has filed Civil Misc. Writ-C No. 12630 of 2013 before this Court for early disposal of suit. In fact, it is nothing but an attempt to linger on the proceeding by filing such amendment application, therefore, Court below has taken right view that it is nothing but an attempt to raise the complexity in the matter and allowing the amendment application would change the nature of case based on those facts which were very well in the knowledge of petitioner-plaintiff since the date of filing of suit. Though, the judgments so cited by counsel for petitioner may favour petitioner-plaintiff in case it was filed with bonafide intention to meet the end of justice, but in the present case, those judgments would not come into the rescue of petitioner for the reasons that intention of petitioner-plaintiff is not fair in filing amendment application. On one hand, petitioner-plaintiff himself has filed writ petitions for early disposal of suit and on the other hand, he has taken chance to linger on the proceeding by filing amendment application at a very belated stage.

20. Therefore, while dealing such situation where amendment application is filed at a very belated stage, it is required to be seen as to whether it has been filed with clean hand, bonafide intention or only with intention to delay the proceedings and if the second one is found, no interference is required as the present case is.

21. Under such facts of the case, this Court is not impressed to interfere with the

impugned orders dated 01.12.2021 and 11.07.2013.

22. Writ petition lacks merit and is, accordingly **dismissed**.

23. No order as to costs.

(2022) 9 ILRA 744
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters Under Article 227 No. 636 of 2021 (CIVIL)

Sadare Alam & Ors. ...Petitioners
Versus
Ram Awadh & Ors. ...Respondents

Counsel for the Petitioners:
Sri Prem Narayan Tiwari, Sri Anil Bhushan (Sr. Advocate)

Counsel for the Respondents:
Sri Brajesh Kumar Dwivedi, Sri Vishnu Gupta, Sri Shiv Om Vikram Singh Chauhan (Sr. Advocate)

Civil Law- Transfer of Property Act, 1882 - Sections 105 & 106- Whether permission granted by the petitioners-plaintiffs to respondents-defendants (first set) on Rs.100/- on non-judicial stamp is a lease or not- Said permission lacks essential ingredients of lease since there is no recitation in the said permission as to what is the premium or rent to be paid by the respondents-defendants (first set) to the petitioners-plaintiffs and respondents-defendants (second set) in lieu of transfer of suit property.The permission dated 28.11.2019 being termed as 'lease' by the respondents-defendants (first set) is not a lease- The question of giving notice contemplated under Section 106 of the Act, 1882 arises only when a valid lease was executed between the parties- the appellate court has erred in holding that notice under Section 106 of the Act, 1882 was mandatory before the institution of the suit by the petitioners-plaintiffs.

In order to be termed as a lease, rent or premium is one of the essential ingredients and mere permission without any rent or premium cannot be termed as a lease. Hence, in absence of a lease no notice u/s 106 of the TPA was required.

Code of Civil Procedure, 1908- Section 94- Order XXXIX Rule 1- Where the nature of possession of the defendant is that of trespasser or unlawful, the plaintiff is not supposed to pray for the relief of possession, and suit for injunction is sufficient- The instant case is not one where respondents-defendants (first set) have been evicted forcefully by the petitioner-plaintiff and are claiming possession of the property in dispute-The possession of the respondent-defendant (first set) on the strength of said lease deed prima facie cannot be said to be lawful for the reason that the property being joint property, it has to be leased out by all co-sharer and the description of the property has to be given in the lease deed specifying which portion of the property has been leased out to respondents-defendants (first set).

Where the alleged lease does not mention any rent or premium and being a joint property is not leased out by all the co-sharers then a suit for injunction would be maintainable as the possession of the defendant would be unlawful. (Para 25, 27, 29, 30, 31, 36, 38, 44)

Petition Allowed. (E-3)

Judgement/ Case law cited :-

1. Rahul Dixit & anr. Vs Chandra Kumar Agarwal 2019(1) ADJ 593(cited)

2. Sant Lal Jain Vs Avtar Singh AIR 1985 SC 857 (relied)

3. Lalli Yeshwant Singh (Dead) Vs Rao Jagdish Singh 1968 AIR SC 620 (cited)

4. East India Hotels Ltd. Vs Syndicate Bank 1992 (Suppl. 2) SCC 29 (cited)

5. M/s. Anamallai Club Vs The Govt. of T.N & ors.1997 (3) SCC 159 (cited)

6. Biswabani (P.) Ltd. Vs Santosh Kumar Dutta & ors. 1980 AIR 226 (cited)

7. Leela Dhar Gera & anr. Vs Special Judge (SC/ST) Act/Additional District Judge, Bareilly & ors.,Writ Petition No.166 of 2010 (cited)

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

1. Heard Sri Anil Bhushan, learned Senior Advocate assisted by Sri P.N. Tiwari, learned counsel for the petitioners, and Sri Shiv Om Vikram Singh Chauhan, learned Senior Advocate assisted by Sri Vishnu Gupta, learned counsel for the respondents.

2. The petitioners are plaintiffs in Original Suit No.2314 of 2020 and have assailed the order dated 20.01.2021 passed by the District Judge, Azamgarh, allowing the appeal of respondents-defendants (first set) by which appellate court has set aside the order dated 22.12.2020 passed by the trial court granting the temporary injunction to the petitioners-plaintiffs.

3. The petitioners-plaintiffs instituted Original Suit No.2314 of 2020 restraining respondents-defendants (first set) (respondent nos.1 & 2 in the writ petition) not to interfere in the possession of the petitioners-plaintiffs, and further respondents-defendants (first set) be restrained from raising any construction over the suit property and not to excavate mud from the suit property i.e. Arazi no.606 area 1.5440 hectare shown as "ABCDEFGH' in the map at the foot of the plaint.

4. The suit has been instituted on the ground that petitioners-plaintiffs and respondents-defendants (second set) are the joint owners of the suit property, and the suit property has not been partitioned between the petitioners-plaintiffs and respondents-defendants (second set) by metes and bounds. It is stated that on the north side of the suit property, a brick kiln (Bhatta) was being run by the respondents-defendants (first set). It is further pleaded that respondents-defendants (first set) have no concern with the suit property. The respondents-defendants (first set) are Bhu-mafias and have been threatening the petitioners-plaintiffs since 14.11.2020 to excavate mud from the suit property and dispossess them. The said action of the respondents-defendants (first set) gave the cause of action to the petitioners-plaintiffs to institute the aforesaid suit. In the said suit, petitioners-plaintiffs also filed 6C-2 application praying for a temporary injunction.

5. The respondents-defendants (first set) filed an objection to the temporary injunction application stating therein that they are in possession of the suit property. It is stated that on account of the Pandemic of COVID-19, the raw material of the respondents-defendants (first set) namely, coal, mud, sand, etc. were lying on the suit property. It is further stated that petitioners-plaintiffs have issued a licence in favour of the respondents-defendants (first set) to run a brick kiln which is still in existence. It is further stated that on account of closure of brick-kiln, respondents-defendants (first set) are suffering a loss of Rs.1 lakh per day. It is further pleaded that no prima facie case and balance of convenience are in

favour of the petitioners-plaintiffs and it is respondents-defendants (first set) who shall suffer irreparable loss if they are not allowed to run brick-kiln.

6. The trial court vide order dated 20.11.2020 granted an ex-parte order of status quo restraining the respondents-defendants (first set) not to interfere in the possession of the petitioners-plaintiffs. The trial court in granting the temporary injunction considered three ingredients namely, prima facie case, the balance of convenience, and irreparable loss. In recording the finding, the trial court found that the suit property is jointly owned by the petitioners-plaintiffs and respondents-defendants (second set). It further found that petitioners-plaintiffs granted lease in favour of the respondents-defendants (first set) to run brick-kiln which has expired on 28.11.2020, and after the expiry of the lease, the possession of respondents-defendants (first set) is illegal because suit property has not yet been partitioned and fresh lease deed has been issued by the respondents-defendants (second set) on 20.11.2020, but no lease has been executed by the petitioners-plaintiffs, therefore, possession of the respondents-defendants (first set) over the suit property is illegal after the expiry of alleged lease dated 28.11.2019. Accordingly, the trial court found that petitioners-plaintiffs have been able to make out a prima facie case.

7. The trial court found that petitioners-plaintiffs are doing agriculture and cultivation over the suit property, therefore, the balance of convenience lay in favour of petitioners-plaintiff. It further held that if respondents-defendants (first set) are permitted to excavate mud from the suit property, that will cause irreparable injury to the petitioners-plaintiffs. Accordingly, it passed the order granting the temporary injunction in favour of petitioners-plaintiffs.

8. Against the order of the trial court, respondents-defendants (first set) preferred Misc. Appeal No.23 of 2020 which was allowed by the appellate court vide order dated 20.01.2021 holding that as admittedly, a lease was executed by petitioners-plaintiffs for a period from 28.11.2019 to 28.11.2020, and respondents-defendants (first set) was in possession on account of lease granted in their favour, therefore, a six-month notice under Section 106 of Transfer of Property Act, 1882 (hereinafter referred to as 'Act, 1882') is necessary to evict the respondents-defendants (first set), and since no notice has been given by the petitioners-plaintiffs as required under Section 106 of the Act, 1882, therefore, no cause of action arose to the petitioners-plaintiffs to institute the present suit.

9. The appellate court further found that the balance of convenience also lay in favour of the respondents-defendants (first set) and they shall suffer irreparable loss if the temporary injunction is allowed to be continued. Accordingly, it allowed the appeal and set aside the order passed by the trial court vide impugned order.

10. Challenging the aforesaid order, learned Senior Counsel for the petitioners-plaintiffs has contended that the order of the appellate court allowing the appeal is per se illegal since no notice under Section 106 of the Act, 1882 is required to be given before the institution of the suit. He submits that the finding returned by the appellate court is illegal and based upon the misinterpretation of the law. He further submits that the trial court has given

elaborate reason in recording a finding that petitioners-plaintiffs have prima facie case and balance of convenience lay in favour of petitioners-plaintiffs, and if the temporary injunction is not granted, that shall cause irreparable injury to the petitioners-plaintiffs.

11. It is further contended that without upsetting the finding returned by the trial court, the appellate court has acted illegally in setting aside the order of the trial court.

12. Per contra, learned Senior Counsel for the respondents has contended that evidence on record establishes that respondents-defendants (first set) are in possession of the suit property, therefore, in the absence of any prayer for a decree of possession, suit for injunction is not maintainable. He further contends that an unregistered lease deed shall be treated as the lease from month to month and the status of the lessee is that of a tenant by holding over, in such view of the fact, the status of respondents-defendants (first set) is that of the tenant by holding over and they are entitled to protect their possession.

13. Lastly, it is urged that final relief cannot be granted by way of the temporary injunction, therefore, it is submitted that the order of the appellate court does not require any interference by this Court under its supervisory jurisdiction.

14. I have considered the rival submission of the parties and perused the record.

15. The facts emanating from the record are that admittedly, suit property belongs to petitioners-plaintiffs and respondents-defendants (second set). It is also not in dispute that suit property is jointly owned by petitioners-plaintiffs and respondents-defendants (second set), and partition of the suit property has not taken place by metes and bounds. The petitioners-plaintiffs to succeed in obtaining the temporary injunction have to establish that they have a prima facie case in their favour, the balance of convenience lay in their favour, and if the temporary injunction is not granted, that shall cause irreparable injury to the petitioners-plaintiffs.

16. In the instant case, respondents-defendants (first set) state that they are in possession of the suit property since 1996. The petitioners-plaintiffs and the respondents-defendants (second set) permitted the respondents-defendants (first set) to run the brick-kiln business on the suit property for one year from 28.11.2019. Each petitioners-plaintiffs, as well as respondents-defendants (second set), permitted respondents-defendants (first set) on Rs.100/- stamp separately on 28.11.2019. The language and contents of the document granting right to use property are written on Rs.100/- non-judicial stamp and the contents of the said document are identical. It is pertinent to note that the permissive right granted by petitioners-plaintiffs by document dated 28.11.2019 is termed by respondents-defendants (second set) as the lease.

17. To consider the nature of right over the property given by the petitioners-plaintiffs on Rs.100/- stamp appearing on page no.29 of the supplementary counter affidavit of the respondent nos.1 & 2, it would be relevant to reproduce the contents of document herein below:-

"हम की सदरे आलम पुत्र सुलेमान अंसारी ग्रा० पो० सिकरौर सहबरी जिला-आजमगढ़ के निवासी है। हम अपनी जमीन को जो सिकरौर

बाजार से पूरब नहर माईनर के पास सड़क से उत्तर स्थित है। उस जमीन (606) को हम श्री सुनील यादव पुत्र श्री राम अवध यादव ग्राम सिकरौर सहबरी जिला-आजमगढ़ को भट्ठा चलाने के लिए आज दिनाँक-28.11.2019 से एक वर्ष के लिए जमीन भट्ठा चलाने हेतु दे दिए। आज जिस हालत में जमीन है, हम उस हालत मे जमीन वापिस देगें। इसी लिए यह एकरार नामा लिख दिया ताकी समय पर काम आवे।"

18. The recitation in the said document is clear that permission has been granted to the respondents-defendants (first set) for one year from 28.11.2019. It further recites that respondents-defendants (first set) shall return the land in the same condition in which the land was on the date of grant of rights to the respondents-defendants (first set).

19. According to the respondents-defendants (first set), after the expiry of the aforesaid period, the respondents-defendants (second set) have separately granted fresh permission on Rs.50/- non-judicial stamp on 28.10.2020 appearing on page 35 of the supplementary counter affidavit which is reproduced herein below:-

"हम कि गुफरान अहमद व इरफान अहमद व रिजवान अहमद सुल्तान अहमद पुत्र गण पुत्रगण शमतुदीन व अन्जुम आरा पत्नी सुफियान अहमद व वसीम अनवर व असद मो० अकरम पुत्रगण सुफियान उर्फ उजमा व साफिया पुत्रीगण सुफियान अहमद ग्राम व पो० सिकरौर सहबरी, परगना माहुल, तहसील मार्टीनगंज, जिला आजमगढ़ के निवासी है। प्रथम पक्ष

सुनील यादव पुत्र राम अवध यादव ग्राम सिकरौर सहबरी, पर० माहुल, तहसील मार्टीनगंज, जिला आजमगढ़-द्वितीय पक्ष

हम प्रथम पक्ष द्वितीय पक्ष को स्टार स्वास्तिक स्टार ईट भट्ठा उद्योग लगाने हेतु अपनी निम्नलिखित गाटा सं० 606 रकवा-1.544 हे० मैं अपने हिस्से से 1/3 भाग पर किराये पर दिया है जिस पर द्वितीय पक्ष अपनी चिमनी व आपिस लगाकर उद्योग चला रहे है जिसकी किरायेनामा की अवधि समाप्त हो रही है। इसलिए हम प्रथमपक्ष द्वितीयपक्ष को एक वर्ष के लिए एकरारनामा कर रहे है। द्वितीय पक्ष से एक लाख रूपया जरिया चेक सं०55943 बैक सलाना के तौर पर ले रहे है। द्वितीय पक्ष अपना ईट भट्ठा उद्योग करके एक वर्ष तक चलायेगे। इसमे हम प्रथम पक्ष की कोई आपत्ति न है न ही भविष्य में होगी। यह एकरार नामा सिर्फ माह 12 हेतु ही है। अतः यह खूब सोच समझ कर स्वेच्छा से यह एग्रीमेण्ट तहरीर कर दिया गया कि प्रमाण रहे और समय पर काम आवे।

दिनांक 28-10-2020"

20. The perusal of the alleged permission granted by the respondents-defendants (second set) dated 28.10.2020 reveals that respondents-defendants (second set) have granted the right to use the suit property to the extent of their 1/3rd share in the suit property.

21. In such a factual backdrop, it is to be seen as to what is the nature of possession of respondents-defendants (first set) after the expiry of permission granted by petitioners-plaintiffs on 28.11.2019 extracted above.

22. learned counsel for the respondents contends that conditional lease was granted by petitioners-plaintiffs and respondents-defendants (second set) in favour of the respondents-defendants (first set), and even if the document is unregistered, that shall be treated as lease month to month and status of respondents-defendants (first set) is that of the tenant by holding over and in such view of the fact, they are entitled to protect their possession.

23. To test the legality of the said argument of learned counsel for respondents-defendants (first set), Court has to be prima facie satisfy at this stage

that said contention of respondents has substance in law.

24. To test the bona fides of the argument of learned counsel for the respondents, it would be useful to have a glance at Section 105 of the Act, 1882 which defines the lease which is being extracted herein below:-

*"105. **Lease defined.**--A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.*

***Lessor, lessee, premium and rent defined**.--The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service, or other thing to be so rendered is called the rent."*

25. Perusal of Section 105 of the Act, 1882 clearly shows that one of the ingredients for a document to be termed as a lease is that transfer of right by lesser to the lessee to enjoy immovable property must be in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the lesser by the lessee to accept the transfer of such permission. Premium and rent are also defined in Section 105 of the Act, 1882 which provides that price is called 'premium' and money, share, service, or other thing to be so rendered is called 'rent'.

26. Now, in the light of the above, this Court proceeds to consider the question as to whether permission granted by the petitioners-plaintiffs to respondents-defendants (first set) on Rs.100/- on non-judicial stamp on 28.11.2019, extracted above, is a lease or not.

27. Perusal of the said permission dated 28.11.2019, extracted above, reveals that petitioners-plaintiffs have granted permission to respondents-defendants (first set) to run the brick-kiln business on the suit property for one year w.e.f 28.11.2019, but said permission lacks essential ingredients of lease since there is no recitation in the said permission as to what is the premium or rent to be paid by the respondents-defendants (first set) to the petitioners-plaintiffs and respondents-defendants (second set) in lieu of transfer of suit property.

28. At this stage, it is also pertinent to point out that in the objection filed by the respondents-defendants (first set) to the 6-C application, there is no pleading by the respondents-defendants (first set) that they were paying any premium or rent.

29. In such view of the fact, this Court prima facie find that the permission dated 28.11.2019 being termed as 'lease' by the respondents-defendants (first set) is not a lease, hence, the contention of learned counsel for the respondents that respondents became tenant by holding over lacks substance.

30. It is pertinent to note that the question of giving notice contemplated under Section 106 of the Act, 1882 arises only when a valid lease was executed between the parties.

31. In view of the aforesaid fact, this Court finds that the appellate court has erred in holding that notice under Section 106 of the Act, 1882 was mandatory before the institution of the suit by the petitioners-plaintiffs.

32. In such view of the fact, the judgement of this Court relied upon by the learned counsel for the respondents in the case of ***Rahul Dixit and Another Vs. Chandra Kumar Agarwal 2019(1) ADJ 593*** is not applicable in the facts of the present case.

33. This Court finds that it has come on record that respondents-defendants (first set) are in possession of the suit property, therefore, in the absence of any prayer for the decree of possession by the petitioners-plaintiffs, the suit for temporary injunction is not maintainable.

34. To test the said argument, the court is to see what is the nature of possession of respondents-defendants (first set).

35. This Court has reproduced the permission which has been granted by the petitioner-plaintiff on 28.11.2019 which reveals that it lacks ingredients of a lease as the said permission does not disclose the premium or rent which was to be paid by the respondents-defendants (first set) in lieu of transfer of possession for the enjoyment of the suit property.

36. The Apex Court in various pronouncements has held that where the nature of possession of the defendant is that of trespasser or unlawful, the plaintiff is not supposed to pray for the relief of possession, and suit for injunction is sufficient.

37. In this regard, it would be apposite to reproduce paragraphs 7 & 8 of the judgement of the Apex Court in the case of ***Sant Lal Jain Vs. Avtar Singh AIR 1985 SC 857*** which are being reproduced herein below:-

"7. In the present case it has not been shown to us that the appellant had come to the court with the suit for mandatory injunction after any considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, we think that in a case of this kind attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble and expense. The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of the property to which he may be found to be entitled. Therefore, we are of the opinion that the appellant should not be denied relief merely because he had couched the plaint in the form of a suit for mandatory injunction.

8. The respondent was a licensee, and he must be deemed to be always a licensee. It is not open to him, during the subsistence of the licence or in the suit for recovery of possession of the property instituted after the revocation of the licence to set up title to the property in himself or anyone else. It is his plain duty to surrender possession of the property as a licence and seek his remedy separately in case he has acquired title to property subsequently through some other person. He need not do so if he has acquired title to the property from the licensor or from some one else lawfully claiming under him, in which case there would be clear merger.

The respondent has not surrendered possession of property to the appellant even after the termination of the licence and the institution of the suit. The appellant is, therefore, entitled to recover possession of the property. We accordingly allow the appeal with costs throughout and direct the respondent to deliver possession of the property to the appellant forthwith failing which it will be open to the appellant to execute the decree and obtain possession."

38. Thus, in view of the discussion in the foregoing paragraphs, this Court prima facie believes that permission dated 28.11.2019 can not be termed as lease. Accordingly, the possession of respondents-defendants (first set) after the expiry of one year from 28.11.2020 prima facie does not appear to be lawful possession, therefore, in view of the judgement of the Apex Court in the case of ***Sant Lal Jain (supra)***, this Court prima facie believes that the suit for injunction is maintainable.

39. It is further pertinent to mention that judgement of the Apex Court in the case of ***Lalli Yeshwant Singh (Dead) Vs. Rao Jagdish Singh 1968 AIR SC 620*** is not applicable in the facts of the present case as in that case, the tenant was forcefully evicted by the landlord without taking any recourse to law and in such view of the fact, the Apex Court held that tenant can maintain a suit under Section 6 of the Specific Relief Act.

40. The judgement of Apex Court in the case of ***East India Hotels Limited Vs. Syndicate Bank 1992 (Suppl. 2) SCC 29*** is also not applicable in the facts of the present case for two reasons; firstly, there was a difference of opinion between the two Hon'ble Judges of the Apex Court as to whether the suit instituted by the bank under Section 6 of the Specific Relief Act was maintainable or not. Secondly, it was a case where the respondent bank was alleging that its eviction was forceful, therefore, the suit under Section 6 of the Specific Relief Act is maintainable for possession.

41. The instant case is not one where respondents-defendants (first set) have been evicted forcefully by the petitioner-plaintiff and are claiming possession of the property in dispute.

42. Similarly, the judgement of the Apex Court in the case of ***M/s. Anamallai Club Vs. The Government of Tamil Nadu and Others 1997 (3) SCC 159*** is not applicable in the facts of the present case.

43. So far as the judgement of Apex Court in the case of ***Biswabani (P.) Ltd. Vs. Santosh Kumar Dutta and Others 1980 AIR 226*** is concerned, the same is also not applicable in the facts of the present case in view of the finding returned above that the question as to whether the permission dated 28.11.2019 was a lease or not and respondents-defendants (first set) can be described as a lawful tenant can be determined at the final disposal of the suit.

44. It is pertinent to mention that it is not in dispute that property was the joint property of petitioners-plaintiffs and respondents-defendants (second set). The lease which is alleged to have been executed by the respondents-defendants (second set) in favour of respondents-defendants (first set) on 20.11.2020 also discloses that respondents-defendants (second set) have granted a lease to respondents-defendants (first set) to the extent of their share, but the description of the property which has been leased out to the respondents-defendants (first set) by respondents-defendants (second set) has not been given in the said lease

deed. In the absence of any description of the property leased out to the respondent-defendant (first set) by the respondent-defendant (second set) and the property being a joint property of petitioners-plaintiffs and respondent-defendant (second set), the possession of the respondent-defendant (first set) on the strength of said lease deed prima facie cannot be said to be lawful for the reason that the property being joint property, it has to be leased out by all co-sharer and the description of the property has to be given in the lease deed specifying which portion of the property has been leased out to respondents-defendants (first set).

45. In such view of the fact, this Court finds that the petitioner-plaintiff has been able to establish a prima facie case in his favour, and in case, the respondents-defendants (first set) are allowed to run brick-kiln business and excavate mud from the suit property during the pendency of the suit, that will change the nature of the property and reduce the fertility of the land as well as it shall cause damage to agriculture which is done by the petitioners-plaintiffs over the suit property.

46. It is also pertinent to mention that excavation of mud and soil from the suit property and running of the brick-kiln business on suit property may also seriously damage the yield of the crop over the suit property and will make the land non-agricultural land which cannot be compensated in terms of money.

47. Thus, in such view of the fact, the contention of learned counsel for the respondents that no final relief at an interim stage by way of injunction can be granted based on the judgement of this Court in the case of ***Leela Dhar Gera and Another Vs. Special Judge (SC/ST) Act/Additional District Judge, Bareilly and Others*** passed in Writ Petition No.166 of 2010 is not sustainable. Accordingly, in the opinion of the Court, the aforesaid judgment is not applicable in the present case as the said judgement has been rendered in a different factual scenario.

48. The perusal of the judgement of the appellate court reveals that it has not upset the finding returned by the trial court while granting the injunction, and accordingly, for this reason also, the order of the appellate court is not sustainable.

49. Thus, for the reasons given above, this Court finds that the order of the appellate court is not sustainable in law, and accordingly, it is set aside. The writ petition is ***allowed*** and respondents-defendants (first set) are restrained from running the brick-kiln business over the suit property.

50. Considering the nature of the dispute in the present case, this Court finds that it would be appropriate to direct the court below in the interest of justice to decide the suit expeditiously without granting any unnecessary adjournment to either of the parties. In case any adjournment is inevitable, the authority concerned may grant the same by imposing a heavy cost which may not be less than Rs.1,000/-.

(2022) 9 ILRA 752
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.09.2022

BEFORE

THE HON'BLE JASPREET SINGH, J.

Matters Under Article 227 No. 2841 of 2022

Avadhesh Kumar & Ors. ...Petitioners
Versus
District Magistrate, Lko. & Ors. ...Respondents

Counsel for the Petitioners:

Dinesh Kumar Singh

Counsel for the Respondents:
C.S.C., Dilip Kumar Pandey

Civil Law- The Uttar Pradesh Revenue Code, 2006- Sections 24 & 25- The Uttar Pradesh Revenue Court Manual (Amendment) Regulations, 2016- Regulations 475 and 476- Application for demarcation of boundaries in terms of Section 24 of the Code of 2006 and had also deposited the requisite fee - Received in the office of the Sub-Divisional Magistrate concerned on 30.04.2022 and remained unattended and the case was registered on 06.09.2022 after the present petition was filed-Demarcation proceedings are summary in nature and more than four months have lapsed and the case of the petitioners has yet not been registered. There is no leverage provided to the Sub-Divisional Magistrate to defer or to avoid registering of a case on the date when an application is received. It is clear that immediately upon receiving of a petition or an application, the office concerned is required to scrutinize the same and unless any defect is pointed out, which cannot be cured at the said point of time then some time is given to cure the defect but if the said application or a petition is found to be in order then the same has to be registered on the same very day.

The provisions of Section 24 and Section 25 of the Code of 2006, as well as the regulations framed thereunder, mandate that unless any defect is found in the application the Sub-Divisional Magistrate is bound to register the application on the very date of filing and to ensure the decision of the case within a period of six months as far as possible.

The Constitution of India- Article 227- Articles 14 and 21- The State has failed to provide the access to justice to the petitioners. The fundamental right of the petitioners to seek redressal through the Court of law has been infringed. This requires introspection from all stakeholders especially the State who is the appointing authority of the Officer manning the Revenue Courts, who adjudicate and decide the valuable rights of the citizens relating to their individual rights and property while exercising judicial and quasi-judicial powers in accordance and within the framework of law- A serious issue arises which involves dereliction of duty of the person, who are required to act and perform ministerial work, judicial and quasi-judicial function.

Where the authorities entrusted with judicial and quasi-judicial powers fail to act in accordance with the mandate of law and statutory provisions by failing to register the case of the applicants and deciding the same, then the said act amounts to denial of access to justice thereby infringing the Fundamental Rights of the petitioners under Articles 14 & 21 of the Constitution of India. (Para 21, 27, 30, 36, 38, 40)

Petition disposed of with directions/ guidelines. (E-3)

Case Law /Judgements relied upon:-

Anita Kushwaha Vs Pushap Sudan, (2016) 8 SCC 509

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

1. As we are celebrating 75 Years of our Independence which has been celebrated with much fanfare across the country under the aegis of "75 Years of Azadi Ka Amrit Mahotsov", but at the same time, this Court is pained to take note of the instant petition whereby the petitioners have approached this Court alleging violation of their fundamental right to access justice.

2. Rule of law is meaningless unless there is access to justice for the common people. Access to justice is one of the constitutionally recognized human and

fundamental right. Access to justice means to reach justice easily by legal proceedings in appropriate time. Delivery of justice should be impartial and non-discriminatory. State to take all necessary steps to provide fair, transparent, effective, and accountable service that promotes access to justice for all.

3. It is in the backdrop of Constitutional vision that the facts of the present case requires to be evaluated.

4. The petitioners have invoked the supervisory jurisdiction of this Court under Article 227 of the Constitution of India seeking a direction to the Sub-Divisional Magistrate (Judicial), Mohanlalganj, District Lucknow to register their case instituted by them under Section 24 of the Uttar Pradesh Revenue Code, 2006 (for short, "the Code of 2006") pending since 21.04.2022.

5. It is the case of the petitioners that they are tenure-holder of land 391 with an area measuring 1.3338 hectares situate in Village Dehramau, Pargana and Tehsil Mohanlalganj, District Lucknow. The petitioners have further stated that in order to get their boundaries properly demarcated, they moved an application in terms of Section 24 of the Code of 2006 and had also deposited the requisite fee of Rs.1,000/- on 29.04.2022. It is also alleged in the petition that though after submitting the said application, it was forwarded to the Tehsildar, Mohanlalganj, who further is stated to have forwarded the application to the Revenue Inspector and Lekhpal, but till date, no proceedings have commenced.

6. It has also been pointed out that demarcation proceedings are summary in nature and more than four months have lapsed and the case of the petitioners has yet not been registered.

7. It has specifically been stated in Paragraphs 9 and 10 of the petition that the Revenue Inspector and the Lekhpal are harassing the petitioners and the application for demarcation is pending since 21.04.2022, but till date, no action has been taken. It is also stated that the petitioners moved another application to the District Magistrate, Lucknow on 23.07.2022 by post as the first application of the petitioners was not evoking any response.

8. It is further stated that the petitioners made a complaint on the public portal but still no action was taken and being disillusioned with the system, the petitioners knocked the doors of this Court bringing it to the notice regarding the injustice being suffered and the basic rights of the petitioners to have access to justice has been deprived.

9. The petitioners have prayed for the following reliefs, which read as under:-

"i. Direct opposite party No.2 i.e. Up-Ziladhikari, Mohanlalganj, District Lucknow to decide the Case under Section 24 of U.P. Revenue Code, 2006 pending before him since 21.04.2022; Avadhesh Kumar and others vs. State of U.P. and others, expeditiously preferably within stipulated period fixed by this Hon'ble Court.

ii. Issue any other order or direction in the nature and manner which this Hon'ble Court deems fit and proper in the circumstances of the case.

iii. Award the cost of the petition in favour of the petitioners."

10. This Court on 08.08.2022 had required the petitioners to indicate the case

number of the proceedings which was filed by them.

11. In compliance of the said order, the petitioners had filed a supplementary affidavit dated 10.08.2022, wherein in Paragraphs 3 to 5, it was stated that the respondents have not even registered the case of the petitioners. In order to substantiate the same, the petitioners have filed the status report, which is available online, however, it has also stated that the case of the petitioners has been entered in the Register at S.No.138 dated 02.05.2022, but till date, neither any case has been registered nor any order-sheet has been drawn. No case number has been allotted and in this view of the matter, this Court on 31.08.2022 had passed the following order, which reads as under:-

"Heard learned counsel for the petitioner.

In compliance of the order dated 08.08.2022, the petitioner has filed a supplementary affidavit wherein in paragraph 3 it is stated that despite having moved an application under Section 24 of the U.P. Revenue Code, 2006 and a sum of Rs. 1,000/- also having been deposited on 29.04.2022 yet the case has not been registered nor any action has been taken thereon. The allegations as well as the averments made in the affidavit is of a serious nature.

Sri Dilip Kumar Pandey, learned counsel as well as the learned counsel for the respondent nos. 3 and 4 shall seek specific instructions and inform the Court as to why the aforesaid case as filed by the petitioner has yet not been registered.

List this matter again on 06th September, 2022, as fresh on which date an affidavit on behalf of opposite party no. 2 shall be filed indicating why the said case has not been registered."

12. To the surprise of the Court, despite a clear order dated 31.08.2022, learned standing counsel did not file the affidavit as he was required and had further sought a week's time. This request for time was rejected and the matter was directed to be listed on 09.09.2022 by means of the order dated 06.09.2022. The order dated 06.09.2022 for clear appraisal of the issue is being reproduced hereinafter:-

"Heard learned counsel for the petitioner as well as the learned Additional Chief Standing Counsel for the State-respondents.

The Court on 31.08.2022 had passed the following order which reads as under:-

"Heard learned counsel for the petitioner.

In compliance of the order dated 08.08.2022, the petitioner has filed a supplementary affidavit wherein in paragraph 3 it is stated that despite having moved an application under Section 24 of the U.P. Revenue Code, 2006 and a sum of Rs. 1,000/- also having been deposited on 29.04.2022 yet the case has not been registered nor any action has been taken thereon. The allegations as well as the averments made in the affidavit is of a serious nature.

Sri Dilip Kumar Pandey, learned counsel as well as the learned counsel for the respondent nos. 3 and 4 shall seek specific instructions and inform the Court as to why the aforesaid case as filed by the petitioner has yet not been registered."

List this matter again on 06th September, 2022, as fresh on which date an affidavit on behalf of opposite party no. 2

shall be filed indicating why the said case has not been registered.

Today, it has been informed by the learned Standing Counsel that the affidavit is not ready and therefore he sought a week's further time.

The prayer of the learned Standing Counsel is rejected.

List this matter on 09th September, 2022, as fresh on which date the respondent no. 2 shall appear in person before this Court."

13. On 09.09.2022, Shri Hanuman Prasad Mauriya, Sub-Divisional Magistrate, Tehsil Mohanlalganj, District Lucknow appeared before the Court along with the learned Additional Chief Standing Counsel, Shri Manish Mishra. The Sub-Divisional Magistrate concerned has filed his personal affidavit and has also brought the original records of the case filed by the petitioners as well as the original register wherein cases under Section 24 of the Code of 2006 are entered and recorded.

14. It has been stated by the learned Additional Chief Standing Counsel that though the case was received in the office on 30.04.2022 and on the same very day the then Sub-Divisional Magistrate, Mohanlalganj had passed an order on the application itself directing the Tehsildar, Mohanlalganj to submit a demarcation report after enquiry. It is also stated that the Tehsildar Mohanlalganj vide his order dated 02.05.2022 directed the Revenue Inspector, Khujauli to submit his report after demarcation.

15. It has also been stated that the present Sub-Divisional Magistrate, who has filed his personal affidavit namely Shri Hanuman Prasad Mauriya had taken charge as Sub-Divisional Magistrate on 02.07.2022 while the directions were issued by the erstwhile Sub-Divisional Magistrate on 02.05.2022. It has also been stated that the concerned Revenue Inspector had issued notices to the parties concerned fixing 01.09.2022 on which date the demarcation was carried out on the spot and the Revenue Inspector submitted his report on 01.09.2022 and the Sub-Divisional Magistrate, Lucknow registered the case on 06.09.2022 and a case No.228877/2022 has been generated fixing 13.09.2022 as the date fixed.

16. It has also been stated by the Sub-Divisional Magistrate in Paragraph 17 of his affidavit that the case could not be decided within three months as provided in the Act and the Rules since the report of the Revenue Inspector was awaited, however, it has been assured that the matter shall be taken up with expedition and insofar as the proceedings prior to 02.07.2022 is concerned, it has been stated that since the new incumbent Shri Mauriya had joined on 02.07.2022, he was not aware of the proceedings prior thereto. He undertakes that he shall be vigilant in future in deciding the judicial proceedings.

17. Despite, the aforesaid facts and explanation given by the respondent in his affidavit and a perusal of the register where the cases are recorded under Section 24 of the Code of 2006 which has been provided to the Court for its perusal indicating that there are 168 pages therein. It would indicate that the first case was entered in the said register on 25.01.2022 and the same goes on in seriatim till S.No.347, which is dated 05.08.2022.

18. However, what the Court finds at running page No.10 and 11 of the said register after the S.No.113, there is no

mention of any case at S.No.114-115 rather it jumps to S.No.116. Thus, it would be seen that the cases have been shown in seriatim till 113. Thereafter, the serial number commences at 116 and goes on till 347. It is in the aforesaid seriatim, the case of the petitioners is shown to have been incorporated at S.No.138 at the bottom of the page of the register and the date of entey therein is 02.05.2022. Thereafter, there are two blank pages and then again it starts at Page-23 and Serial starts from 1 in seriatim under the heading "Computerized Application for Demarcation' and this also goes in seriatim till S.No.200.

19. Similarly, upon perusing the original case file, it would indicate that the petitioners had filed the case and submitted on 30.04.2022 on which date there is an endorsement of the Sub-Divisional Magistrate concerned. Thereafter, the S.No.138 dated 02.05.2022 has been mentioned. The order-sheet which has been brought on record is dated 06.09.2022 which states that the case be registered. Issue notice to the parties fixing 13.09.2022.

20. The record also indicates that notices have been issued under the signatures of the Sub-Divisional Magistrate concerned on 07.09.2022 on the file. Available on the record is the report of Revenue Inspector allegedly dated 01.09.2022 which indicates that in pursuance of the application for demarcation given by the petitioners, notices were issued on 17.08.2022. It is also stated that the petitioners themselves were present at the time of the survey and a spot memo was also prepared. While preparing the spot memo, it is indicated that any person who has any objection to the demarcation may file or submit his objection before the Court concerned. The parties were required to put their signatures but they refused. Accordingly, the signatures of three other persons have been appended. From a perusal thereof, it would indicate that there is no indication as to who are the said witnesses, as their father's name/parentage or address is not known. It is also not known whether they belong to the said village in question.

21. Be that as it may, the facts are clear and undeniable. The petitioners had filed an application seeking demarcation, which was received in the office of the Sub-Divisional Magistrate concerned on 30.04.2022 and remained unattended and the case was registered on 06.09.2022 after the present petition was filed.

22. The demarcation proceedings are covered under Section 24 of the Code of 2006 and Rule 22 framed thereunder. The Revenue Court Manual has also been framed to regulate the procedural aspect and to ensure the transparency, uniformity and to bring sanctity to the Institution and disposal of the cases.

23. Section 24 of the Code of 2006 reads as under:-

"24. Disputes regarding boundaries.*-(1) The Sub-Divisional Officer may, on his own motion or on an application made in this behalf by a person interested, decide, by summary inquiry, any dispute regarding boundaries on the basis of existing survey maps or, where they have been revised in accordance with the provisions of the Uttar Pradesh Consolidation of Holdings Act, 1953, on the basis of such maps, but if this is not possible, the boundaries shall be fixed on the basis of actual possession.*

(2) If in the course of an inquiry into a dispute under sub-section (1), the Sub-Divisional Officer is unable to satisfy himself as to which party is in possession or if it is shown that possession has been obtained by wrongful dispossession of the lawful occupant, the Sub-Divisional Officer shall-

(a) in the first case, ascertain by summary inquiry who is the person best entitled to the property, and shall put such person in possession;

(b) in the second case, put the person so dispossessed in possession, and for that purpose use or cause to be used such force as may be necessary and shall then fix the boundary accordingly.

(3) Every proceeding under this section shall, as far as possible, be concluded by the Sub-Divisional Officer within three months from the date of the application.

(4) Any person aggrieved by the order of the Sub-Divisional Officer may prefer an appeal before the Commissioner within thirty days of the date of such order. The order of the Commissioner shall be final."

24. The relevant Rule 22 farmed under the Code of 2006 which is related to demarcation reads as under:-

*"**22. Recovery of the cost for removal of obstacle (Section 25 and 26)**.(1) Every application for settlement of boundary dispute under section 24(1) of the Code shall be made to the Sub-Divisional-Officer and it shall contain the following particulars:*

(a) The names, parentage and addresses of the parties;

(b) Plot number, area and boundaries of the land, along with its location;

(c) Precise nature of the dispute.

(2) No application for demarcation of boundaries under section 24(1) of the Code shall be entertained unless it is accompanied by certified extracts from the maps, Khasras and Record of Rights (Khatauni) on the basis of which demarcation is sought, and the required amount calculated at the rate of Rs. 1000/- per survey number of the applicant as fee for demarcation has been paid by the applicant.

(3) If the application is for demarcation of two or more than two adjoining plots, only one set of demarcation fee shall be payable but where the survey numbers sought to be demarcated are not adjoining, separate sets of demarcation fee shall be paid.

(4) On the receipt of the application the concerned official shall check the application as to whether the requirements have been fulfilled or not. If there is any defect of formal nature, the applicant or his counsel shall be permitted to remove the defect at once but where the requirements of the application have not been fulfilled, the applicant shall be afforded opportunity as sought for to fulfil the requirements.

(5) As soon as the requirements are fulfilled the official concerned shall register the application in the register concerned and put up the same before the Sub-Divisional-Officer for appropriate order.

(6) The Sub-Divisional-Officer shall pass order on the same day or on the next working day, directing the Revenue Inspector or other revenue officer to demarcate the plot or plots as the case may be after fixing a date and serving the notice in respect thereof to all the tenure holders concerned. This exercise shall be completed within a period of one month

from the date of order passed by Sub-Divisional-Officer.

(7) The notice under sub-rule (6) of this rule shall be served on the concerned tenure holder or in his absence on his adult family member. The notice shall also be served on the Chairman of the Land Management Committee.

(8) At the time of demarcation of the plot the spot memo shall be prepared by the Revenue Inspector or other revenue officer and the same shall be signed by all the parties concerned and by the Chairman of the Land Management Committee or any two independent witnesses present at the time of the demarcation. If any party refuses to sign the spot memo, the endorsement to the effect shall be made by the Revenue Inspector.

(9) The Revenue Inspector or other revenue officer shall submit his report of demarcation with spot memo within a period of fifteen days from the date of demarcation. The name and address of the every affected party shall be disclosed in the report.

(10) On receipt of the report under sub-rule (9), the notices shall be issued within one week to all the affected parties inviting the objections on the report and the date shall be fixed which shall not be later than 15 days from the date of issuing the notice.

(11) On the date fixed or on any other date to which the hearing is adjourned, the Sub Divisional Officer shall decide the dispute regarding the boundaries in accordance with the provisions of the sub-section (2) of the section 24 of the Code and pass the appropriate order after considering the report and the objections, if any, filed against the report and affording opportunity of hearing to the parties concerned.

(12) If the report is confirmed by the Sub Divisional Officer, the boundary pillars shall be fixed accordingly within a period of one week and report in respect thereof shall be submitted which shall be part of the record.

(13) Where boundaries of plots/survey numbers are not identifiable or damaged, due to alluvion or diluvion or heavy rain or for any other reasons, the Sub-Divisional Officer may, on the application of the Chairman of the Village Revenue Committee of the village or on the report of Revenue Inspector or Lekhpal of the Circle or on the joint application signed by all the tenure holders concerned, direct, by general or special order in writing, the Revenue Inspector or Lekhpal concerned to demarcate the boundaries on the spot on the basis of the existing survey map or where it is not possible, on the basis of the possession and to redress the grievance, if any, on the basis of the conciliation in consultation with the Village Revenue Committee. The Revenue Inspector or the Lekhpal shall comply with the such order within two weeks from the date of the order and submit the report thereof to the Sub-Divisional Officer.

(14) If any party is aggrieved by the demarcation under sub-rule (13) of this rule, he may move application for demarcation of the boundaries under sub-section (1) of section 24 of the Code and the demarcation under sub-rule (13) will be subject to demarcation under sub-section (1) of section 24 of the Code.

(15) The Sub Divisional Officer, at the time of passing the order for the demarcation under section 24 of the Code or under sub-rule (13) of this rule, may direct the station officer of the police station concerned to make the police force available for maintaining the law and order on the spot at the time of demarcation.

(16) The Sub-Divisional Officer shall make an endeavour to conclude the proceeding within the period specified in

section 24(3) and if the proceeding is not concluded within such period the reason for the same shall be recorded."

25. The relevant rules regarding notice as to how it is to be served also reads as under:-

***"216. Service of notice**.- Any notice or other document required or authorized to be served under this Code may be served either:-*

(a) by delivering it to the person on whom it is to be served; or

(b) by registered post addressed to that person at his usual or last known place of abode; or

(c) in case of an incorporated company or body, by delivering it or sending it by registered post addressed to the secretary or other principal functionary of the company or body at its principal office; or

(d) in any other manner laid down in this Code of Civil Procedure, 1908 for service of summons."

26. The relevant provisions contained in the Uttar Pradesh Revenue Court Manual which relates to institution of the suit and drawing of the order-sheets, the issuance of the notice and the duties of the Presiding Officer and their readers is also mentioned and the relevant Regulations in respect thereto are being reproduced hereinafter:-

***"29. Particulars to be written on order-sheet**-The order-sheet (paragraph 1202, Revenue Manual) shall contain a note of every order made in the suit or case, and shall show, the date of and the proceedings at every hearing. It shall show, amongst other matters the names of the parties present or of their counsel, if they are represented by counsel, or of their duly authorized agents and the dates on which the plaint and written statement were filed, issues were recorded, or amended, witnesses examined and the names of such witnesses, of the delivery of judgments, of the signing of the decree, and of any application for review of judgment or amendment of the decree. It shall also contain a note of every proceeding such as the reading of the deposition of a witness examined by commission; the reading of a commission's report and of the fact of any objection being made thereto and if witnesses are in attendance when a case is adjourned, the fact shall be noted.*

***30. Order sheet to be written by the presiding officer or by an officer of the Court to be signed by presiding officer**- Every order on the order-sheet shall be written by the presiding officer or by an officer of the Court under his superintendence, and shall be signed by the presiding officer.*

[Note An officer should be appointed in respect of each Court to sign the order fixing the adjourned date under Rule 32, in the absence of the presiding officer due to sudden illness or some other such cause].

* * * * * * * * * *

***32 Order affixing dates or directing anything to be done by parties should be signed by parties or their pleaders**-Order fixing dates of adjourned dates for hearing or directing anything to be done by the parties of their pleaders whether recorded in the order-sheet or elsewhere shall be signed then and there by the parties or their pleaders.*

* * * * * * * * * *

The Uttar Pradesh Revenue Court Manual (Amendment) Regulations, 2016

***472. Procedure applicable to the summary proceedings**-Procedure*

prescribed in this chapter shall, subject to the provisions of the Code and the Rules, apply to the summary proceedings under the Code and the Rules.

* * * * * * * * * *

475- Presentation and scrutiny of application *-(1) The official F authorised to receive the application shall endorse on the application the date on which it is presented and shall sign the endorsement.*

(2) If, on scrutiny, the application is found to be in order, it shall be duly registered and given a serial number.

(3) If the application, on scrutiny, is found to be defective and the defect noticed is formal in nature, the official may allow the applicant or his counsel to remove the defect in his presence, and if the said defect is not formal in nature, the official may allow the applicant or his counsel to rectify the defect at such time as he may deem fit and the endorsement thereof shall be made a on the application which shall be signed by the party or counsel thereof.

(4) If the applicant fails to rectify the defect within the time allowed under the preceding sub- para, the official may decline to register the application and if so, he shall place the matter before the Presiding Officer for appropriate orders.

(5) All the registered applications shall be posted for admission/order before the appropriate Presiding Officer on the next working day. The notice of the posting shall be given by notifying in the Daily Cause List for the day.

(6) The Board shall, apart from the Offline system, endeavour to adopt the online system for the submitting the application processing and depositing the fee prescribed therefor."

27. From the above, it would be clear that there is no leverage provided to the Sub-Divisional Magistrate to defer or to avoid registering of a case on the date when an application is received. It is clear that immediately upon receiving of a petition or an application, the office concerned is required to scrutinize the same and unless any defect is pointed out, which cannot be cured at the said point of time then some time is given to cure the defect but if the said application or a petition is found to be in order then the same has to be registered on the same very day.

28. This being so, the record indicating that the case was recorded and entered in the register on 02.05.2022 and thereafter as per the Sub-Divisional Magistrate and as reflected from the order on the application, a report has been called for and notices have been issued to the parties to participate in the survey and demarcation proceedings yet there is not a single order-sheet on record reflecting the said exercise.

29. The first order-sheet which is available on record is dated 06.09.2022 which indicates that, the case be registered and parties be noticed. Apparently, the manner in which the proceedings have been taken is *de-hors* the provisions of law, the Rules and the Regulations framed and reproduced hereinabove first.

30. The very fact that demarcation proceedings are summary in nature and have to be decided within a period of three months as far as possible as mentioned in Section 24 of the Code of 2006 itself and here this Court is dealing with a case where the application of the petitioners for demarcation was not even registered for four months and they had to knock the doors of this Court for getting their case

registered and it was done only after strict orders were passed by this Court.

31. Access to justice is often used as a term for access to the formal institution of the legal proceedings by those in search of a remedy either individually in a particular civil or criminal case or collectively in a group for a class action or for raising constitutional or legal challenges.

32. Viewed through the lens of human right, access to justice is the obligation of State to construct a legal and institutional framework which facilitates access to independent and effective judicial and adjudicatory mechanisms and ensure a fair outcome for those seeking redress without discrimination of any kind.

33. A Constitutional Bench of the Apex Court in the case of **Anita Kushwaha v. Pushap Sudan, (2016) 8 SCC 509** categorically held that access to justice is a facet of right guaranteed under Articles 14 and 21 of the Constitution of India.

34. Justice is a concept of rightness, fairness based on ethics, moral and rationality. Laws made by sovereign body strive for achieving justice for various sections of the society; courts are established for eradicating injustice by reprimanding those who violate the laws and provide remedy to the aggrieved persons.

35. Justice is important, as it restores a sense of equal citizenship and humanity, forces acknowledgment of the suffering, and prevents recurrence. To work in order to secure justice to each and every section of the society is one of the most important goal of a successful State . In Indian context securing justice to the citizens has been kept on supreme priority, since constitution is drafted by the people which lays down the formation of state and direct it to do its function keeping in mind basic principles enshrined in the constitution. Preamble to the Indian constitution also talks about achieving social, economic and political justice as its goal.

36. Having noticed the aforesaid, with a heavy heart, the Court notices that the State has failed to provide the access to justice to the petitioners. The fundamental right of the petitioners to seek redressal through the Court of law has been infringed. This requires introspection from all stakeholders especially the State who is the appointing authority of the Officer manning the Revenue Courts, who adjudicate and decide the valuable rights of the citizens relating to their individual rights and property while exercising judicial and quasi-judicial powers in accordance and within the framework of law.

37. Though the case of the petitioners has now been registered and his prayer has become redundant, however, the Court concerned before whom the demarcation proceedings are now pending shall after issuing fresh and proper notice to all the parties concerned shall get the inspection done once again and thereafter inviting objection on the same decide the matter expeditiously in accordance with law, after affording full opportunity of hearing to the parties concerned. The earlier inspection which is said to have been carried out in absence of the parties shall not come in the way of the parties or the Court and shall be ignored while deciding the matter.

38. However, the facts which have been brought to the notice of the Court is an eye-opener and it cannot be left unaddressed. From the above, it is clear that the fundamental rights of the petitioners to seek access to justice has

been infringed. The respondent No.2 could not give any explanation as to why the case of the petitioners filed on 30.04.2022 could not be registered till 06.09.2022. How the order for demarcation and inspection could have been passed without any order being on the order-sheet. How could the Revenue Inspector conduct the inspection without notice being issued to the parties concerned and without adhering to the Rules relevant and applicable in respect thereto. How could the Revenue Inspector act upon any alleged order when the case itself was not registered.

39. Another aspect needs to be investigated is that when the petitioner filed the writ petition before this Court after serving a copy of the same in the office of the Chief Standing Counsel, who accepts advance notice of all matters filed in the High Court where State is a party then despite having knowledge of the same, no instructions were made available and despite three dates were fixed in Court on 08.08.2022, 31.08.2022 and 06.09.2022 and after the request of the State Counsel was rejected on 06.09.2022 only thereafter the case of the petitioner was registered on 06.09.2022.

40. Apparently, a serious issue arises which involves dereliction of duty of the person, who are required to act and perform ministerial work, judicial and quasi-judicial function. The respondent No.2 even after having taken charge on 02.07.2022 did not address the issue and slept over the matter, reason being that no order-sheet was drawn nor any date fixed which is nothing but depriving a citizen of this right to access fair and speedy justice.

41. Thus, exercising powers under Article 227 of the Constitution of India, this Court issue directions to the Principal Secretary (Revenue), Government of Uttar Pradesh, Civil Secretariat, Lucknow as well as the Chairman, Board of Revenue, Lucknow to pass the necessary orders ensuring that the cases which are filed before the Revenue Courts are promptly registered. The order-sheets are properly drawn and signed by the Presiding Officer of the respective Courts promptly. To ensure its efficacy and implementation necessary checks and regular inspections be made in Tehsils in all districts of the State periodically and at intervals to oversee that the compliancies are being made.

42. The Principal Secretary (Revenue) shall also hold an enquiry into the matter relating to non-registration of the case of the petitioners which was filed on 30.04.2022 and the first order-sheet, which came to be written on 06.09.2022 registering the case in light of the observations made in Paragraphs 38 to 40 of this judgment and it be completed within three months. Upon the conclusion of the enquiry, the necessary action be taken against the person found responsible and guilty. A copy of the said enquiry report with the action taken be placed on the record of this case.

43. As the relief claimed by the petitioners has already been rendered otiose, hence, this petition shall stands disposed of, however, the matter shall be listed on on 9th January, 2023 only for compliance of Para-42 of this judgment.

44. List this matter on 9th January, 2023 for compliance.

45. The original register and the record, which have been provided to the Court for its perusal, the same are being

returned to the learned Additional Chief Standing Counsel.

46. A copy of this order shall be served upon the Principal Secretary (Revenue), Lucknow and the Chairman, Board of Revenue, Lucknow through the Senior Registrar of this Court forthwith.

(2022) 9 ILRA 764
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.08.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Matters under Article 227 No. 2846 of 2022

Lucknow Development Authority
...Petitioner
Versus
Ganesh Shankar Tripathi & Anr.
...Respondents

Counsel for the Petitioner:
Ratnesh Chandra

Counsel for the Respondents:
Ashok Kumar Singh

Civil Law- The Consumer Protection Act, 1986- Section 21, 2(c) & 2(e)- Section 2(e)- Section 21(b)- The learned National Commission has got jurisdiction under Section 21(b) of the Act 1986 to call for records and pass appropriate orders in any consumer dispute which is either pending or has been decided by the said Commission. The order impugned has been passed by the learned Commission in an execution case and not in a consumer dispute and consequently, considering the provisions of Section 21(b) of the Act read with definitions as given in Section 2(c) and 2(e) of the Act 1986, it is apparent that the petitioner does not have a remedy of filing of a revision before the learned National Commission.

There is no alternative remedy by way of a revision before The National Commission as the same is vested with the jurisdiction for matters involving consumer disputes and therefore a matter arising out of an execution case, which is not a consumer dispute, cannot be adjudicated by the National Commission.

The Consumer Protection Act, 1986- Section 17- Whether the learned Commission can be considered to be a ''Tribunal' for the purpose of exercise of power under Article 227 of the Constitution of India- Once the learned Commission has been given power to decide the controversy between two or more contesting parties with regard to any matter, then the same would satisfy the test of the learned Commission being vested with judicial powers and as such the learned Commission can clearly be regarded as a "Tribunal" and consequently the High Court has got jurisdiction under Article 227 of the Constitution of India to entertain petitions against learned State Commission.

Settled law that where any authority is vested with judicial powers and is having the trappings of a court of law then any orders passed by would be amenable to the jurisdiction of the High Court under Article 227 of the Constitution of India.

The Consumer Protection Act, 1986 - Section 25 - A perusal of the impugned order would indicate that it is not an attachment order rather it restrains the petitioner authority from carrying out the aforesaid acts of allotting, registering, transferring or auctioning any plot in Gomti Nagar Scheme and as such by no stretch of imagination, can the impugned order fall within the ambit of being an attachment order- Once the State Commission has passed an order which is patently beyond its jurisdiction and the petitioner does not have any alternative remedy of raising a challenge to the said order, accordingly this Court while exercising jurisdiction under Article 227 of the Constitution of India and exercising the power of superintendence over the

learned Commission can very well see the validity of the impugned order. It is apparent that the order impugned dated 21.07.2022 has been passed by the learned State Commission without any jurisdiction.

Since the State Commission has no jurisdiction to pass a restraint order and the National Commission has no power to entertain a revision challenging the said order then the High Court has the jurisdiction to examine the legality and validity of such order passed by the State Commission. (Para 10, 11, 19, 24, 25, 26)

Petition allowed. (E-3)

Case Law/Judgements relied upon:-

1. A. Gurunathan Vs K. Natarajan ,2012-4-L.W.470 (cited, distinguished on facts)

2. R. Jaivel Vs St. of T.N, 2006(2) CTC 709 (cited, distinguished on facts)

3. Laxmikant Revchand Bhojwani & anr. Vs PratapsinghMohansingh Pardeshi, (1995) 6 SCC 576

4. Associate Cement Companies Ltd. Vs P. N. Sharma,AIR 1965 SC 1595

5. L. Chandra Kumar Vs U.O.I (1997) 3 SCC 261

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and Shri Prashant Chandra, learned Senior Advocate assisted by Ms. Mahima Pahwa, learned counsel for the respondents no. 1.

2. At the very outset, Shri Prashant Chandra, learned Senior Advocate, contends that he does not intend to file any counter affidavit and the matter may finally be decided. Accordingly, the Court proceeds to hear and decide the matter.

3. The instant petition has been filed praying for following main reliefs:

"(i) Set aside/quash the judgment dated 21.07.2022 passed in Execution Application no. EA/43/2018 in complaint Case no. C/2011/136 (Ganesh Shankar Tripathi vs Lucknow Development Authority), a certified copy of which is contained as annexure no. 1 to this petition.

(ii) Direct the opposite party no.2 to consign the proceedings to records of Execution Application no. EA/43/2018 in complaint Case no. C/2011/136 (Ganesh Shankar Tripathi vs Lucknow Development Authority) pending before it after declaring that the judgment and decree dated 21.08.2015 has been fully complied and satisfied."

4. The facts of the case have already been set forth by this Court in order dated 23.08.2022, which for the sake of convenience is reproduced below:

"Heard.

Under challenge is the order dated 21.07.2022 passed by the learned State Consumer Disputes Redressal Commission in an execution case, a copy of which is Annexure-1 to the petition, whereby the learned Commission has directed that till the next date no plot in Gomti Nagar or Gomti Nagar Extension shall be allotted, registered, transferred or auctioned.

Learned counsel for the petitioner contends that respondent no.1, the complainant, had filed a complaint under Section 17 of the Consumer Protection Act, 1986 (hereinafter referred to as the 'Act, 1986'), which was decided vide order dated 21.08.2015, a copy of which is Annexure-5 to the writ petition, whereby the learned Commission directed the petitioner herein

(Lucknow Development Authority) to deliver the possession of plot measuring 200 sq. meters in Gomti Nagar or in any other scheme in terms of the allotment letter dated 25.10.1993 along with cost. Subsequent thereto, the Lucknow Development Authority issued an allotment letter dated 18.04.2018, a copy of which is Annexure-8 to the petition, allotting the complainant a plot in Sharda Nagar Extension Scheme. Being aggrieved, the execution case was filed by the complainant before the learned Commission. Learned Commission had perused the allotment letter offered by the petitioner in Sharda Nagar scheme and being not satisfied with the same has passed the impugned order, as indicated above.

Learned counsel for the petitioner contends that the judgment passed by the learned Commission dated 21.08.2015 stood complied with the issuance of the allotment letter inasmuch the learned Commission had directed for delivering the possession of a plot in Gomti Nagar Lucknow or in any other scheme and as now through the allotment letter which has been issued to the complainant a plot has been offered in the Sharda Nagar Extension scheme, as such, the judgment passed by the learned Commission has been complied with. He also contends that even if for the sake of arguments it is accepted that the order has not been complied with then too the learned Commission could not have passed the order in the execution proceedings whereby restraining the Lucknow Development Authority from allotting or registering or transferring or auctioning any plot in Gomti Nagar Scheme inasmuch as the orders in execution cases under the provisions of the Act, 1986 can only be passed in terms of Sections 25 and 27 of the Act, 1986 which do not contemplate passing of the order impugned.

Ms. Mahima Pahwa, learned counsel for the respondent no.1, prays for some time to address the Court on the aforesaid issue.

As such, on her request, list this case in the next week as fresh indicating her name in the cause list from the side of the respondents."

5. Shri Prashant Chandra, learned Senior Advocate, assisted by Ms. Mahima Pahwa, learned counsel for the respondent no.1 has contended that the instant petition is not maintainable on the following grounds:

(a) the petitioner has an alternative remedy of filing of a revision under Section 21(b) of the Consumer Protection Act, 1986 (hereinafter referred to as the Act 1986) before the National Consumer Disputes Redressal Commission, New Delhi. In this regard Shri Prashant Chandra has placed reliance on the judgements of Madras High Court in the case of **A. Gurunathan vs K. Natarajan** reported in **2012-4-L.W.470** as well as in the case of **R. Jaivel vs State of Tamil Nadu** reported in **2006(2) CTC 709**.

(b) the impugned order has correctly been passed by the U.P. State Consumer Disputes Redressal Commission (hereinafter referred to as learned Commission) under the provisions of Section 25(1) of the Act 1986 in as much as an attachment order can be passed and impugned order is sort of an attachment order,

(c) this Court while exercising jurisdiction under Article 227 of the Constitution of India cannot correct the error, if any, which may have been committed by the court below,

(d) the petition has been filed by making false averments, as stated in paragraphs 17 and 18 of the petition, that the judgement passed by the learned Commission had attained finality while the facts are otherwise in as much as, in the revision filed by the respondent no. 1 herein, the order of learned Commission had been modified as would be apparent from a perusal of the order dated 12.01.2016, a copy of which annexure 6 to the petition, which has been passed by the learned National Commission.

(e) Act, 1986 being a special enactment, as such, keeping in view the law laid down by Hon'ble the Apex Court in the case of **Laxmikant Revchand Bhojwani and another vs Pratapsingh Mohansingh Pardeshi** reported in **(1995) 6 SCC 576**, this Court under Article 227 of the Constitution of India cannot assume unlimited prerogative to correct the error that may have been committed by the State Commission.

6. Heard learned counsel for the parties and perused the record.

7. So far as the objection (a) is concerned i.e. the petitioner having an alternative remedy of filing of a revision under Section 21(b) of the Consumer Protection Act, 1986 before the National Consumer Disputes Redressal Commission, New Delhi against the order impugned under Section 21(b) of the Act 1986, the Court will have to consider the relevant provisions of the Act, 1986.

8. Section 21 of the Act, 1986 reads as under:

"21. Jurisdiction of the National Commission*.-Subject to the other provisions of this Act, the National Commission shall have jurisdiction-*

(a) to entertain-

(i) complaints where the value of the goods or services and compensation, if any, claimed exceeds [rupees one crore]; and

(ii) appeals against the orders of any State Commission; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity."

9. Sections 2(c) and 2(e) of the Act, 1986 read as under:

"2(c) "complaint" means any allegation in writing made by a complainant that-

[(i) an unfair trade practice or a restrictive trade practice has been adopted by (any trader or service provider ;]

(ii) [the goods bought by him or agreed to be bought by him] suffer from one or more defects;

(iii) [the services hired or availed of or agreed to be hired or availed of by him] suffer from deficiency in any respect;

(iv) a trader or the service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price-

(a) Fixed by or under any law for the time being in force;

(b) displayed on the goods or any package containing such goods;

(c) displayed on the price list exhibited by him by or under any law for the time being in force;

(d) agreed between the parties;)

[(V) goods which will be hazardous to life and safety when used, are being-offered for sale to the public-

(a) in contravention of any standard relating to safety of such goods as required to be complied with, by or under any law for the time being in force;

(b) if the trader could have known with due diligence that the goods so offered are unsafe to the public;)

(vi) services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety;) with a view to obtaining any relief provided by or under this Act;"

2(e) "consumer dispute" means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint;

10. From the perusal of the aforesaid it is apparent that the learned National Commission has got jurisdiction under Section 21(b) of the Act 1986 to call for records and pass appropriate orders in any **consumer dispute** which is either pending or has been decided by the said Commission. **"Consumer dispute"** has been defined in Section 2(e) to mean a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint, while **"complaint"** has been defined under Section 2(c) of the Act 1986 to mean any allegation in writing made by a complainant alleging of an unfair trade practice, defect in the goods bought by him or where the service suffers from deficiency in any respect or a higher price has been charged.

11. In the instant case the order impugned has been passed by the learned Commission in an execution case and not in a **consumer dispute** and consequently, considering the provisions of Section 21(b) of the Act read with definitions as given in Section 2(c) and 2(e) of the Act 1986, it is apparent that the petitioner does not have a remedy of filing of a revision before the learned National Commission.

12. As regards the judgement of Madras High Court in the case of **A. Gurunathan and R. Jaivel (Supra)** suffice to say that in both the cases the words "consumer dispute" as used in Section 21(b) of the Act 1986 have not been considered and as such the said judgments will have no applicability in the instant case.

13. Before proceeding further with the case and considering the discussion on objection (a) as has been raised by learned Senior Advocate and this Court having held that the petitioner does not have a remedy of filing of a revision before the learned National Commission, another question, which though has not been argued by learned Senior Advocate, is also to be considered which is as to whether this Court, while exercising jurisdiction under Article 226/227 of the Constitution of India, has the power of superintendence over the learned Commission?

14. In this regard the jurisdiction of learned Commission, as provided under Section 17 of the Act 1986 has to be seen, which for the sake of convenience is reproduced below:

"17. Jurisdiction of the State Commission.-- *[(1)] Subject to the other*

provisions of this Act, the State Commission shall have jurisdiction--

(a) to entertain--

(i) complaints where the value of the goods or services and compensation, if any, claimed [exceeds rupees twenty lakhs but does not exceed rupees one crore]; and

(ii) appeals against the orders of any District Forum within the State; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A complaint shall be instituted in a State Commission within the limits of whose jurisdiction,--

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain; or

(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided that in such case either the permission of the State Commission is given or the opposite parties who do not reside or carry on business or have a branch office or personally works for gain, as the case may be, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises."

15. From perusal of Section 17 of the Act 1986, it emerges that learned Commission has got original jurisdiction to entertain complaints where the fault of goods or services and compensation, if any, claimed exceed Rs 20 lakhs but does not exceed Rs 1 crore and to hear appeals against the orders of any district forum within the State. It also has jurisdiction, as per Section 17(1)(b), to call for records and pass appropriate orders on any consumer dispute which is pending or has been decided by the district forum within the state.

16. Undisputedly in this case, the complaint had been filed by the respondent no. 1 before the learned Commission under Section 17 of the Act 1986 which resulted in the judgement dated 25.08.2015 which in turn has been affirmed in both the appeals that have been filed by the respondent no. 1 herein as well as by the petitioner (with some modification). When the judgement of learned Commission has not been complied, the execution case has been filed and during the pendency of the said case, the impugned order has been passed.

18. Whether the learned Commission can be considered to be a "Tribunal' for the purpose of exercise of power under Article 227 of the Constitution of India by this Court? This question as to when an authority is a "Tribunal' has been considered by a Constitution Bench of Hon'ble the Apex Court in the case of **Associate Cement Companies Limited vs P. N. Sharma** reported in **AIR 1965 SC 1595** wherein the Apex Court has held as under:

"44. An authority other than a court may be vested by statute with judicial power in widely different circumstances, which it would be impossible and indeed

inadvisable to attempt to define exhaustively. The proper thing is to examine each case as it arises, and to ascertain whether the powers vested in the authority can be truly described as judicial functions or judicial powers of the State. For the purpose of this case, it is sufficient to say that any outside authority empowered by the State to determine conclusively the rights of two or more contending parties with regard to any matter in controversy between them satisfies the test of an authority vested with the judicial powers of the State and may be regarded as a tribunal within the meaning of Article 136. Such a power of adjudication implies that the authority must act judicially and must determine the dispute by ascertainment of the relevant facts on the materials before it and by application of the relevant law to those facts. This test of a tribunal is not meant to be exhaustive, and it may be that other bodies not satisfying this test are also tribunals. In order to be a tribunal, it is essential that the power of adjudication must be derived from a statute or a statutory rule. An authority or body deriving its power of adjudication from an agreement of the parties, such as a private arbitrator or a tribunal acting under Section 10-A of the Industrial Disputes Act, 1947, does not satisfy the test of a tribunal within Article 136. It matters little that such a body or authority is vested with the trappings of a court. The Arbitration Act, 1940 vests an arbitrator with some of the trappings of a court, so also the Industrial Disputes Act, 1947 vests an authority acting under Section 10-A of the Act with many of such trappings, and yet, such bodies and authorities are not tribunals."

19. From the aforesaid judgement it emerges that in order to ascertain as to whether learned Commission is a tribunal and as to whether power being exercised by learned Commission can be described as judicial power, suffice to say that once the learned Commission has been given power to decide the controversy between two or more contesting parties with regard to any matter, then the same would satisfy the test of the learned Commission being vested with judicial powers and as such the learned Commission can clearly be regarded as a "Tribunal" and consequently this Court would have the power under Article 227 of the Constitution of India over the learned Commission.

20. Likewise reference may also be given of another Constitution Bench judgement of Hon'ble the Apex Court in the case of **L. Chandra Kumar vs Union of India** reported in **(1997) 3 SCC 261** wherein, with regard to jurisdiction of the high courts under Article 226/227 of the Constitution of India in the respective powers of judicial review, it was held as under:

"90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Articles 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues,

many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter."

21. Keeping in view the aforesaid judgments of Hon'ble the Apex Court in the cases of **Associate Cement Companies Limited (supra)** and **L. Chandra Kumar (supra)** this Court holds that the High Court has got jurisdiction under Article 227 of the Constitution of India to entertain petitions against learned State Commission.

22. So far as the objection (b) is concerned i.e. the impugned order has correctly been passed by the State Commission under the provisions of Section 25(1) of the Act 1986 in as much as an attachment order can be passed and impugned order is sort of an attachment order this Court will have to consider the provisions of Section 25 of the Act 1986.

23. Section 25 of the Act 1986 reads as under:

"25. Enforcement of orders of the District Forum, the State Commission or the National Commission.--

(1) Where an interim order made under this Act is not complied with, the District Forum or the State Commission or the National Commission, as the case may be, may order the property of the person, not complying with such order to be attached.

(2) No attachment made under sub-section (1) shall remain in force for more than three months at the end of which, if the non-compliance continues, the property attached may be sold and out of the proceeds thereof, the District Forum or the State Commission or the National Commission may award such damages as it thinks fit to the complainant and shall pay the balance, if any, to the party entitled thereto.

(3) Where any amount is due from any person under an order made by a District Forum, State Commission or the National Commission, as the case may be, the person entitled to the amount may make an application to the District Forum, the State Commission or the National Commission, as the case may be, and such District Forum or the State Commission or the National Commission may issue a certificate for the said amount to the Collector of the district (by whatever name called) and the Collector shall proceed to recover the amount in the same manner as arrears of land revenue."

24. From perusal of the Section 25 it is apparent that when an interim order made under the Act 1986 is not complied with, the learned Commission may order

the attachment of the property of the person not complying with the order.

25. A perusal of the impugned order would indicate that it is not an attachment order rather it restrains the petitioner authority from carrying out the aforesaid acts of allotting, registering, transferring or auctioning any plot in Gomti Nagar Scheme and as such by no stretch of imagination, can the impugned order fall within the ambit of being an attachment order. As such, the said objection is also rejected.

26. So far as the objections (c) and (e) are concerned i.e. this Court while exercising jurisdiction under Article 227 of the Constitution of India cannot correct the error which has been committed by the court below particularly when Act, 1986 is a special enactment, suffice to say that once the State Commission has passed an order which is patently beyond its jurisdiction and the petitioner does not have any alternative remedy of raising a challenge to the said order, accordingly this Court while exercising jurisdiction under Article 227 of the Constitution of India and exercising the power of superintendence over the learned Commission can very well see the validity of the impugned order. This would be amply clear from perusal of the judgement of Hon'ble the Apex Court in the case of **Laxmikant Revchand Bhojwani (Supra)** wherein the Apex Court has held as under:

"Before parting with this judgment we would like to say that the High Court was not justified in extending its jurisdiction under Article 227 of the Constitution of India in the present case. The Act is a special legislation governing landlord-tenant relationship and disputes. The legislature has, in its wisdom, not provided second appeal or revision to the High Court. The object is to give finality to the decision of the appellate authority. The High Court under Article 227 of the Constitution of India cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. ***It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes.***

(emphasis by the Court)"

The said objection is also rejected.

27. So far as the objection (d) is concerned i.e. the petition has been filed by making false averments as contained in paragraphs 17 and 18 of the petition, suffice to say that the order dated 12.01.2016 has been annexed by the petitioner as annexure 6 to the petition. The National Commission has modified the order passed by the State Commission by **enhancing** the compensation and imposing penalty. Rest of the order has not been interfered with. Hence, it cannot be said that there has been material concealment of facts in as much as the execution case has been filed being aggrieved for non allotment of the plot in Gomti Nagar Scheme. The said objection is also rejected.

28. Keeping the view the aforesaid discussion, it is apparent that the order impugned dated 21.07.2022 has been passed by the learned State Commission without any jurisdiction. Accordingly the petition is allowed. The impugned order dated 21.07.2022, a copy of which is annexure 1 to the petition, is set aside.

29. It is provided that learned State Consumer Disputes Redressal Commission

shall proceed with the execution proceedings pending before it in accordance with law considering all the objections as have been raised by the authority before it.

(2022) 9 ILRA 773
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters Under Article 227 No. 3386 of 2022
(CIVIL)

Shobhit Shah & Ors. ...Petitioners
Versus
M/s Induratna Realtors L.L.P. & Ors. ...Respondents

Counsel for the Petitioners:
Ms. Shreya Gupta

Counsel for the Respondents:

Article 227 of the Constitution of India - Arbitration and Conciliation Act, 1996 – Section 8- Section 9 - Commercial Court Act, 2015- Section 2 (1) (C) (XV) - Quashing of plaint of Original Suit - To determine whether the dispute is to be referred to the arbitrator under clause 21 of the partnership deed, the first question which needs to be determined is whether the dispute among the partners arises out of the partnership deed. The said issue being an issue of fact can be adjudicated by the trial court only on the basis of evidence and material on record, and this Court cannot adjudicate the said issue under its supervisory jurisdiction under Article 227 of the Constitution of India.

Settled law that disputed questions of fact can only be adjudicated by the trial court by leading evidence and the said exercise cannot be conducted under the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India.

Article 227 of the Constitution of India - Arbitration and Conciliation Act, 1996 – Section 9- Section 11-Though an application under Section 9 of the Act, 1996 has been filed by respondent no.1 stating that there is an arbitration clause in the partnership deed that does not amount to estoppel or acquiescence as against the respondent no.1 admitting that dispute falls within the ambit of the arbitration clause, more so, when no application under Section 11 of the Act, 1996 has been filed for appointment of the arbitrator-said application withdrawn and Original Suit instituted -The question as to whether the dispute falls within the ambit of the arbitration clause is yet to be adjudicated upon-As the aforesaid question has not been determined and no application under Section 11 of the Act, 1996 was filed by respondent no.1, whether pleading made in Section 9 application will amount to acquiescence on the part of respondent no.1 cannot be adjudicated upon at this stage in a proceeding under Article 227 of Constitution of India as it is an issue to be adjudicated in trial on the basis of evidence under which circumstances the respondent no.1 preferred Section 9 application.

Mere filing of an application u/s 9 of the Act 1996 where no application u/s 11 of the Act 1996 has been filed cannot lead to the inference of either estoppels or acquiescence against the respondent and neither can the said question be gone into by the High Court under its supervisory jurisdiction under Article 227 of the Constitution of India as it is an issue that can only be decided in trial.

Article 227 of the Constitution of India - Arbitration and Conciliation Act, 1996 - Section 9- Section 11the respondent no.1 did not file any application under Section 11 of the Act, 1996 for appointment of Arbitrator and got the application under Section 9 of the Act, 1996 withdrawn, and

thereafter, instituted Original Suit in which he obtained a temporary injunction. The petitioners have a remedy of contesting the temporary injunction application and get the injunction vacated. At this stage, it is too early to conclude that suit is liable to be dismissed for the concealment of fact inasmuch as before dismissing the suit on the ground of concealment, the court has to ascertain as to whether such concealment of fact has any bearing on the outcome of the suit, which can be determined only on the basis of evidence and material on record and not by this Court in the exercise of its supervisory jurisdiction under Article 227 of the Constitution of India.

The issue of concealment of fact is a disputed question of fact, which can be decided only by the trial court and not under the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India. (20, 21, 23, 24, 25, 26, 27, 28, 29, 34)

Petition accordingly rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Mohd. Shahid & anr. Vs St. of U.P. & ors. 2003 AWC 65249

2. Shrawan Kumar @ Pappu Vs Nirmala ,Writ-C No.62174 of 2012

3. Prem Shanker Tripathi Vs 1st A.D.J., Alld.& ors. 1986 ALL. L.J. 1200

4. Gulab Chand Vs Munsif West Alld. & ors. ARC 1988 (1)

5. Smt. Tajwar Jahan & anr. Vs Munsif North, Lucknow, & anr. 1994 ALR 24 528

6. S.J.S. Business Enterprises (P) Ltd. Vs St. of Bih. & ors. 2004 (7) SCC 166

7. Arunima Baruah Vs U.O.I & ors. 2007 (6) SCC 120

8. Virudhunagar Hindu Nadargal Dharma Paribalana Sabai & Ors Vs Tuticorin Edu. Society & ors. 2019 (9) SCC 538

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

1. Heard Ms. Shreya Gupta, learned counsel for petitioners.

2. The petitioners through the present petition under Article 227 of the Constitution of India have prayed for quashing of plaint of Original Suit No.557 of 2022.

3. The facts, in brief, are that plaintiff-respondent no.1 (for convenience referred to as 'respondent no.1') instituted a suit bearing Original Suit No.557 of 2022 against the petitioners, who are defendant nos.2, 3, 4 & 7 in suit (for convenience referred to as 'petitioners') stating therein that a registered partnership agreement was entered into between the respondent no.1, petitioners and respondent nos.2 to 4, who are defendant nos.1, 5 & 6 in the suit, (for convenience referred to as 'respondent nos.2 to 4). Under the partnership agreement, petitioners shall transfer the ownership of suit property to respondent no.1, and the respondent no.1 shall bear all expenses in developing the suit property. The details of the suit property have been stated at the foot of the plaint. Under the partnership agreement, multistory building, residential complex, commercial complex, multiplex complex, hotel/motel apartment club, etc. will be constructed and respondent no.1 was given possession of the suit property.

4. The further averments in the plaint is that respondent no.1 incurred a huge amount in developing the suit property and started construction on 21.04.2022. The petitioners with some unscrupulous persons came to the suit property and started threatening respondent no.1 and made an attempt to dispossess respondent no.1 from

the suit property. It is further stated that the cause of action for the institution of suit arose on 21.04.2022 when respondent no.1 came to know that the petitioners want to sell the suit property to some other person at a higher price. In the aforesaid backdrop, the following relief has been prayed for in the suit:-

12- यह कि वादी निम्नलिखित दादरसी के लिये निवेदन करता है:-

क- यह कि बजरिये हुकुम इम्तनाई दवामी दवाम के लिये प्रतिवादीगण को मुमानियत किया जावे कि प्रतिवादीगण किसी दीगर सख्स को किसी प्रकार का कोई भी अन्तरण व हस्तान्तरण, सट्टा या बैनामा या किसी भी प्रकार का Assign Agreement प्रश्नगत जायदाद जिसका विवरण वादपत्र के अन्त में मय नक्शा नजरी व चौहद्दी के दिया गया है, का न करें तथा वादी के स्वामित्व की भी भूमि पर वादी के शान्ति पूर्ण अध्यासन में कोई अवरोध पैदा न करें तथा उसके उपयोग उपभोग व निर्माण कार्य जो चल रहा है उसको न रोके तथा किसी तरह की कोई मुजाहिमत पैदा न करे।

ख- यह कि कुल खर्चा मुकदमा बहक वादी खिलाफ प्रतिवादीगण आयद फरमाया जाय।

ग- यह कि अलावा ख्वाह बजाय मुतजिकरह सदर वदानिश्त राय अदालत वादी और भी जिस किसी दादरसी को पाने का मुश्तहक करार पावे उसकी भी डिग्री बहक वादी खिलाफ प्रतिवादीगण आयद फरमाया जावे।"

5. The description of the suit property as stated at the foot of the plaint is as follows:-

"मकान नम्बर एस० 8/106 जो आराजी नम्बर 140/1 रकबा 1.2790 हे० आराजी नं० 141 रकबा 0.3360 हे०, 113/2 रकबा 0.0260 हे०, 117 रकबा 0.3200 हे०, 118/1 रकबा 0.1250 हे०, 143 रकबा 0.3000 हे०, 144 रकबा 0.0120 हे०, 145 रकबा 0.0040 हे०, 146 रकबा 0.0280 हे०, 147 रकबा 0.0040 हे०, 148/1 रकबा 0.0040 हे०, 142 रकबा 0.3360 हे०, 148/2 रकबा 0.320 हे०, 149 रकबा 0.2020 हे०, 150 रकबा 0.4410 हे०, 151 रकबा 0.0200 हे० 153 रकबा 0.0530 हे० पर बना है वाका मुहल्ला खजुरी, वार्ड सिकरौल, शहर वाराणसी जिसको नक्शा मुन्सलिका दाव हाजा मे बकैद पैमाईश जाहिर किया गया है हसब चौहद्दी जैल-

पूरब- आराजी नम्बर-154 व अन्य

पश्चिम- जमीन राजकृष्ण दास आराजी नम्बर 116 व अन्य उत्तर-प्राइवेट रास्ता बादहूं मकबूल आलम रोड (मुख्य मार्ग)

दक्षिण:- आराजी नम्बर 120, 121, 122 व अन्य व मकान नं० एस 8/106 ए।"

6. Learned counsel for the petitioners has urged that under clause 21 of the partnership deed, any dispute between partners of the firm shall be referred to an arbitrator who has jurisdiction to decide the dispute. It is further contended that the suit filed by respondent no.1 is sham illusory and inspired by nefarious and vexatious design to harass the petitioners which are established from the record and in such view of the fact, this Court under Article 227 of the Constitution of India has jurisdiction to interfere in the matter and quash the plaint.

7. To buttress the said submission, learned counsel for the petitioners further urged that the fact that dispute between partners is to be referred to the arbitrator is admitted by respondent no.1 which is evident from the record of the case instituted by respondent no.1 under Section 9 of the Arbitration and Conciliation Act, 1996 and Section 2 (1) (C) (XV) of Commercial Court Act, 2015. Accordingly, it is contended that when it is admitted by respondent no.1 that the forum to resolve the dispute between the partners is the arbitration under clause 21 of the partnership deed, the suit is barred under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996'). Accordingly, it is contended that it is a fit case where this Court should exercise its power under

Article 227 of the Constitution of India to quash the plaint.

8. Now in view of the submission advanced by the learned counsel for the petitioners, the moot question which arises for consideration is as to whether the present case falls within the periphery of one of such cases where this Court should exercise its power under Article 227 of the Constitution of India to quash the plaint or as the alternative remedy is available to the petitioners in the form of application under Order 7 Rule 11 of C.P.C., they may be relegated to the same.

9. I have considered submissions of counsel for the petitioners and perused the record.

10. The submission advanced by learned counsel for the petitioners is solely based upon application under Section 9 of the Act, 1996 read with Section 2 (1) (C)(XV) of Commercial Court Act, 2015 filed by respondent no.1 registered as Misc. Civil Case No. 113 of 2022. The petitioners have placed reliance upon paragraphs 2, 9 to 11 and prayer made by respondent no.1 in para 15 of the application. Para 2, 9 to 11, and 15 of Section 9 application are reproduced herein below:

"2. यह है कि विपक्षीगण की जमीन मुहल्ला खजुरी, वार्ड सिकरौल, शहर वाराणसी जिस पर मकान नम्बर एस० 8/106 नगर निगम वाराणसी द्वारा पड़ा है जो प्रार्थनापत्र के साथ (संलग्नक-4) है, तथा जो आराजी नम्बर 141 रकबा 0.3360 हे०, 113/2 रकबा 0.026 हे०, 117 रकबा 0.320 हे०, 118/1 रकबा 0.125 हे०, 143 रकबा 0.300 हे०, 144 रकबा 0.012 हे०, 145 रकबा 0.004 हे०, 146 रकबा 0.028 हे०, 147 रकबा 0.004 है, 148/1 रकबा 0.004 हे०, 142 रकबा 0.336 हे०, 148/2 रकबा 0.032 हे०, 149 रकबा 0.202, 150 रकबा 0.441 हे०, 151 रकबा 0.020 हे०, 153 रकबा 0.053 हे० पर कायम है प्रार्थनापत्र के साथ खतौनी (संलग्नक-3) है। और विपक्षीगण ने जरिये पार्टनरशिप विलेख दिनांक 31.03.2015 को प्रार्थी के फर्म मेसर्स ईन्द्र रत्ना रियलटर्स एल.एल.पी. के साथ पार्टनशिप इकरारनामा तहरीर करके रुबरू गवाहान निष्पादित कर दिया। पार्टनरशिप इकरारनामा इस पार्थनापत्र के साथ (संलग्नक-2) है तथा बादहू फर्म निबंधक रजिस्ट्रार उ०प्र० के कार्यालय वाराणसी में संख्या 820/7-3-15105 को दिनांक 21.05.2015 को फर्म निबंधक उ०प्र० वाराणसी द्वारा पार्टनरशिप डीड को निबंधित कर दिया गया। रजिस्ट्रेशन इस प्रार्थनापत्र के साथ (संलग्नक-1) है। तथा मेसर्स ईन्द्र रत्ना रियलटर्स एल.एल.पी. (संलग्नक-5) व मुद्दालेहुम के मध्य पार्टनरशिप डीड निबंधित वाराणसी में हुआ उसके अनुसार प्रार्थी को विकसित करने का सम्पूर्ण खर्च वहन करना होगा तथा विपक्षीगण प्रश्नगत आराजियात व मकान नम्बर की जमीन को पार्टनर शिप डीड के अनुसार ईन्द्र रत्ना रेसिडेन्सियल्स को बतौर मालिकाना हक प्रदान कर दिये। यानी प्रश्नगत जायदाद के बावत ईन्द्ररत्ना रेसीडेन्सियल्स हर फेल मालिकाना हक अमल मे लाते रहेगे।

9. यह कि दिनांक 04.03.2022 को प्रार्थी ने विपक्षीगण से अनुरोध किया कि पार्टनरशिप डीड दिनांकित 31.03.2015 के पैरा 21 के अनुपालन में मध्यस्थ नियुक्त कर एक सप्ताह के भीतर अवगत करावे ताकि विवाद का निस्तारण मध्यस्थम द्वारा किया जा सके।

10. यह कि प्रार्थी, विपक्षीगण की सूचना का इन्तजार करता रहा परन्तु उक्त अवधि व्यतीत हो जाने के बाद तथा उसके बाद भी दस दिन बीत जाने के बाद विपक्षीगण आर्विट्रेशन क्लाज पैरा 21 के अनुपालन मे मध्यस्थम नियुक्त किये जाने मे कोई अभिरुचि नही दिखाई और न ही इस सम्बन्ध में कोई सूचना ही प्रेषित की गई।

11. यह कि प्रार्थी ने प्रश्नगत जायदाद जिसका विवरण नीचे दिया गया है, के संबंध मे कोई अन्य वाद किसी अन्य न्यायालय मे दाखिल नही किया है न ही वह मौजूदा समय मे विचाराधीन है। प्रार्थी का विवादित जायदाद के संबंध मे यह पहला वाद है।

15. यह कि प्रार्थी निम्नलिखित दादरसी के लिये निवेदन करता है:-

क- यह कि बजरिये हुकुम इम्तनाई दवामी दवाम के लिये विपक्षीगण को मुमानियत किया जावे कि दौरान मुकदमा विपक्षीगण किसी दीगर सख्स को किसी प्रकार का अन्तरण व हस्तान्तरण सट्टा या बैनामा प्रश्नगत जायदाद का जिसका विवरण प्रार्थनापत्र के अन्त में मय नक्शा नजरी व चौहद्दी के दिया गया है, का न करे तथा प्रार्थी के स्वामित्व की भूमि पर प्रार्थी के शान्ति पूर्ण अध्यासन मे कोई अवरोध पैदा न करें तथा उसके उपयोग उपभोग व निर्माण कार्य जो चल रहा है उसको न रोके तथा किसी तरह की कोई मुजाहिमत पैदा न करे।

ख- यह कि कुल खर्चा मुकदमा वहक प्रार्थी खिलाफ विपक्षीगण आयद फरमाया जाय।

ग- यह कि अलावा ख्वाह वजाय मुतजिकरह सदर वदानिश्त राय अदालत प्रार्थी और भी जिस किसी दादरसी को पाने का मुश्तहक करार पावे उसको भी वहक प्रार्थी खिलाफ विपक्षीगण आयद फरमाया जावे।"

11. Placing reliance upon para 9, 10 to 11 of Section 9 application, extracted above, it is contended that the averments contained in the aforesaid paragraphs of Section 9 application discloses that respondent no.1 has admitted that any dispute among the partners shall be referred to the arbitrator, and once admission has been made by respondent no.1 in Section 9 application, it is crystal clear that suit is barred by Section 8 of the Act, 1996 and jurisdiction of the civil court is ousted, hence, the suit is nothing but an abuse of the process of the court and deserves to be quashed by this Court under Article 227 of the Constitution of India.

12. Before proceeding to consider the contention of the petitioners' counsel, it would be fruitful to analyse the judgement relied upon by the learned counsel for the petitioners.

13. In the case of ***Mohd. Shahid and Another Vs. State of U.P. and Others 2003 AWC 65249***, a landlord filed suit under Section 21(1)(b) of the U.P. Act No.13 of 1972 for eviction of the tenant. The application of the landlord was allowed and the matter travelled up to High Court where the order passed by the court below for eviction was affirmed and no special leave petition was preferred against the order passed by the High Court, yet the tenant, who was District Election Officer, instituted a suit against the landlord in which temporary injunction application was rejected, but in the appeal, the injunction was granted. In such view of the fact, the writ petition was filed praying for quashing of the order of the appellate court granting the temporary injunction and quashing the plaint.

14. This Court after analyzing the fact in the said case found that it is a fit case where the institution of the suit by the tenant is nothing but an abuse of the process of the court inasmuch as the decree of the eviction against the tenant-District Election Officer had attained finality till High Court and as the rights of the parties have already been determined, the tenant had no option but to vacate the premises in question and the institution of the suit by the tenant is nothing but an abuse of the process of the court which can very well be corrected by this Court in the exercise of power under Article 227 of Constitution of India by quashing the plaint and the technical objection raised by the Standing Counsel regarding alternative remedy available to the landlord under Order 7 Rule 11 of C.P.C. was overruled.

15. In the case of ***Shrawan Kumar @ Pappu Vs. Nirmala*** passed in Writ-C No.62174 of 2012, this Court quashed the plaint as the prayer in the suit was to restrain the respondent from marrying any

other person except the petitioner. This Court found that the prayer in the suit was against public policy and as such, it is impliedly barred by Section 9 of C.P.C. In returning the said finding, this Court noticed Section 26 of the Indian Contract Act, 1872 which provides that an agreement to restrain a marriage of any person is void. It was in such peculiar facts, that this Court quashed the plaint suo moto.

16. In the case of ***Prem Shanker Tripathi Vs. 1st Additional District Judge, Allahabad and Others 1986 ALL. L.J. 1200*** this Court quashed the plaint of Original Suit No.139 of 1977 pending in the court of Munsif (West) Allahabad on the ground that controversy in the suit has already been settled by this Court in Writ Petition No.852A of 1976 and Writ Petition No.302 of 1976. In such view of the fact, this Court found that the filing of the suit was a frivolous and vexatious act. The Court further noticed that by filing the suit an effort had been made to get over the order passed by this Court in the writ petition. Accordingly, this Court held that suit is impliedly barred within the meaning of Section 9 of C.P.C.

17. In the case of ***Gulab Chand Vs. Munsif West Allahabad and Others ARC 1988 (1)*** this Court quashed the plaint of Original Suit No.102 of 1987 instituted by one Meera Dutta. The facts in that case was that the petitioner-landlord instituted a suit for eviction in the court of Judge Small Causes Court, Allahabad being Suit No.50 of 1981 against O.P. No.3 to 5 for their ejectment from the disputed house. The said suit was decreed and O.P. Nos. 3 to 5 were directed to vacate the disputed house within a month. The decree of eviction was challenged by the tenants O.P. Nos.3 to 5 in revision before the District Judge, who dismissed the revision and affirmed the decree of eviction. Thereafter, O.P. Nos.3 to 5 preferred Writ Petition No.4419 of 1983 before this Court which was also dismissed. The O.P. Nos.3 to 5 when unable to save their eviction, adopted a device to institute a suit by their sister Smt. Meera Dutta (O.P. No.2 in the revision) on the ground that she was also one of the co-tenant of the disputed house and she was not put to notice before passing the eviction decree and thus, the eviction decree is collusive. This Court found that institution of the suit by O.P. No.2 Smt. Meera Dutta is nothing but an abuse of the process of the court inasmuch as it is impossible to believe in view of the averment made in the plaint that she had been residing at the disputed house throughout, yet she could not know about the eviction suit instituted against O.P. Nos.3 to 5. The Court found that it is established that the litigation is sham, illusory, collusive, and inspired by nefarious and vexatious design, therefore, this Court quashed the plaint.

18. Similarly, in the case of ***Smt. Tajwar Jahan and Another Vs. Munsif North, Lucknow, and Another 1994 ALR 24 528*** this Court quashed the plaint in a case where rights of the parties have been adjudicated and have attained finality up to Apex Court.

19. In all five judgements relied upon by the learned counsel for the petitioners, it is pertinent to note that rights among the parties have been determined by a competent court, and to scuttle the execution of the decree, fresh suits have been instituted and in such view of the fact, this Court has held that when the rights among the parties have been determined, the propriety demands that the order or decree determining the rights of the parties

which have attained finality must be complied with or adhered to. In such circumstances, this Court held that where it is established on record that the suit is sham, illusory, collusive, and inspired by nefarious and vexatious design, the Courts not only have jurisdiction but owe a duty to throttle such litigation at the threshold.

20. Now at this juncture, it is pertinent to note that though respondent no.1 has filed an application under Section 9 of the Act, 1996 and has stated in para 9, 10, and 11 of the application that clause 21 provides for settlement of dispute among the partners by the arbitrator. Such averment in Section 9 application, for the reasons stated hereinafter, does not amount to an admission by respondent no.1 that the dispute raised in the suit by the respondent no.1 falls within clause 21 of the partnership deed and such dispute can be resolved only through an arbitrator.

21. To determine whether the dispute is to be referred to the arbitrator under clause 21 of the partnership deed, the first question which needs to be determined is whether the dispute among the partners arises out of the partnership deed. The said issue being an issue of fact can be adjudicated by the trial court only on the basis of evidence and material on record, and this Court cannot adjudicate the said issue under its supervisory jurisdiction under Article 227 of the Constitution of India.

22. The matter can be viewed from another angle, that application under Section 9 of the Act, 1996 is an application only for grant of temporary injunction on the existence of any condition enumerated in Section 9 of the Act, 1996, but application filed under Section 11 of the Act, 1996 is the application for referring the matter to the arbitrator under the scheme of the Act, 1996, and power to appoint an arbitrator is conferred upon the High Court in case parties could not appoint the arbitrator under the mode provided in the agreement.

23. In the instant case, there is nothing on record to indicate that any application under Section 11 of the Act, 1996 was filed by respondent no.1 for the appointment of an arbitrator on the ground that the dispute among the partners falls within the ambit of the arbitration clause, and the arbitrator may be appointed to resolve the dispute.

24. In such view of the fact, this Court finds that though an application under Section 9 of the Act, 1996 has been filed by respondent no.1 stating that there is an arbitration clause in the partnership deed that does not amount to estoppel or acquiescence as against the respondent no.1 admitting that dispute falls within the ambit of the arbitration clause, more so, when no application under Section 11 of the Act, 1996 has been filed for appointment of the arbitrator.

25. Though respondent no.1 has filed an application under Section 9 of the Act, 1996 stating that clause 21 of the partnership deed provides for arbitration agreement among the parties, but he got the said application withdrawn and instituted Original Suit No.557 of 2022 for the relief, extracted above.

26. The question as to whether the dispute falls within the ambit of the arbitration clause is yet to be adjudicated upon. It is relevant to notice that respondent no.1 has not approached the

proper forum under Section 11 of the Act, 1996 for the appointment of Arbitrator.

27. As the aforesaid question has not been determined and no application under Section 11 of the Act, 1996 was filed by respondent no.1, whether pleading made in Section 9 application will amount to acquiescence on the part of respondent no.1 cannot be adjudicated upon at this stage in a proceeding under Article 227 of Constitution of India as it is an issue to be adjudicated in trial on the basis of evidence under which circumstances the respondent no.1 preferred Section 9 application, therefore, in the opinion of the Court, the submission of learned counsel for the petitioners does not stand to merit.

28. It is also contended that the institution of suit is a nefarious and vexatious act on the part of respondent no.1 which is evident from the fact that when respondent no.1 failed to get an order under Section 9 of the Act, 1996, he instituted Original Suit No.557 of 2022 and obtained an interim injunction order. It may be that respondent no.1 could not succeed in obtaining an injunction order under Section 9 application, but that does not mean that suit instituted by respondent no.1 is frivolous and amounts to abuse of the process of the court as the institution of Section 9 application by the respondent no.1 may be on some wrong legal advice, but fact remains that the respondent no.1 did not file any application under Section 11 of the Act, 1996 for appointment of Arbitrator and got the application under Section 9 of the Act, 1996 withdrawn, and thereafter, instituted Original Suit No.557 of 2022 in which he obtained a temporary injunction. The petitioners have a remedy of contesting the temporary injunction application and get the injunction vacated.

29. It is also contended that the suit has been instituted by concealing the material fact that respondent no.1 has filed an application under Section 9 of the Act, 1996 before the Commercial Court Act wherein he admitted in para 21 that the dispute falls within the ambit of arbitration clause of the partnership agreement, that may be so, but at this stage, it is too early to conclude that suit is liable to be dismissed for the concealment of fact inasmuch as before dismissing the suit on the ground of concealment, the court has to ascertain as to whether such concealment of fact has any bearing on the outcome of the suit, which can be determined only on the basis of evidence and material on record and not by this Court in the exercise of its supervisory jurisdiction under Article 227 of the Constitution of India.

30. In the case of ***S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar and Others 2004 (7) SCC 166,*** the Apex has held that the suppression of the material fact disentitles the litigant to any relief, but suppression must be of a material fact which has bearing on the outcome of the decision of the case. Relevant paragraph 13 of the judgment is reproduced herein below:-

"13. As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the court, whatever view the court may have taken. Thus when the

liability to income tax was questioned by an applicant on the ground of her non-residence, the fact that she had purchased and was maintaining a house in the country was held to be a material fact, the suppression of which disentitled her from the relief claimed. Again when in earlier proceedings before this Court, the appellant had undertaken that it would not carry on the manufacture of liquor at its distillery and the proceedings before this Court were concluded on that basis, a subsequent writ petition for renewal of the licence to manufacture liquor at the same distillery before the High Court was held to have been initiated for oblique and ulterior purposes and the interim order passed by the High Court in such subsequent application was set aside by this Court. Similarly, a challenge to an order fixing the price was rejected because the petitioners had suppressed the fact that an agreement had been entered into between the petitioners and the Government relating to the fixation of price and that the impugned order had been replaced by another order."

31. Similar view has been reiterated by the Apex Court in the case of ***Arunima Baruah Vs. Union of India & Others 2007 (6) SCC 120***. Relevant paragraphs 11 & 12 of the judgment are reproduced herein-below:-

11. The court's jurisdiction to determine the lis between the parties, therefore, may be viewed from the human rights concept of access to justice. The same, however, would not mean that the court will have no jurisdiction to deny equitable relief when the complainant does not approach the court with a pair of clean hands; but to what extent such relief should be denied is the question.

12. It is trite law that so as to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question."

32. Therefore, in the opinion of the Court, the said contention also does not stand to merit.

33. Indeed, the alternative remedy is not always a bar in entertaining a petition under Article 227 of the Constitution of India, but the Apex Court in paragraphs 11 to 13 of the judgement in the case of ***Virudhunagar Hindu Nadargal Dharma Paribalana Sabai and Others Vs. Tuticorin Educational Society and Others 2019 (9) SCC 538*** has held that the Court should refrain from interfering under Article 227 of Constitution of India where there is an alternate remedy provided under the scheme of the act. Paragraphs 11 to 13 of the said judgement are being reproduced herein below:-

"11. Secondly, the High Court ought to have seen that when a remedy of appeal under Section 104 (1)(i) read with Order 43, Rule 1 (r) of the Code of Civil Procedure, 1908, was directly available, Respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In A. Venkatasubbiah Naidu Vs. S. Chellappan 2000 (7) SCC 695, this Court held that "though no hurdle can be put against the exercise of the constitutional powers of the High Court, it is a well-recognised principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a Constitutional remedy"

12. But courts should always bear in mind a distinction between (i) cases where such alternative remedy is available before civil courts in terms of the provisions of Code of Civil Procedure, and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasi-judicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which the Respondents 1 and 2 invoked the jurisdiction of the High Court. This is why, a 3-member Bench of this Court, while overruling the decision in Surya Dev Rai vs. Ram Chander Rai 2003 (6) SCC 675, pointed out in Radhey Shyam Vs. Chhabi Nath 2015 (5) SCC 423 that "orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts".

13. Therefore wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself."

34. In such view of the fact, as the petitioners have the remedy of filing application under Order 7 Rule 11 of C.P.C. for rejection of plaint if the suit is barred by any provision of law, this Court finds that this is not a fit case where this Court should exercise its power under Article 227 of Constitution of India to quash the plaint.

35. Thus, for the reasons given above, the writ petition under Article 227 of the Constitution of India lacks merit and is accordingly, ***dismissed*** with no order as to costs.

(2022) 9 ILRA 782
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters Under Article 227 No. 5135 of 2016 (Civil)

Ghaziabad Development Authority ...Petitioner

Versus

District Judge/Appellate Authority, Civil Court, Ghaziabad & Anr. ...Respondents

Counsel for the Petitioner:
Sri Mahendra Pratap, Sri Mahesh Narain Singh

Counsel for the Respondents:
Sri Rajesh Srivastava, Sri Himanshu Tiwari, Sri Kashif Zaidi, Sri Shashi Nandan (Senior Adv.)

Civil Law - U.P. Urban Planning and Development Act, 1973 - Sections 18 (4-A) & 18(6) - Transfer of Property Act, 1882- Sections 111 (g),105 & 108- Indian Easements Act- Section 52- Appeal of the respondent no.2 - direction to reconsider the case of respondent no.2 -Notice under Section 111 (g) of the Transfer of Property Act, 1882- It is clear that there was a clear intention on the part of the G.D.A. to handover the exclusive possession of the plot, and perusal of the stipulation of the agreement and brochure and possession memo do not reflect or indicate in any manner that G.D.A. wanted to retain the possession of the plot and wished to grant only the permissive right to respondent no.2 to run the school-To ascertain as to whether a document is a lease deed or not, the title of the deed is not relevant and the only relevant point for consideration is the intention of the parties in executing the said deed. If the terms and conditions stipulated in the document principally satisfy the condition that exclusive possession of the plot has been delivered with the right to enjoy the property, it is a lease, and if only the right to use the property has been granted while the possession is retained by the owner, the document is not a lease deed- G.D.A. has treated the document to be a lease is also apparent from the fact that notice has been issued to respondent no.2 under Section 111(g) of the Act, 1882.

In order to ascertain as to whether the agreement is a lease or not, the terms and conditions of the agreement and the brochures have to be considered along with the intention of the parties executing the said deed. Where the said terms and conditions show that exclusive possession has been delivered to the other party, then the same is a lease but where only the right to use the property is granted then the document would not be a lease. (Para 35, 40, 41, 42, 47)

Petition rejected. (E-3)

Judgements/ Case law relied upon:-

1. New Okhla Industrial Development Authority Vs Ravindra Kumar Singhvi (Dead) thru L.Rs, Civil Appeal No.382 of 2012.(cited)

2. C.M. Beena & anr. Vs P.N. Ramachandra Rao 2004(3) SCC 595 (relied)

3. Khalil Ahmed Bashir Ahmed Vs Tufelhussein Samasbhai Sarangpurwala 1988 (1) SCC 155. (relied)

4. Associated Hotels of India Ltd. Vs R.N. Kapoor AIR 1959 SC 1262 (relied)

5. The New Bus Stand Shop Vs Corporation of Kozhikode & Ors. 2009 (10) 455.(relied)

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

1. Heard Sri Mahesh Narain Singh, learned counsel for the petitioner, and Sri Shashi Nandan, learned Senior Advocate assisted by Sri Kashif Zaidi, learned counsel for the respondents.

2. This petition under Article 227 of the Constitution of India has been filed by the petitioner-Ghaziabad Development Authority (hereinafter referred to as 'G.D.A.') challenging the order dated 14.04.2016 passed by the Additional District Judge, Court No.1, Ghaziabad by which he has allowed the appeal of the respondent no.2 under Section 18(6) of U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as 'Act,

1973') and directed the petitioner to reconsider the case of respondent no.2 under Section 18(4-A) of the Act, 1973.

3. The facts, in brief, are that G.D.A. floated a scheme for allotment of plots to Creche/Nursery/Primary/High School/Degree College, Educational Institutions and invited application for the same. The G.D.A. issued a brochure containing terms and conditions of registration and allotment of plots.

4. Under the scheme floated for allotment of plots, respondent no.2 applied for allotment of a plot alongwith the registration amount. The G.D.A. informed respondent no.2 vide letter dated 24.06.2008 that the plot situated at Indirapuram, Nyay Khand-1, Ghaziabad has been allotted to the society with the approval dated 20.06.2008 of State of U.P. The Vice Chairman of the G.D.A. issued a consequential order dated 24.06.2008.

5. The rate of the plot was Rs.3600/- per sq. meter and the area of the plot was 7363.96 per sq. meter. The total value of the plot was Rs.2,65,10,256/-. Respondent no.2 was also directed to pay a sum of Rs.53,02,052/- towards the location charge and Rs.31,81,231/- as lease rent.

6. On depositing the aforesaid amount as well as fulfillment of terms of allotment, the G.D.A. executed an agreement dated 31.08.2008 titled as 'आवासीय क्षेत्र में स्कूल के निर्माणार्थ गाज़ियाबाद विकास प्राधिकरण की भूमि का संविदा' (hereinafter referred to as 'agreement') in favour of the respondent no.2.

7. The agreement was registered in the office of Sub-Registrar, Ghaziabad on the payment of stamp duty of Rs.24,50,000/-. The G.D.A., thereafter, delivered the possession of the said plot to respondent no.2 on 30.09.2008. Thereafter, respondent no.2 submitted a plan for the construction of the building on the said plot, but the plan submitted by respondent no.2 was not approved by the G.D.A.

8. The record reflects that a notice under Section 111 (g) of the Transfer of Property Act, 1882 (hereinafter referred to as 'Act, 1882') was issued by G.D.A. calling upon respondent no.2 to show cause as to why the agreement be not cancelled for non-construction of building over the said plot within five years from the date of allotment which is a breach of the condition of the agreement. The reply was submitted by respondent no.2, but G.D.A. being dissatisfied with the reply of respondent no.2 cancelled the aforesaid agreement on 30.06.2014. Accordingly, a communication was sent to respondent no.2 vide letter dated 02.07.2014 informing about the cancellation of the agreement.

9. Feeling aggrieved by the order of cancellation of agreement and allotment of plot, respondent no.2 preferred an appeal bearing Appeal No.55 of 2014 under Section 18(6) of the Act, 1973 on the ground that respondent no.2 is entitled to benefit of Section 18 (4-A) of the Act, 1973 on payment of the surcharge.

10. The appeal was opposed by the petitioner contending inter-alia that respondent no.2 is not entitled to the benefit of Section 18(4-A) of the Act, 1973 as only an agreement has been entered into between the parties and the lease deed is yet to be executed between the parties. The said appeal was allowed by the Additional District Judge, Court No.1, Ghaziabad vide order dated 14.04.2016, which is impugned in the present writ petition.

11. The case of respondent no.2 is that the order of G.D.A. dated 02.07.2014 cancelling the allotment of plot for construction of schools was per se illegal and in the teeth of Section 18(4-A) of the Act, 1973. Further case of respondent no.2 is that stipulation contained in para 6.1 of the brochure, which is also part of the agreement, is binding upon the parties, therefore, respondent no.2 is entitled to the benefit of the said clause and Section 18(4-A) of the Act, 1973.

12. Respondent no.2 in the counter affidavit has averred that they are ready and willing to pay the additional surcharge as provided in Section 18(4-A) of the Act, 1973, and this aspect was not considered by the G.D.A. while cancelling the allotment of plot in favour of respondent no.2. The further case of the respondent no.2 was that though the agreement has been styled as 'आवासीय क्षेत्र में स्कूल के निर्माणार्थ गाज़ियाबाद विकास प्राधिकरण की भूमि का संविदा' but in fact, the agreement is lease deed as the terms and conditions stipulated in the agreement decipher that it has all the trappings of the lease.

13. The further case of respondent no.2 was that as per the stipulation contained in the agreement, the brochure is also part of the agreement, therefore, the stipulation contained in the brochure is binding upon the parties. Thus, respondent no.2 is entitled to the extension of time for a period of five years for raising construction over the said plot on payment of charges as prescribed under Section 18(4-A) of the Act, 1973.

14. Challenging the aforesaid order, learned counsel for the petitioner has contended that it is evident from the agreement that agreement has been styled as 'आवासीय क्षेत्र में स्कूल के निर्माणार्थ गाज़ियाबाद विकास प्राधिकरण की भूमि का संविदा' and cannot be termed as lease deed, therefore, Section 18(4-A) is not attracted and thus, appeal under Section 18(6) of the Act, 1973 filed by the respondent no.2 was not maintainable. Accordingly, it is contended that the order impugned is illegal and without jurisdiction.

15. The further contention advanced by the learned counsel for the petitioner is that in view of the clear stipulation in the agreement that the construction has to be raised within five years from the date of agreement failing which the G.D.A shall have the right to cancel the agreement and re-enter in the said plot, so, it is submitted that on non-fulfillment of the said condition, the agreement stands cancelled. He contends that the appellate court has failed to appreciate the law correctly while holding that the agreement reflects that it has all the trappings of a lease deed, therefore, Section 18(4-A) of the Act, 1973 are attracted in the instant case and the G.D.A. had ignored this aspect of the matter while cancelling the allotment. In support of the case, learned counsel for the petitioner has placed reliance upon the judgement of Apex Court in the case of ***New Okhla Industrial Development Authority Vs. Ravindra Kumar Singhvi (Dead) through L.Rs*** passed in ***Civil Appeal No.382 of 2012***.

16. Rebutting the aforesaid contention, Sri Shashi Nandan, learned Senior Counsel for the respondents has placed various stipulations of the agreement to contend that though the agreement may be titled as 'आवासीय क्षेत्र में स्कूल के निर्माणार्थ गाज़ियाबाद विकास प्राधिकरण की भूमि का संविदा' but the stipulation contained therein reflects clear intention of the

petitioner that exclusive possession of plot has been delivered to respondent no.2 for enjoyment, thus, the agreement is a lease deed, therefore, the finding of the appellate court is correct and based upon proper appreciation of the law. He further contends that admittedly a notice under Section 111(g) of the Act, 1882 has been issued by the petitioner for cancellation of agreement which reflects that the petitioner has also treated the said agreement as a lease deed. Thus, it is contended that had the G.D.A. not treated the agreement to be a lease deed, it would not have issued a notice under Section 111(g) of the Act, 1882. In support of his argument, he has placed reliance upon the judgements of the Apex Court in the cases of ***C.M. Beena and Another Vs. P.N. Ramachandra Rao 2004(3) SCC 595 & Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala 1988 (1) SCC 155***.

17. I have considered the rival submissions of the parties and perused the record.

18. The controversy in the present case revolves around the question whether the agreement has trapping of the lease or not.

19. If the answer to this question is 'yes', obviously Section 18(4-A) of the Act, 1973 would be applicable and respondent no.2 is entitled to consideration of its claim for extension of a further period of five years for raising construction over the plot on payment of charge as provided in Section 18(4-A) of the Act, 1973.

20. To appreciate the aforesaid question, it would be apt to reproduce the relevant clause of the agreement in which petitioner has been referred to as 'संविदाकर्ता' and respondent no.2 has been referred to as 'संविदाग्राहिता':-

"चूंकि संविदाकर्ता द्वारा विकसित योजना के अन्तर्गत स्कूल के निर्माण हेतु नियोजित भूखण्ड नियमानुसार योजना घोषित कर दिनांक 24.06.2008 को स्कूल भूखण्ड न्याय खण्ड-1 स्थित इन्दिरापुरम् योजना में इस कार्यालय के पत्र संख्या-915/व्य०अनु/08, दिनांक 24.06.2008 द्वारा आवंटित किया गया था। साईट प्लान के अनुसार भूखण्ड क्षेत्रफल 7363.96 वर्गमीटर है । जिसकी सीमायें इस विलेख के अन्त में अंकित हैं तथा संलग्न स्थल चित्र में भी स्पष्ट है, को अंकन रू. 3,18,12,308.00 (रूपये तीन करोड़ अट्ठारह लाख बारह हजार तीन सौ आठ मात्र) आंशिक प्रीमियम रू. 67,50,000.00 व 20 प्रतिशत लोकेशन चार्ज रू. 53,02,052.00 कुल आंशिक प्रीमियम रू. 1,20,52,052.00 व लीज किराया रूपये 31,81,231.00 एवं कुल बकाया रू. 1,97,60,256.00 (रूपये एक करोड़ सत्तान्नबे लाख साठ हजार दो सौ छप्पन मात्र) का भुगतान निम्नानुसार 05 वर्ष वार्षिक किश्तों में 21 प्रतिशत ब्याज सहित किये जाने बाबत संविदाग्राहिता अदा करने हेतु सहमत हुए है। अतः किश्तों का विवरण निम्नानुसार है:-

क्रम	*राशि*	*ब्याज 21%*	*कुल देय राशि*	*देय तिथि*
1.	*39,52,052.00*	*41,49,655.00*	*81,01,,707.00*	*24-06-2009*
2.	*39,52,052.00*	*33,19,724.00*	*72,71,776.00*	*24-06-2010*
3.	*39,52,052.00*	*24,89,793.00*	*64,41,845.00*	*24-06-2011*
4.	*39,52,052.00*	*16,59,862.00*	*56,11,914.00*	*24-06-2012*
5.	*39,52,052.00*	*8,29,931.00*	*47,81,983.00*	*24-06-2013*

देय तिथि पर भुगतान करने पर 3.5 प्रतिशत ब्यान में छूट दी जायेगी। देय तिथि पर भुगतान न करने पर देय राशि पर 21 प्रतिशत अतिरिक्त ब्याज देय होगा। भूखण्ड का कब्जा एग्रीमेन्ट कराने के उपरान्त हस्तान्तरित किया जायेगा। देय तिथि पर कब्जा न लेने पर रू. 500/- प्रतिमाह चौकीदार शुल्क जमा कराना होगा। भूखण्ड पर

निर्माण एग्रीमेन्ट की तिथि से 05 वर्ष के अन्दर पूर्ण करना होगा। शेष नियम व शर्ते ब्रोशर के अनुसार होंगी।

अतः यह संविदा निम्न बातों का साक्षी है:-

1. यह कि उपर्युक्त भूखण्ड जिसकी सीमाओं को संलग्न रेखाचित्र में दिखाया गया है और प्रश्नगत स्कूल भूखण्ड हाई स्कूल के निर्माण हेतु आवंटित किया गया है तो सभी भार व देनदारियों से मुक्त है तथा विवाद रहित सम्पदा है जिसे इस विलेख में आगे स्कूल के निर्माण हेतु संविदा भूखण्ड कह कर सम्बोधित किया गया है, संविदाग्राहिता को 90 (नब्बे) वर्ष की अवधि हेतु संविदा पर हस्तान्तरित किया जा रहा है किन्तु प्राधिकरण के पक्ष में निम्नलिखित अधिकार सदैव आरक्षित होंगे:-

(क) यदि प्राधिकरण उक्त क्षेत्र का विकास किया जाना आवश्यक समझे तो संविदा भूखण्ड के नीचे तथा ऊपर जल सम्बाहक, नालियों, सीवरों या बिजली के तारों को डालने, बनाने या बिछाने का अधिकार।

(ख) संविदा भूखण्ड या उसके किसी भाग में होने वाले सभी खानों और खनिजों के सम्पूर्ण अधिकार।

(ग) ...

(घ) ...

4. संविदाग्राहिता अपने खर्च से संविदा भूखण्ड पर प्राधिकरण द्वारा लिखित रूप से अनुमोदित रेखाचित्र वाह्य अद्विक्षेप तथा डिजाईन व स्थिति के अनुसार एक स्कूल के लिए भवन का सारभूत एवं शिल्प कौशल में निर्माण करायेगा, जिसमें स्कूल भवन, नालियों शौचालयों तथा संयोजनों के संबंध में विहित प्राधिकरण तथा नगर पालिका नियमावली तथा उपविधियों के अनुसार सभी आवश्यक सीवरों, नालियों तथा अनुसंलग्नकों का प्राविधान होगा।

15. संविदाग्राहिता को संविदा भूखण्ड पर संविदा की दिनांक से 05 वर्ष तक स्कूल भवन को निर्माण करना और उसे पूरा करना आवश्यक होगा समय पर निर्माण पूर्ण नहीं किया गया तो भूमि वापिस ले ली जायेगी।

16. और इस संविदा के पक्षों द्वारा उनके बीच एतद्द्वारा निम्नलिखित सम्बन्ध में सहमति और घोषणा की जाती है:-

(क) इसके पूर्व किसी बात को अन्यथा होते हुए भी यदि प्राधिकरण के मतानुसार (जिसका अन्तिम तथा बाध्य होगा) संविदाग्राहिता अथवा उसके अधीन दावा करने वाले किसी भी व्यक्ति द्वारा पूर्व की शर्तों या प्रसंविदाओं में से किसी का उल्लंघन किया गया हो, जिनका पालन तथा सम्पादन किया जाना उनका कर्तव्य था तथा विशेषतया और इस उपखण्ड की व्यापकता पर प्रतिकूल प्रभाव डाले बिना, यदि संविदाग्राहिता पूर्ववत प्राविधानों के अनुसार सम्पूर्ण संविदा भूखण्ड पर स्कूल भवन निर्माण निर्धारित अवधि में पूर्ण करने में असफल रहता है या स्कूल भवन निर्माण करने से पूर्व संविदा भूखण्ड का अन्तरण परित्याग बंधक या अभ्यापर्ण करता है या अन्तरित भूखण्ड के सम्पूर्ण भाग से कम भाग का अन्तरण परित्याग बंधक का अभ्यापर्ण करता है या पूर्वकित खण्ड -2 में उल्लिखित अवधि के भीतर इस संविदा में उल्लिखित प्रीमियम को किसी किश्त का भुगतान नहीं करता है या यदि संविदाग्राहिता या कोई ऐसा व्यक्ति जिसमें इस संविदा के अधिकार एतद्द्वारा निहित किये गये हों, दिवालिया निर्णीत हो गया है या प्राधिकरण के लिए वह वैध होगा कि (अनुबन्ध के उल्लघंन के सम्बन्ध में प्राधिकरण द्वारा कार्यवाही करने के लिए किसी अधिकार पर प्रतिकूल प्रभाव डाले बिना) वह संविदा या उसके किसी भाग पर अन्तरित सम्पूर्ण भूखण्ड के नाम पर पुनः प्रवेश कर लें और उक्त दशा में यह संविदा समाप्त हो जायेगा और तत्पश्चातः-

यदि पुनः प्रवेश के समय, संविदाग्राहिता द्वारा संविदा भूखण्ड पर स्कूल भवन का निर्माण किया गया हो तो संविदाग्राहिता पुनः प्रवेश के दिनांक से तीन माह की अवधि के भीतर उस पर से सभी निर्माण कार्य या स्कूल भवन जुड़नार तथा वस्तुएं जो किसी समय या उक्त अवधि के दौरान उक्त अवधि में भूखण्ड पर या उसमें जुड़ी या लगायी गयी हों, हटा लेगा और उक्त स्थान को ऐसी अच्छी दशा में लायेगा, जैसी कि संविदा देने के समय थी, पर उपरोक्त के सम्बन्ध में चूक किये जाने पर वे उक्त भूखण्ड और उस पर होने वाले आवश्यक जुड़नार और वस्तुओं के सम्बन्ध में संविदाग्राहिता को किसी प्रतिकर का भुगतान किये बिना प्राधिकरण की सम्पत्ति हो जायेगी। यदि संविदाग्राहिता निर्दिष्ट अवधि के भीतर निर्माण कार्यों स्कूल भवन, जुड़नारों और वस्तुओं को नहीं हटा लेता है तो संविदा भूखण्ड का पुनः आवंटन कर लिया जायेगा।

(ख) ..."

21. It is evident that respondent no.2 was directed to pay location charges to the tune of Rs.53,02,052/- and lease rent of Rs.31,81,231/-. It is also apt to refer to the letter of Executive Engineer (Expenditure) of the G.D.A. dated 29.08.2008 addressed to respondent no.2 stating therein that respondent no.2 had deposited Rs.67,50,000/-, 20% of location charge to the tune of Rs.53,02,052/- and 10% of the lease rent to the tune of Rs.31,81,000/-.

22. On depositing of the said amount, the agreement was executed on 31.08.2008 and possession memo was prepared, thereafter, the plot was delivered to

respondent no.2. The contents of the possession memo are being reproduced herein below:-

मैने उपरोक्त प्लाट का अधिकार आज दिनांक ..... को ..... बजे मध्यान्ह पूर्व/पश्चात प्राप्त कर लिया है। प्लाट की पूर्ण पट्टे में दर्शायी गई/ नाप मेरे सामने की गई है, जिससे मैं पूर्णतः सन्तुष्ट हूँ।"

23. Perusal of the letter dated 29.08.2008 reveals that respondent no.2 after depositing the amount in compliance with the letter dated 29.08.2008 got the agreement dated 31.08.2008 executed. Stipulation under the agreement, extracted above, shows that construction was to be raised by respondent no.2 within a period of five years from the date of execution of the agreement. Further, clause 1 of the agreement stipulates that the plot is free from all encumbrances and has been allotted for 90 years and possession thereof has been delivered to respondent no.2.

24. At this stage, it would also be apt to refer to the language used in the possession memo, extracted above, which recites that respondent no.2 has obtained exclusive possession of the plot. The stipulation contained in the agreement as well as the reading of the possession memo clearly reflects that exclusive possession of the plot has been delivered to respondent no.2. It does not indicate that there was any intention on the part of the petitioner not to deliver the exclusive possession of the plot to the respondent no.2.

25. The aforesaid fact is further fortified from the stipulation in the agreement that the plot has been given to respondent no.2 for 90 years. The agreement does not stipulate any condition from which it can be inferred that there was any intention on the part of the petitioner to retain the exclusive possession of the plot with it and grant only a permissive right to respondent no.2 to run the school.

26. The aforesaid contention is further supported by the conditions contained in the brochure which is a part of the agreement. The fact that the brochure is treated to be a part of the agreement is also evident from the allotment letter dated 24.06.2008 and letter dated 29.08.2008 of the petitioner which states that "नियम व शर्ते ब्रोशर के अनुसार होंगी'.

27. In this context, it would also be apposite to reproduce para 5, 6, 7, 10.10, and 10.11 of the brochure:-

5.0 भुगतान की प्रक्रिया तथा कब्जा हेतु शर्तें

विद्यालयों/शैक्षिक संस्थाओं की भूमि के मूल्य के भुगतान की प्रक्रिया निम्नवत होगी:-

5.1 आवंटित भूखण्ड के मूल्य की 25 प्रतिशत धनराशि संस्था को आवंटन पत्र जारी होने की तिथि के 30 दिन के अन्दर जमा करानी होगी, जिसमें पंजीकरण राशि समायोजित कर ली जायेगी।

5.2 25 प्रतिशत धनाराशि तथा लीज रेंन्ट एवं लोकेशन चार्जेज (यदि लागू हों) जमा होने के उपरान्त रजिस्टर्ड एग्रीमेंट कराकर ही कब्जा दिया जायेगा।

5.3 अवशेष 75 प्रतिशत धनाराशि पांच सालाना किश्तों में 21 प्रतिशत वार्षिक ब्याज सहित जमा करानी होगी। समय से किश्तों का भुगतान करने पर ब्याज में 3.5 प्रतिशत की छूट दी जायेगी। प्रथम किश्त आवंटन की तिथि से एक वर्ष के अन्दर देय होगी।

5.4 रजिस्टर्ड एग्रीमेंट से पूर्व भूखण्ड के कुल मूल्य का 10 प्रतिशत लीज रेन्ट जमा करना होगा।

5.5 समस्त भुगतान बैंक ड्राफ्ट/पे-आर्डर के माध्यम से गाजियाबाद विकास प्राधिकरण के कैस काउन्टर पर प्रत्येक कार्य दिवस में प्रातः 10.00 बजे से 2.00 बजे तक जमा किये जा सकते है। ड्राफ्ट/पे-आर्डर उपाध्यक्ष गाजियाबाद विकास प्राधिकरण के नाम एवं गाजियाबाद में भुगतान योग्य होने चाहिए।

5.6 निर्धारित तिथि तक कब्जा नहीं लेने पर नियमानुसार शुल्क देय होगा।

5.7 भूखण्डों का क्षेत्रफल अनुमानित है, जिसमें स्थल पर विचलन हो सकता है। क्षेत्रफल में कमी या बढ़ोत्तरी के लिए कोई आपत्ति मान्य नहीं होगी। वास्तविक

क्षेत्रफल के आधार पर ही देय धनराशि की गणना आवंटित मूल्य पर की जायेगी।

5.8 भूखण्ड के क्षेत्रफल में स्थल के अनुसार परिवर्तन होने की दशा में यदि आवंटी द्वारा इस आधार पर भूखण्ड निरस्त करने/ परित्याग का अनुरोध किया जाता है तो उसकी जमा धनराशि बिना किसी ब्याज के वापस कर दी जायेगी।

5.9 भुगतान की समय सीमा आदि के विषय में प्राधिकरण/ शासन के आदेश मान्य होंगे।

6.0 भवन निर्माण अवधिः

6.1 आवंटी भवन मानचित्र सक्षम प्राधिकारी से स्वीकृत कराकर ही अपने व्यय पर निर्माण करेगा। भवन निर्माण की अवधि संविदा पंजीकरण की तिथि से 5 वर्ष की दी जायेगी। परन्तु आवंटी को तीन वर्ष के अन्दर अध्यापन कार्य प्रारम्भ करना होगा। निर्धारित अवधि के अन्दर निर्माण पूर्ण नहीं किया जाता है तो नियमानुसार सरचार्ज देकर यह अवधि बढ़ाई जा सकेगी किन्तु 5 वर्ष से अधिक समय के लिए अभिवृद्धि नहीं की जायेगी और दस वर्ष तक भी निर्माण न करने की दशा में संविदा निरस्त कर भंग कर दी जायेगी तथा अधिनियम के प्राविधान के अनुसार पुनः प्रवेश कर लिया जायेगा।

6.2 आवंटी आवंटित भूखण्ड का उपविभाजन अथवा संयोजन नहीं करेगा।

6.3 आवंटित भूखण्ड पर किया गया किसी भी प्रकार का अनाधिकृत निर्माण नियमानुसार ध्वस्त कर दिया जायेगा।

7.0 पट्टा विलेख

7.1 संस्था को भूखण्ड 90 वर्ष की अवधि हेतु पट्टे पर दिया जायेगा। संस्था द्वारा समस्त देय धनराशि जमा कराकर अन्तिम किश्त की निर्धारित तिथि से तीन माह में निर्धारित प्रोफार्मा पर अपने खर्चे पर पट्टा विलेख कराना होगा अन्यथा आवंटन/ अनुबन्ध निरस्त कर दिया जायेगा।

7.2 आवंटित भूखण्ड के कुल प्रीमियम का 10 प्रतिशत लीज रेन्ट 90 वर्ष की लीज अवधि हेतु अग्रिम रूप से कब्जा प्राप्त करते समय देय होगा।

7.3 पट्टा विलेख तैयार करने में स्टाम्प, रजिस्ट्री, लीज डीड एवं उसकी प्रति तथा अन्य सभी खर्चे आवंटी को स्वयं करने होंगे।

10.10 संस्था को भूखण्ड या उस पर निर्मित किये गये भवन को प्राधिकरण की अनुमति के बिना किसी अन्य को स्थनान्तरित करने का अधिकार नहीं हैं। अगर आवंटी किसी अन्य समान कार्य करने वाले संस्था को उक्त सम्पत्ति स्थानान्तरित करने हेतु प्राधिकरण से अनुमति मांगता है तो प्राधिकरण के नियम एवं शर्तों के अधीन हस्तानान्तरण शुल्क के भुगतान पर आवंटी को सम्पत्ति स्थानान्तरण करने की अनुमति दी जा सकती है। इस संबंध में प्राधिकरण का निर्णय अन्तिम होगा, जो आवंटी को मान्य होगा।

10.11 संस्था को प्राधिकरण की पूर्ण सहमति से संस्था की स्थापना/ निर्माण कार्य हेतु वित्तीय आवश्यकताओं की पूर्ति हेतु किसी सरकारी संस्था या सरकार द्वारा मान्यता प्राप्त किसी वित्तीय संस्था से ऋण के लिए भूखण्ड को संस्था के पक्ष में बंधक रखने हेतु अनुमति प्राधिकरण द्वारा निर्धारित नियम एवं शर्तों पर दी जा सकती है।"

28. Conjoint reading of Para 5.1 and Para 5.2 of the brochure suggests that on deposit of 25% price of the land and lease rent and location charge, the possession can be delivered after the execution of the agreement between the parties.

29. Para 5.4 of the brochure stipulates that 10% of the lease rent has to be deposited before the execution of the registered agreement.

30. Para 5.6 of the brochure provides that charges as per rules have to be paid if the possession of the plot is not taken within the stipulated time.

31. Para 6.1 of the brochure provides that in case the construction could not be raised within the stipulated period of five years, a further extension of five years can be granted for construction on payment of the surcharge as per rules. Para 7 of the brochure relates to the execution of the lease deed.

32. Para 10.10 of the brochure provides that the plot cannot be transferred by respondent no.2 without permission of the G.D.A. However if respondent no.2 wants to transfer the plot to any other society engaged in the same work, the same can be transferred after permission from the G.D.A. however, the decision of the G.D.A. in this respect shall be final.

33. Para 10.11 permits respondent no.2 to mortgage the property to any Government institution or any institution recognised by the Government after permission from the G.D.A.

34. The conditions detailed above from the brochure, which is a part of the agreement, also reveal that the agreement was to be executed after the deposit of 10% lease rent and in case, the possession is not taken within the stipulated time, respondent no.2 shall be liable to pay charges as per rules.

35. Further condition stipulated in para 6.1 of the brochure provides that five years period can be extended on payment of surcharge if the construction is not raised within the time stipulated in the agreement. Respondent no.2 in view of clause 10.10 of the agreement can transfer the plot after permission from the G.D.A. Respondent no.2 can also mortgage the property for any financial assistance to any Government institution or institution recognised by the Government after permission from the G.D.A. Thus, it is clear that there was a clear intention on the part of the G.D.A. to handover the exclusive possession of the plot, and perusal of the stipulation of the agreement and brochure and possession memo do not reflect or indicate in any manner that G.D.A. wanted to retain the possession of the plot and wished to grant only the permissive right to respondent no.2 to run the school.

36. The Apex Court in the case of ***Associated Hotels of India Ltd. Vs. R.N. Kapoor AIR 1959 SC 1262*** has held that it is the substance of the agreement that matters and not the form, for otherwise clever drafting can camouflage the real intention of the parties. While considering the question as to whether the document is a licence or lease, it expounded four conditions in the judgment, on the existence of which a document can be termed as 'lease'. In the context of the present case, paragraph 27 of the said judgement is being reproduced herein below:-

"27.There is a marked distinction between a lease and a licence. S. 105 of the Transfer of Property Act defines a lease of immoveable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under S. 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor. Whereas S. 52 of the Indian Easements Act defines a licence thus:

"Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

Under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose'. But for the permission, his occupation would be unlawful. It does not

create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infalliable and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in Errington v. Errington 1952-1 All. ER 149, wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at p.155:

"The result of all these cases is that, although a person who is let into exclusive possession is, 'prima facie', to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

The Court of Appeal again in Cobb v. Lane, 1952-1 All ER 1199, considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. At p. 1201, Somervell. L. J., stated:

"..... the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties."

Denning, L. J., said much to the same effect at p. 1202:

"The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land ?"

The following propositions may, therefore, be taken as well-established: (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties-whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, 'prima facie', he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. Judged by the said tests, it is not possible to hold that the document is one of licence. Certainly it does not confer only a bare personal privilege on the respondent to make use of the rooms. It puts him in exclusive possession of them, untrammelled by the control and free from the directions of the appellants. The covenants are those that are usually found or expected to be included in a lease deed. The right of the respondent to transfer his interest under the document, although with the consent of the appellants, is destructive of any theory of licence. The solitary circumstance that the rooms let out in the present case are situated in a building wherein a hotel is run cannot make any difference in the character of the holding. The intention of the parties is clearly manifest, and the clever phraseology used or the ingenuity of the document- writer hardly conceals the real intent. I, therefore, hold that under the document there was transfer of a right to enjoy the two rooms, and, therefore, it created a tenancy in favour of the respondent."

37. In the case of ***Khalil Ahmed Bashir Ahmed (supra)***, the Apex Court in paragraph 10 of the judgement held that if an interest in immovable property entitling

the transferee to enjoyment was created, it was lease; if a permission to use land without exclusive possession alone was granted, a licence was the legal result. In the said case, the Apex Court was considering the effect of a document which according to the appellant was a lease while according to respondent/owner of the property, it was a licence. The Apex Court after considering the stipulations contained in the document and by applying the aforesaid principle of law found that document was a licence. Accordingly, it negated the contention of the appellant.

38. In the case of ***C.M. Beena and Another (supra)***, the Apex Court considered the effect of a document which according to the respondent was a licence whereas according to the appellant, it was a lease. The Apex Court held that in determining the question as to whether the document is lease or licence, an endeavour shall be made to find out as to whether the deed confers a right to possess exclusively coupled with the transfer of a right to enjoy the property or merely a right to use the property while possession is retained by the owner. It further held that in considering the said question, the conduct of the parties before and after the creation of the relationship is of relevance to find out the real intention of the parties. Paragraphs 9, 10, and 11 of the aforesaid judgement are being reproduced herein below:-

"9. A few principles are well settled. User of the terms like "lease" or "licence", "lessor", or "licensor", "rent" or "licence fee" is not by itself decisive of the nature of the right created by the document. An effort should be made to find out whether the deed confers a right to possess exclusively coupled with transfer of a right to enjoy the property or what has been parted with is merely a right to use the property while the possession is retained by the owner. The conduct of the parties before and after the creation of relationship is of relevance for finding out their intention.

10. Given the facts and circumstances of a case, particularly when there is a written document executed between the parties, question arises as to what are the tests which would enable pronouncing upon the nature of relationship between the parties. Evans & Smith state in The Law of Landlord and Tenant (Fourth Edition)-

"A lease, because it confers an estate in land, is much more than a mere personal or contractual agreement for the occupation of a freeholder's land by a tenant. A lease, whether fixed-term or periodic, confers a right in property, enabling the tenant to exclude all third parties, including the landlord, from possession, for the duration of the lease, in return for which a rent or periodical payment is reserved out of the land. A contractual licence confers no more than a permission on the occupier to do some act on the owner's land which would otherwise constitute a trespass. If exclusive possession is not conferred by an agreement, it is a licence.....[The fundamental difference between a tenant and a licensee is that a tenant, who has exclusive possession, has an estate in land, as opposed to a personal permission to occupy. If, however, the owner of land proves that he never intended to accept the occupier as tenant, then the fact that the occupier pays regular sums for his occupation does not make the occupier a tenant."

11. In Hill and Redman: Law of Landlord and Tenant (Seventeenth Edn., Vol.1) a more detailed discussion also

laying down the determinative tests, is to be found stated as follows:

"It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should be granted the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without being entitled to exclusive possession must operate as a licence and not as a lease. It was probably correct law at one time to say that the right of exclusive possession necessarily characterized the grant as that of a lease; but it is now possible for a licensee to have the right to exclusive possession. However, the fact that exclusive possession is granted, though by no means decisive against the view that there is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance. Further, a grant of exclusive possession may be only a licence and not a lease where the grantor has no power to grant a lease. In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance rather than the form of the agreement, for the relationship between the parties is determined by the law and not by the label which they choose to put on it. It has been said that the law will not impute an intention to enter into the legal relation of landlord and tenant where circumstances and conduct negative that intention; but the fact that the agreement contains a clause that no tenancy is to be created will not, of itself, preclude the instrument from being a lease. If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is prima facie a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and under the control of the owner, it is a licence. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee require that he should have exclusive possession. On the other hand, the employment of words appropriate to a lease such as 'rent' or 'rental' will not prevent the grant from being a mere licence if from the whole document it appears that the possession of the property is to be retained by the grantor."

39. The similar view has been reiterated by the Apex Court in the case of ***The New Bus Stand Shop Vs. Corporation of Kozhikode and Others 2009 (10) 455.***

40. The principles propounded by the Apex Court in the aforesaid judgements leave no manner of doubt that to ascertain as to whether a document is a lease deed or not, the title of the deed is not relevant and the only relevant point for consideration is the intention of the parties in executing the said deed. If the terms and conditions stipulated in the document principally satisfy the condition that exclusive possession of the plot has been delivered with the right to enjoy the property, it is a lease, and if only the right to use the property has been granted while the possession is retained by the owner, the document is not a lease deed.

41. Stipulations in the agreement leave no manner of doubt that exclusive possession of the plot has been handed over to respondent no.2 with an intention to use and enjoy the property. Further, the terms and conditions stipulated in the agreement as well in the brochure and recitation in the possession memo do not reflect that only a right to use the property has been given to

respondent no.2 while the possession is retained by the G.D.A. Therefore, applying the principles laid down by the Apex Court in aforesaid cases, the only irresistible conclusion which can be arrived at in the facts of the present case is that agreement is a lease.

42. In such view of the fact, this Court finds the submission of learned counsel for the petitioner that agreement is not lease is devoid of merit. Consequently, this Court does not find any illegality in the order passed by the court below.

43. So far as the judgement relied upon by the learned counsel for the petitioner in the case of ***New Okhla Industrial Development Authority (supra)*** is concerned, the same is not applicable in the facts of the present case as it was not a case dealing with the issue as to whether the document in question was a lease or not, the facts in the said case are different and law enunciated, in that case, is not applicable in the facts of the present case.

44. It is also pertinent to mention that clause 6.1 of the brochure, which is part of the agreement, stipulates that in case of construction is not raised within the stipulated time provided in the agreement, a further period of five years can be extended to the respondent no.2 on payment of the surcharge as per rules.

45. Clause 6.1 of the brochure being part of the agreement is binding upon the parties, therefore, G.D.A. cannot resile from that. Further, the petitioner in paragraph 30 of the writ petition has admitted that G.D.A. has the power to recover 2% surcharge on the prevailing market value of the land, but to avail of the said benefit, respondent no.2 has to make an application.

46. In this respect, it is pertinent to reproduce paragraphs 9 to 13 of the reply of respondent no.2 dated 07.10.2013 to the show cause notice wherein respondent no.2 has prayed for the benefit of clause 6.1 of the brochure and Section 18(4-A) of the Act, 1973 which fact is also admitted by the Vice Chairman in the order dated/letter dated 02.07.2014.:-

9. As evident from the letter of allotment (ANNEXURE I) the allotment of the plot is subject to terms and conditions specified in the brochure. Clause 6 of the brochure stipulates conditions in regard to period for construction of the school as under:-

भवन निर्माण अवधि

आवंटी भवन मानचित्र प्राधिकारी से स्वीकृत करा कर ही अपने व्यय पर निर्माण करेगा। भवन निर्माण की अवधि संविदा पंजीकरण की तिथि से 5 वर्ष की दी जायेगी परन्तु आवंटी को तीन वर्ष के अंदर अध्यापन कार्य शुरू करना होगा। निर्धारित अवधि के अंदर निर्माण पूर्ण नहीं किया जाता है तो नियमानुसार सरचार्ज दे कर यह अवधि बढ़ाई जा सकेगी किन्तु 5 वर्ष से अधिक समय के लिये अभिवृद्धि नहीं की जाएगी और दस वर्ष तक भी निर्माण न करने की दशा में संविदा निरस्त कर भंग कर दी जाएगी तथा अधिनियम के प्रावधान के अनुसार पुनः प्रवेश कर लिया जायेगा।

10. It is noted that the above stipulation is consistent with the following provisions of section 18(4A) of the Uttar Pradesh Urban Planning & Development Act 1973 as introduced in 1997:

18...

(4-A) Where a lessee fails to make construction within the stipulated time, and the extended time, if any, under Sub-section (4) so that the total period from the date of lease exceeds five years, a charge at the rate of two per cent of the prevailing market value of the concerned

land shall be real be released every year from him by the lessor and if from the date of imposition of the said charge a further period of five years elapses the lease shall stand forfeited and the lessor shall re-enter upon the land.

11. The same stipulation exists in the lease deed.

.....भूखंड पर निर्माण एग्रीमेंट की तिथि से 05 वर्ष के अंदर पूर्ण करना होगा। शेष नियम व शर्ते ब्रोशर के अनुसार होगी।

12. The notice under reference seeks to cancel the allotment, without allowing the society to undertake construction of the school in the extended period, against payment of charge prescribed under section 18(4A) of the Act ibid. The proposed action is bad in law as it tends to curtail the statutory right of the Society vested under the Act under which the Authority is created.

13. A reference to clause 15 of the sale deed in, isolation, rendering other stipulations redundant and leading to an inference violative of section 18(4) of the Act ibid is not in conformity with the general principles of jurisprudence.

47. The fact that G.D.A. has treated the document to be a lease is also apparent from the fact that notice has been issued to respondent no.2 under Section 111(g) of the Act, 1882.

48. In such view of the fact, this Court does not find any illegality in the order impugned.

49. Thus, for the reason given above, the writ petition lacks merit and is accordingly, ***dismissed*** with no order as to costs.

(2022) 9 ILRA 795
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.08.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Matters Under Article 227 No. 23908 of 2021

Trading Engineers International Ltd.
...Petitioner
Versus
U.P. Power Transmission Corp.
...Respondent

Counsel for the Petitioner:
Gantavya, Dhanesh Relan, Kumar Abishek, Mayur Narang, Meha Rashmi, Utkarsh Kumar

Counsel for the Respondent:
Puneet Chandra, Sunil Sharma

Civil Law-The Insolvency and Bankruptcy Code 2016 - Section 14 - The Arbitration and Conciliation Act, 1996 - Sections 16 & 34 - Petitioner filed an application before the Learned Tribunal for rejection of the counterclaim stating that it had no jurisdiction to adjudicate as the moratorium ordered by the NCLT was still in operation-The Arbitration Act is a Code in itself-The Arbitration Act provides for a mechanism of challenge under Section 34-Under Article 227 of the Constitution of India, the supervisory role assigned to this Court is extremely limited. The Supreme Court has repeatedly emphasised in its judgements the importance of keeping handsoff approach where arbitration matters are concerned. This Court finds that the learned Tribunal has decided an application made to it by the petitioner and the orders squarely falls under the provisions of Section 16 of the Act of 1966. Therefore, it cannot be said to be an order patently lacking in jurisdiction and therefore perverse and liable to be interfered with by this Court under Article 227 of the Constitution.

Settled law that once an order is passed under Section 16 of the Act, 1996 then the same is amenable to challenge under Section 34 of the

Act, 1996 and requires no interference of the High Court under its supervisory jurisdiction as the Act, 1996 is a complete code in itself. (Para 77)

Petition rejected. (E-3)

Case Law/ judgements relied upon:-

1. Deep Industries Ltd. Vs O.N.G.C Ltd & anr. (2019) SCC online SC 1602

2. Bhaven Construction Vs Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. (2021) SCC online SC

3. Surendra Kumar Singhal & ors. Vs Arun Kumar Bhalotia & ors., (2021) SCC online DEL 3708

4. St. of U.P. Vs G.V.K. Emry (U.P) Pvt. Ltd. Writ Petition No.16858 (MS) of 2021

5. Radheshyam Vs Chhabi Nath & ors. (2015) 5 SCC 423

6. UmmaJi Keshao Meshram Vs Radika Bai, (1986) Supp. SCC 401

7. Alchemist Asset Reconstruction Comp. Ltd. Vs M/s Hotel Godavari (Pvt.) Ltd., (2017) SCC Online SC 1669

8. SBP and Co Vs Patel Engineering Ltd. & anr.,(2005) 8 SCC 618

9. Fuerst Day Lawson Ltd. Vs Jindal Exports Ltd., (2011) 8 SCC 333

10. Ghanshyam Mishra & Sons Pvt. Ltd. (thru Authorised Signatory Versus Edelweiss Asset Reconstruction Comp. Ltd. (through the Director) & ors. (Civil Appeal No.8129 of 2019) SC.

11. Innoventive Industries Ltd. Vs ICICI Bank & Anr. (2018) 1 SCC 407

12. Ebix Singapore (Pvt) Ltd Vs Committee of Creditors of Educomp Solutions Ltd., Civil Appeal No.3224 of 2020

13. P Mohan Raj & ors. Vs Shah Brothers Ispat Pvt. Ltd, 2021 (6) SCC 258

14. Jharkhand Bijli Vitaran Nigam Ltd. Vs IVRCL Ltd & anr. (Company Appeal (Insolvency) 285/2018 decided on 3 August 2018).

15. Surendra Kumar Singhal & ors. Vs Arun Kumar Bhalotia & ors, Delhi High Court on 25.03.2021.

16. Punj. St. Power Corp. Ltd. Vs Emta Coal Ltd & anr, (SLP decided on 18.09.2020)

17. Power Grid Corp. of India Ltd. Vs Jyoti Structures 2017 SCC Online Del 12729

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

1. This petition has been filed by the petitioner a Private Limited company which is under liquidation through its Insolvency Resolution Professional (Hereinafter referred to as "IRP") praying for quashing of the order dated 19.09.2021 passed by the sole Arbitrator (hereinafter referred to as the "learned Tribunal") in arbitration proceedings *Trading Engineers (International) Ltd versus U.P. Power Transmission Corporation Limited (UPPTCL).*

The facts relevant for decision of this petition in brief are that the petitioner being under huge debt, several petitions under Sections 7 & 9 of the Insolvency and Bankruptcy Code 2016 (hereinafter referred to as the I & B Code) were filed before the NCLT New Delhi. In one such proceeding, *Smt. Vijay Purohit versus Trading Engineers*, the NCLT initiated Corporate Insolvency Resolution proceedings by appointment of IRP by its order dated 04.07.2019. In the meantime the petitioner had issued a legal notice on 11.6.2019 to the respondent for initiation of arbitration proceedings for Rs.45,55,18,787/- (Rupees Forty Five Crores Fifty Five Lakhs Eighteen Thousand Seven Hundred Eighty Seven) in terms of the Contracts dated 15.4.2011 and

28.4.2011. On failure of the respondent to reply to such notice the petitioner approached this Court for appointment of a sole Arbitrator. This Court by its order dated 17.03.2020 appointed Justice (Retired) Anurag Kumar. The petitioner filed its Statement of Claim of more than Rs.45 crores on 14.09.2020. The respondent filed a Defence Statement and a Counter Claim of Rs.144,11,93,202/- (Rupees One hundred Forty Four Crores Eleven Lakhs Ninety Three Thousand Two Hundred Two only) before the Learned Tribunalon 16.11.2020. The petitioner also filed a reply.

2. In a connected arbitration proceedings pending before another sole Arbitrator, Justice (Retired) Anil Kumar, a preliminary objection was taken on 25.03.2021 by the respondent that the arbitration proceedings cannot proceed in view of the provisions of Section 14 of the I&B Code.

3. On 08.04.2021, taking a cue from the application of the Respondent in the other arbitration proceedings the petitioner filed an application before the Learned Tribunalfor rejection of the counterclaim stating that it had no jurisdiction to adjudicate as the moratorium ordered by the NCLT was still in operation. The NCLT's orders were open to challenge before the NCLAT or the Supreme Court of India. The respondent had not challenged the moratorium declared by the NCLT on 4 July 2019. The respondent filed its reply before the Learned Tribunalon 29.05.2021 stating that the determination of counterclaim is not barred under Section 14 of the I&B Code, and the question of violation of Section 14 would only arise when execution proceedings are initiated after determination of dispute and adjudication of claim as well as counterclaim. The petitioner filed another application on 15.06.2021 reiterating its prayer for rejection of counterclaim filed by the respondent. The petitioner's application was made mainly on the ground that the claim and counter claim had been filed during the period of moratorium under Section 14 of the I&B Code. The claimant had submitted that after initiation of Corporate Insolvency Resolution Process all creditors are required to file their claims before the Resolution Professional and the only option which was available with the respondent was to file a claim before the IRP. No counterclaim could be filed as under paragraph 238 of the I&B Code, the Code has been given overriding effect over all other laws and procedure under Arbitration Act would not, more specifically apply where a moratorium has been issued under the provisions of Section 14 of the said Code.

4. The Learned Tribunalrejected the application dated 08.04.2021 by its order dated 19.09.2021. Hence this petition. The grounds for challenge to the order dated 19.09.2021 by the petitioners being that it is perverse as the learned Tribunal has decided that it will adjudicate both the claim and the counterclaim together in terms of the mandate given to it under section 23 (2-A) of the Act of 1996.

5. Sri Sanjay Bhasin, learned Senior Advocate assisted by Shri Sunil Sharma and Sri Puneet Chandra, has raised a preliminary objection as to the maintainability of this writ petition under Article 227 of the Constitution and learned Senior Counsel has referred to the interim order passed by this court on 23.12.2021 in this Petition. The counsel for the respondent had placed reliance upon

several judgments of the Supreme Court and has argued that this court had entertained the petition without going into the question of maintainability because it was of the opinion that it is related to disputed questions of fact that could be decided at the time of final hearing. It had nevertheless granted an interim order to the petitioner to the extent that the matter was directed to be listed on 17.01.2022 and till such date, arbitrator was directed not to proceed with the arbitration. The respondents were directed to file their counter affidavit in the matter. Against this order granting interim relief to the petitioner the petitioner had approached the Supreme Court for modification of the order of interim relief to the extent that the arbitrator may continue to hear the claim of the petitioner on its merits but ignore the counterclaim of the respondent as it amounted to an institution of a suit against the corporate debtor which is prohibited under Section 14 (1)(A) of the I&B Code. It has been argued that the Supreme Court did not think it appropriate to pass any order on such application being made to it. It had only clarified that not only the application of the petitioner should be considered but the maintainability of the petition should also be considered by this court on the next date of hearing.

6. The Learned Senior Advocate has pointed out the prayer clause in this petition under Article 227 which is for quashing of the order dated 19.09.2021 passed by the learned Tribunal in arbitration proceedings pending before him in the matter of *Trading Engineers (International) Limited versus U.P. Power Transmission Corporation Limited*. The interim relief application prays for stay of adjudication of the counterclaim raised by the respondent before the learned Tribunal.

7. The Learned Senior Advocate has pointed out that the respondent did not go to the Supreme Court challenging the interim order granted by this court on 23.12.2021. The petitioner had itself gone to the Supreme Court for modification of the interim order. The Supreme Court instead of modifying and directing the Learned tribunal to continue to adjudicate the claim of the petitioner against the respondent, had directed this court to consider the maintainability of the petition under Article 227 of the Constitution.

8. It has been argued that the High Court under Article 227 of the Constitution should no adjudicate upon an order passed by the Arbitral Tribunal deciding its jurisdiction to continue with the arbitration proceedings. The learned counsel for the respondent has placed reliance upon Section 5, Section 16, and Section 34 of the Act of 1996, and has also referred to the Statement of Objects and Reasons of the Act of 1996 as amended by the Act of 2015. It has been argued that the legislative intent has been made clear that arbitration proceedings should continue without unnecessary and undue interference at each and every stage by the courts including extraordinary jurisdiction as exercised by the High Court under Article 226 and supervisory jurisdiction under Article 227 of the Constitution.

9. The learned counsel appearing for the respondent has placed reliance upon the following -

(1) *SBP and Co. versus Patel Engineering Ltd and Another* (2005) 8 SCC 618 and paragraph 45, 46 and 47 as also paragraph 103 and 108.

(2) *Deep Industries Ltd Versus Oil and Natural Gas Corp Ltd and another*

(2019 SCC online SC 1608) and paragraphs 13, 16, 17, 22 and 24.

(3) *Bhaven Construction through Authorised Signatory Premji Bhai K Shah versus Executive Engineer Sardar Sarovar Narmada Nigam Ltd and another* (2021 SCC online SC 8) and paragraphs 11, 16, 18, 20 and 21

(4) *Punjab State Power Corporation Limited versus Emta Coal Ltd and another* (2020 SCC online SC 1165) paragraph 5;

(5) *Navayuga Engineering Co versus Bangalore Metro Rail Corp Ltd* (2021 SCC online SC 469);

(6) *Essar Steel India Ltd Committee of Creditors versus Satish Kumar Gupta 2020* (8) SCC 531;

(7) *P. Mohan Raj v Shah Bros.Ispat (Pvt) Ltd 2021* (6) SCC 258.

10. In response to the arguments made by the learned counsel for the respondent, the learned counsel for the petitioner had submitted that the company is under liquidation and a CIRP is pending before the National Company Law Tribunal, Adjudicating Authority, under the Insolvency and Bankruptcy Code 2006 and and Insolvency Resolution Professional has been appointed on 04.07.2020 therefore no counterclaim by the respondent against the petitioner could be entertained by the Arbitrator. The learned counsel for the petitioner has referred to Section 14 of the I&B Code and sub-clause 1(a) thereof to say that both the institution of proceedings and the hearing in pending proceedings including execution is barred and this argument was raised before the Learned Tribunal that a moratorium had come into being as soon as the Adjudicating Authority entertained the insolvency proceedings. The Learned counsel for the petitioner has referred to the language of sub-clause (a) of Section 14 (1) of the I&B Code where it prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any Court of law, Tribunal, Arbitration panel or other Authority. Although arbitration proceedings are not specifically mentioned in the language of Section 14(1)(a), proceedings relating to "transactions" entered into by the corporate debtor before the imposition of the moratorium are also included. The definition of "transaction" in Section 3 (33) of the I&B Code being an inclusive one, it is extremely wide in nature and would include a transaction evidencing a debt or liability.

11. The learned counsel for the petitioner has also placed reliance upon:-

(i) *Deep industries Ltd versus Oil and Natural Gas Corp Ltd and another* (2019) SCC online SC 1602 Para 13;

2) *Bhaven Construction versus Executive Engineer, Sardar Sarovar Narmada Nigam Limited* (2021) SCC online SC 8, paras 17 to 20 & 25;

3) *Surendra Kumar Singhal and others versus Arun Kumar Bhalotia and others*, (2021) SCC online DEL 3708; paras 17 to 21 & 24;

4) *State of U.P. versus G.V.K. Emry (U.P) Private Limited Writ Petition* No.16858 (MS) of 2021;

5) *Radheshyam versus Chhabi Nath and others* (2015) 5 SCC 423; paras 24 & 25;

6) *UmmaJi Keshao Meshram versus Radika Bai*, (1986) Supplement SCC 401; paras 85, 91, 100 to 103; and

7) *Alchemist Asset Reconstruction Company Limited Vs. M/s Hotel Godavari (Pvt.) Ltd.*, (2017) SCC Online SC 1669.

12. It has been argued that Article 227 gives the High Court the power of superintendence over all courts and tribunals in relation to which it exercises territorial jurisdiction. This includes Arbitration Tribunal. This supervisory jurisdiction is intended to ensure that the subordinate courts and tribunals act within the limits of their authority and in accordance with law. Since Article 227 is a constitutional provision therefore no fetters can be placed on the jurisdiction conferred on the High Court by any ordinary legislation like the Arbitration Act 1996, hence existence of a statutory remedy in an ordinary legislation cannot take away or limit the right to exercise constitutional power under Article 227. While it had been held by the Supreme Court that the High Court should be extremely circumspect in exercising its discretion under Article 227, it has been emphasised repeatedly that if there is an exceptional circumstance which would justify the exercise of these powers, the same ought to be exercised even if there is an alternate statutory remedy. The High Court ought to interfere under Article 227 where there is a patent lack of inherent jurisdiction, or where a party is left remedyless, or a Tribunal has acted in bad faith, or the tribunal has not acted within the limits of its authority resulting in grave injustice or failure of justice, where the Tribunal has assumed a jurisdiction it does not have, failed to exercise a jurisdiction it does have, or exercised jurisdiction in a manner which tantamounts to overstepping the limits of its jurisdiction.

13. The learned counsel for the petitioner has placed reliance upon ***Ummaji Keshao Meshram and others versus Radhika Bai and another*** (supra) and paragraph 85 thereof wherein the Supreme Court had observed that the insertion of Article 226, 227 and 228 in the Constitution without making them subject to any law to be made by the appropriate legislature put these Articles beyond the legislative reach of Parliament and the State legislatures with the result that the jurisdiction conferred by these Articles can only be curtailed or excluded with respect to any matter by a constitutional amendment and not by ordinary legislation. The power of superintendence conferred upon every High Court by Article 227 is a supervisory jurisdiction intended to ensure that subordinate courts and Tribunals act within the limits of their authority and according to law. The power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors.

14. The learned counsel for the petitioner has also relied upon judgement rendered by the Supreme Court in the case of ***Radheshyam versus Chhabi Nath and others*** (supra) to say that proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article 227 is intended to be used sparingly and the power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or Tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) The jurisdiction though available is being exercised in a manner which tantamount to overstepping the limits of its jurisdiction. In exercise of supervisory jurisdiction the High Court

may not only quash or set aside the impugned proceedings, judgement or order but it may also make such directions as the facts and circumstances of the case may warrant, maybe, by way of guiding the inferior court or Tribunal as to the manner in which it should now proceed further or afresh as commended to it or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such impugned decision by a decision of its own, as the inferior court or Tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised Suo Moto as well.

15. On the basis of such judgments, submissions have been made by the Counsel that the High Court under Article 227 can exercise jurisdiction over private Tribunals as well, such as arbitral Tribunals to ensure that such Tribunals act within the limits of their authority and according to law. Article 227 being a constitutional provision no fetters can be placed on the jurisdiction conferred by such Article by any ordinary legislation like the Arbitration Act. The High Court should exercise its jurisdiction under Section 227 where there is a patent lack of inherent restriction, or a party is left remedyless, or a party has acted in bad faith, or a Tribunalhas not acted within the limits of their authority, or there is a grave injustice or failure of justice such as when the Tribunal has assumed a jurisdiction it does not have or failed to exercise a jurisdiction that it does have or exercised a jurisdiction in a manner which tantamount to overstepping the limits of jurisdiction.

16. The learned counsel for the petitioner has argued that even though in paragraph 22 of its order, the learned Tribunal has observed that strictly speaking a counterclaim is in the nature of a suit against the corporate debtor under Section 14(1)(a) of the I&B Code 2016 and strictly speaking is a *"proceeding"* during the moratorium period, yet he concludes that he must still go on with such proceedings because of Section 23(2) A of Act of 1996. The learned Tribunal has failed to appreciate that an act done after prohibition that is statutorily imposed, is non-est in law. The counterclaim is a proceeding against the corporate debtor. It is filed after imposition of moratorium and is thus non-est. Adjudication of such a non-est counterclaim would be illegal and perverse and therefore needs to be set aside.

17. It has been argued that the learned Tribunal has observed in para 23 of the impugned order that after determination of the counterclaim when the amount is determined and the execution proceeding starts at that stage the provisions of Section 14 of the I&B Code is to be looked into. It has been argued on the basis of the language of Section 14 (1) that it not only prohibits execution but also prohibits the institution but also continuation of proceedings against the corporate debtor. It has been argued that the learned Tribunal has proceeded on conjectures and surmises and observed in paragraph 25 that it may be possible that by now the proceedings before the Adjudicating Authority may have come to an end which shows that the Tribunal recognised that a moratorium under Section 14 poses a hurdle in proceeding with the counterclaim against the corporate debtor, yet instead of ascerting the current status of the moratorium, the Tribunal has assumed that the moratorium must have ended after lapse of 330 days. It has been argued that the

learned Tribunal ought to have reckoned that in the CIRP before the Adjudicating authority, either the Resolution Plan may have been allowed or it may have been rejected, in both these scenarios the alleged counterclaim of the respondent could not have been adjudicated and would have stood extinguished as they were not submitted before the Resolution Professional at the relevant time as per the mandate of the I&B Code. The learned Tribunal erroneously stated that the moratorium under Section 14 would apply only at the stage of execution and not at the stage of mere adjudication of claims and counterclaims. In the present case the arbitration clause was invoked on 11.06.2019. The moratorium was declared by the Adjudicating Authority on 04.07.2019. The counterclaim was filed on 16.11.2020 at a time when the moratorium was in force and such counterclaim being in the nature of a Suit could not have been instituted much less adjudicated.

18. In ***Deep Industries Ltd. Versus Oil and Natural Gas Corporation Ltd. and Another*** (supra), a three judges bench of the Supreme Court was considering the question as to whether High Court could have exercised its jurisdiction under Article 227 of the Constitution of India when it comes to matters that are decided under the Arbitration and Conciliation Act 1996. The respondent ONGC had awarded a contract to the Appellant for a period of five years. The contract was terminated much earlier. The Appellant invoked the arbitration clause contained in the contract on 02.11.2017 and a sole Arbitrator was appointed on 21.12.2017. On 02.02.2018 claim was filed by the Appellant. On 15.02.2018 Show Cause Notice was issued to the appellant and it was a blacklisted. The Appellant had earlier challenged the termination of its contract and the Show Cause Notice regarding blacklisting and had claimed damages. It filed an application for amendment in the pending petition challenging blacklisting order as well. Meanwhile a Section 16 application was filed before the Arbitrator on the ground that since arbitration notice was confined only to termination of agreement, blacklisting would be outside the Arbitrators' jurisdiction. This Section 16 application was dismissed by the Arbitrator. On the same day a Section 17 application was separately disposed of by the Arbitrator in which he stayed the operation of the order of blacklisting/two year ban which it said would operate only if the Appellant ultimately loses the final arbitration proceedings. The First Appeal was filed against this order passed under Section 17 which was dismissed. The ONGC then filed a petition under Article 227 of the Constitution before the High Court of Gujarat. The High Court entertained the petition ignoring the preliminary objection that such petition was not maintainable. It passed an order in favour of ONGC not only setting aside the Civil Court's order but also the order passed by the Arbitrator under Section 17 of the Act.

19. It was argued before the Supreme Court that once a preliminary objection had been raised before the High Court it should have dealt with it first. The language of Section 5 and Section 37 of the Act were also pointed out and it was argued that although a constitutional provision such as Article 227 cannot be fettered, yet the statutory scheme ought to be taken into account in order to deny relief in almost every case. The appellant placed reliance upon ***SBP and Co versus Patel Engineering Ltd. and Another reported in***

(2005) 8 SCC 618, and Fuerst Day Lawson Ltd. Versus Jindal Exports Limited reported in (2011) 8 SCC 333, to say that the Act is a self contained Code and since Second Appeals have been interdicted expressly under Section 37 (2) of the Act an Article 227 petition should also not be entertained. It was argued that even under Section 115 of the CPC as amended, Revision would lie only in cases where no Appeal lies but such orders should not be interlocutory orders which do not decide the matter in issue finally. It was held that the High Court should not have entertained the petition under Article 227 as any observations made by the Arbitrator while entertaining a Stay Application and granting interim relief would amount to a mere error of law and not amount to lack of jurisdiction.

20. On the other hand the counsel for the respondent had argued that ***SBP and Co (Supra)*** applied only at a stage where an order of Arbitral Tribunal was sought to be interfered with directly under Article 226/227. In the present case the Tribunal's orders was challenged in a First Appeal which was dismissed. Such order came to be challenged in a petition under Article 227 praying for exercise of supervisory jurisdiction which vested in the High Court. The Supreme Court considered the language of Section 5 of the Act of 1966 as also Section 37 and held that it was important to note that under Section 29A of the Act inserted by Amendment in 2016, a time limit was given within which Arbitral Awards must be made. Even in so far as Section 34 applications are concerned, Subsection (6) added by the same Amendment stated that these applications are to be disposed of expeditiously. The Supreme Court observed in paragraph 11 thus:-

"given the aforesaid statutory provision and given the fact that the 1996 Act repealed the three previous enactments in order that there be speedy disposal of all matters covered by it, it is clear that the statutory policy of the Act is that not only a time limit is set down for disposal of Arbitral proceedings themselves, but time limits have also been set down for Section 34 references to be decided. Equally in ***Union of India Versus Messers Varindera Construction Ltd. Reported in (2020) 2 SCC 111****, this Court had imposed self same limitation on First Appeals under Section 37 so that there be timely resolution of all matters which are covered by the arbitration Award.."*

21. The Supreme Court further observed in paragraph 12-

"most significant of all is a non-obstante clause contained in Section 5 which is that notwithstanding anything contained in any other law, in matters that arise under Part-I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part." Section 37 grants a constricted right of First Appeal against certain judgements and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a Second Appeal being filed (see Section 37 (2) of the Act).

22. It observed in paragraph 13 thus:-

"this being the case, there is no doubt whatsoever that if petitions were to be filed under Article 226/227 of the Constitution against orders passed in Appeals under Section 37, the entire Arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that

Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances what is important to note is that petitions can be filed under Article 227 against judgements allowing or dismissing First Appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."

23. The Supreme Court in Paragraph-14 onwards referred to its judgement in ***Nivedita Sharma Versus Cellular Operators Association of India and Others reported in (2011) 14 SCC 337***; wherein several judgements including ***L. Chandra Kumar Versus Union of India reported in 1997 (3) SCC 261, Thansingh Nath Mal Versus Superintendent of Taxes reported in AIR 1964 Supreme Court 1419, Titaghur Paper Mills Co. Ltd. Versus State of Orissa reported in (1983) 2 SCC 433; Mafatlal Industries Ltd. Versus Union of India reported (1997) 5 SCC 536***, were cited and observed that *"the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken, itself contains a mechanism for redressal of grievance still hold the field".*

24. The Supreme Court referred to the judgement rendered by the larger bench of seven judges in *SBP and Company (Supra),* where the Court was considering interference with an order passed by an Arbitral Tribunal by the High Court under Article 226/227 and had observed in paragraph 45 and 46 as follows:"

"It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitrator appealable under Section 34, the aggrieved party has an avenue for ventilating his grievances against the Award including any in between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal has a right of Appeal under Section 37 of the Act, has to wait until the Award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Court is not permissible.

"46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution

against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the Award is pronounced unless, of course, right of Appeal is available to them under Section 37 of the Act even at an earlier stage."

25. The Supreme Court in Deep Industries (Supra) further referred to the attempt made by the Learned Additional Solicitor General to distinguish the judgement in SBP and Co. to say that the same did not apply to the facts of the case, and the Supreme Court observed - *"- - - yet, it is important to notice that the seven judge bench has referred to the object of the Act being that of minimising judicial intervention and that this important object should always be kept in the forefront when a 227 petition is being disposed of against proceedings that are decided under the Act."*

26. The three judges bench in Deep Industries (Supra) also noticed that in ***Punjab Agro Industries Corporation Limited Versus Kewal Singh Dhillon reported in 2008 (10) SCC 128,*** the Supreme Court had distinguished SBP and Co (supra) but it held that the same was an exceptional case where the statutory provisions did not conceive of any appeal against an order passed under Section 11 refusing to appoint an Arbitrator. In the case of Deep Industries (supra) however, the Supreme Court observed that the High Court has entertained a 227 petition after the First Appeal was dismissed by the Civil Court whereas Section 37 of the Act did not permit any Second Appeal and only one bite at the cherry. It observed further- *"...,The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final Award at which stage it may be raised under Section 34... Further to state that serious disputes as to jurisdiction seem to have cropped up is not the same thing as saying that the Arbitral Tribunal lacked inherent jurisdiction in going into and deciding the Section 17 application. In point of fact, the Arbitral tribunal was well within its jurisdiction in referring to the contract - - - - - even if it be accepted that the principle laid down in Section 41 (e) of the Specific Relief Act was infracted... is a mere error of law and not an error of jurisdiction, much less an error of inherent jurisdiction going to the root of the matter. Therefore, even otherwise, the High Court judgement cannot be sustained and is set aside."*

27. In paragraph 17 the Supreme Court further observed:-

"17. We reiterate that the policy of the Act is speedy disposal of arbitration Cases. The Arbitration Act is a Special Act and a self contained Code dealing with arbitration. This court in Fuerst Day Lawson Ltd. (supra) has specifically held as follows:

"89. It is thus to be seen that the Arbitration Act 1940 from its inception and right through to 2004 was held to be a self contained Code - - - - - - once it is held that Arbitration Act is a self contained Code and exhaustive, then it must also be held, using the lucid expression of Justice Tulzapurkar, that if carries with it a negative import that only "Such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words- - - Where the special Act sets

out a self contained code the applicability of the general law procedure would be impliedly excluded."

What becomes clear is that the - - - - Merely because - - First Appeal was disposed of by a Court subordinate to the High Court, an Article 227 petition ought not to have been entertained."

28. Another Three-judge bench of the Supreme Court in ***Bhaven Construction versus Executive Engineer Sardar Sarovar Narmada Nigam Limited, 2022 (1) SCC 75;*** was looking into the question - "whether the arbitral process could be interfered under Article 226/227 of the Constitution, and under what circumstances?" The facts before the court were that the respondent no.1 had entered into a contract with the appellant. Dispute arose regarding payment. The Appellant issued a notice seeking appointment of Arbitrator in terms of the agreement. The respondent refused to appoint such Arbitrator. The appellant instead appointed respondent no. 2 to act as sole Arbitrator for adjudication of the disputes. The respondent no.1 preferred an application under Section 16 of the Act disputing the jurisdiction of the sole Arbitrator. The Arbitrator rejected the application of the respondent no.1 and held that it had jurisdiction to adjudicate the dispute. Aggrieved by such orders of the Arbitrator the respondent no.1 preferred a petition under Article 226/227 of the Constitution. It was rejected by the Single Judge as not maintainable by holding that remedy under Section 34 of the Act was available and the respondent no.1 should wait till the Award is passed by the Learned Arbitrator. The respondent no.1 further challenged such order before the Division Bench in the Letters Patent Appeal. Such appeal was entertained and allowed. Aggrieved, the appellant filed the Civil Appeal before the Supreme Court saying that Section 16(2) of the Act mandates that the sole Arbitrator had the jurisdiction to adjudicate the preliminary issue of jurisdiction, which can only be challenged under Section 34 of the Act. On the other hand the respondent no.1 contended that under Article 226 and 227 of the Constitution it was always open for the respondent no.1 to invoke the jurisdiction of the High Court to set aside an arbitration proceeding which was a nullity.

29. The Supreme Court observed in paragraphs 11 and 12 as under:-

"11. We need to note that the Arbitration Act is a Code in itself. This phrase is not merely perfunctory, but has definite legal consequences. One such consequence is spelt out under Section 5 of the Arbitration Act, which reads as under.....The non-obstante clause is provided to uphold intention of the legislature as provided in the Preamble "to adopt UNCITRAL model law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act".

12. The Arbitration Act itself gives various procedures and forms to challenge the appointment of an Arbitrator. The framework really portrays an intention to address most of the issues within the ambit of the Act itself, without there being any scope for any extra statutory mechanism to provide just and fair solutions."

30. The Supreme Court thereafter referred to the action of the respondent no.1 in choosing to impugn an order passed under Section 16(2) of the Act through a petition under Article 226/227. In the usual

course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phrase of Section 34 reads as, *"Recourse to a court against an arbitral award may be made "only" by an application for setting aside such Award in accordance with subsection (2) and subsection (3)". The use of the term "only" as occurring under the provision serves two purposes of making the provision a complete Code and laying down the procedure."*

31. The Supreme Court observed in paragraph 17 of *Bhaven Constructions (supra)* that even though the hierarchy in the legal framework mandates that a legislative enactment cannot curtail a constitutional right, *"still it is one thing to say that in the exercise of the powers vested in it under Article 226 of the Constitution, the High Court can entertain a petition against any order passed by or any action taken by the State and/or its Agencies/Instrumentalities or any Public Authority or order passed by quasi judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory Forum is created by law for redressal of grievances, awrit petition should not be entertained ignoring the statutory dispensation. It is therefore, prudent for a judge to not exercise discretion to allow judicial interference beyond the procedure prescribed under the enactment. This power needs to be exercised in exceptional rarity, where in one party is left remedyless under the statute or a clear bad faith is shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient."*

32. The Supreme Court thereafter referred to the observations made by it in *M/s Deep Industries Ltd (supra)* that the *"High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumberated by us hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."*

33. The Supreme Court observed further that the respondent no.1 had not been able to show exceptional circumstances or bad faith on the part of the appellant, to invoke the remedy under article 227 of the Constitution. *"No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage. - -If the courts are allowed to interfere with the arbitral process beyond the ambit of the enactment , then the efficiency of the process will be diminished- - - the High Court did not appreciate the limitations under Article 226 and 227 of the Constitution and reasoned that the appellant had undertaken to appoint an Arbitrator unilaterally, thereby rendering the respondent no.1 remedyless. However, a plain reading of the arbitration agreement points to the fact that the Appellant herein had actually acted in accordance with the procedure laid down without any malafides. It is just that the respondent no.1 has not been able to show any exceptional circumstance which mandates the exercise of jurisdiction under Article 226 and 227 of the Constitution.*

34. The Supreme Court observed in paragraph 25 of Bhaven Construction (Supra) thus :-

"25. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the Tribunal, before the Court examines the same under Section 34. Respondent no.1 is therefore not left remedyless, and has statutorily been provided a chance of appeal.

35. The Supreme Court referred to paragraph 22 of the judgement in Deep Industries where Section 16 of the Act had been dealt with. The Supreme Court held that the High Court had erred in using its discretionary power available under Article 226 and 227 of the Constitution and allowed the Appeal.

36. The learned counsel for the petitioner has also cited ***Alchemist Asset Reconstruction company Ltd versus M/s Hotel Godavari Private Limited, 2017 SCC online SC 1669,*** where the Supreme Court was considering a case where an order was passed by the National Company Law Tribunal on 31.03.2017 and an Interim Resolution Professional was appointed. Despite such moratorium, a letter was issued by the respondent no.1 to the respondent no.2 invoking the arbitration clause between the parties and an Arbitrator was appointed. The National Company Law Tribunal in its order dated 31.05.2017 referred to Section 14 of the I&B Code and stated that given the moratorium no arbitration proceedings could go on. A First Appeal was filed before the District Judge under Section 37 of the Arbitration and Conciliation Act 1996 and by an order dated 06.07.2017 the appeal was asked to be registered and notice was issued awaiting reply. It was this order which was challenged before the Supreme Court. The Supreme Court observed that the mandate of the new I&B Code is that the moment an insolvency petition is admitted, the moratorium comes into effect under Section 14 expressly interdicts institution or continuation of pending suits or proceedings against the corporate debtors. The Court set aside the order of the District Judge dated 06.07.2017 entertaining the appeal under Section 37 of the Arbitration Act 1996 and observed that the effect of Section 14 is that the arbitration that has been instituted after the aforesaid moratorium is non-est in law.

37. The Learned counsel for the petitioner has placed reliance upon ***Committee of Creditors of Essar Steel*** (supra) to say that once the Resolution Plan is approved by the Committee of Creditors and submitted before the Adjudicating Authority no other claims that may exist apart from those decided on merit by the Resolution Professional and by the Adjudicating Authority/Appellate Tribunal could be decided by any other forum. He has referred to para 63 onwards of the judgement which deals with extinguishment of personal guarantees and undecided claims. He has referred to Paragraph-67 of the judgement where it was observed:-

"a successful Resolution Applicant cannot suddenly be faced with undecided claims after the Resolution Plan submitted by him has been accepted, as this would amount to a hydra head popping up which would throw into uncertainty the amounts payable by a prospective Resolution Applicant who successfully takes over the business of the corporate

debtor. All claims must be submitted to and decided by the Resolution Professional so that a prospective Resolution Applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor, this the successful Resolution Applicant does on a fresh slate. - - -"

38. Also, with regard to the constitutional validity of Sections 4 and 6 of the Amending Act of 2019, the Learned Counsel for the petitioner has referred to Paragraph-71 onwards wherein the amendment of Section-12 by addition of two Provisos in Subsection (3) was considered which provided that the Corporate Insolvency Resolution Process shall mandatorily be completed within a period of 330 days from the insolvency commencement date, including any extension of the period of Corporate Insolvency Resolution Process granted under that section, and the time taken in legal proceedings in relation to such resolution process of the corporate debtor'. Provided also, that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the Second Proviso, such resolution process shall be completed within a period of 90 days from the date of commencement of the Amendment Act of 2019.

39. The Supreme Court referred to the reason for introducing this proviso by way of amendment. Experience with Sick Industrial Companies Act, Recovery of Debts Act 1993, and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002, all of which provided for expeditious determination and timely detection of sickness in industrial companies, yet, legal proceedings under the same dragged on for years as a result of which all the statutory measures proved to be abject failures in resolving the stressed assets. The Supreme Court considered the arguments raised against the validity of Section 4 and found that the only one argument against the amendment is that the time taken in legal proceedings should not be put against parties before the NCLT and NCLAT based upon a latin maxim which sub serves the cause of justice namely, *"actus curiae neminem gravabit"*.

The Supreme Court observed thereafter in paragraph 79 thus : -

"given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant or the provision which mandatorily requires the CIRP to end by a certain date without any exception thereto, may well be an excessive interference with the litigants' fundamental right to non-arbitrary treatment under Article-14, and an excessive and arbitrary and therefore unreasonable restriction on the litigant's Fundamental Right to carry on business under Article 19 of the Constitution of India - - - while leaving the provision otherwise intact, we strike down the word "mandatorily "as being manifestly arbitrary under Article 14 of the Constitution of India - - - the effect of this declaration is that ordinarily the time taken in relation to corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings however, on facts of a given case, if it can be shown to the Adjudicating Authority and/or the Appellate Tribunal under the Code that only a short period is

left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which fault cannot be ascribed to the litigant before the Adjudicating Authority and/or the Appellate Tribunal, the delay or large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or the Appellate Tribunal to extend time beyond 330 days - - - it is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation."

40. In ***Ghanshyam Mishra and Sons Private Limited (through Authorised Signatory Versus Edelweiss Asset Reconstruction Company Ltd. (through the Director) and others*** (Civil Appeal No.8129 of 2019) decided by the Supreme Court it was dealing with the questions- *"whether any creditor including the Central Government, the State Government or any local authority is bound by the Resolution Plan once it is approved by Adjudicating Authority under Subsection (1) of Section 31 of the I&B Code 2016? "*

And as to "whether after approval of Resolution Plan by the Adjudicating Authority a creditor including the Central Government, the State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the corporate debtor, which are not part of the Resolution Plan approved by the Adjudicating Authority?"

41. It referred to the facts of the case regarding NCLT admitting a petition under Section 7 of the I&B Code on 25.07.2017 and initiating the CIRP. On 28.07.2017 the Resolution Professional made a public announcement inviting claims from all the creditors of the corporate debtor as is required under Section 15 of the I&B Code. The last date for submission of claims was 8.8.2017. The Resolution Professional upon receipt of the claims maintained a list of creditors alongside the amount claimed by them and the security interest. The Resolution Professional thereafter also invited Expression of Interest. Resolution Plans were submitted thereafter. Pursuant to the approval by Committee of Creditors of one plan, NCLT also granted approval. Despite various communications addressed to the Tax Authorities informing them that after the Resolution Plan was approved by the NCLT all proceedings instituted against the corporate debtor, arising and pending before the transfer date shall stand withdrawn, and that all liabilities towards operational creditors shall be deemed to have been settled by discharge and payment of resolution amount by the corporate debtor, it was insisted by the Tax Authorities that since there was no specific stay, the proceedings could not be dropped for recovery of Commercial Tax against the corporate debtor. The appellant approached the Supreme Court and argued that though the respondent authorities were aware of the Resolution proceedings, they had failed to submit any claim in response to the public notices issued by the Resolution Professional. On the other hand, the counsel appearing for the State authorities defended the continuance of proceedings for recovery of tax by saying that any order

passed by the NCLT would not come in the way of adjudicatory proceedings which were continued by the authorities under the provisions of the relevant statutes.He submitted that the assessment orders which were passed in accordance with law were duly approved in appeal by higher authority and the High Court had rightly dismissed the petition as not maintainable in view of the alternative remedy of filing a Second Appeal before the Commercial Tax Appellate Tribunal.

The learned Senior counsel appearing for the Tax Authorities also stated that adjudicatory authorities acting under the relevant statutes not being part of the Committee of Creditors were not bound by the decision of the Committee of Creditors which was approved by the NCLT. He further submitted that merely continuation of adjudicatory proceedings cannot be a part of coercive action.

The counsel for the appellant however submitted that various courts have held that statutory dues prior to the date of admission of Section-7 application, which are not part of the Resolution Plan, shall stand extinguished and the proceedings in respect thereof would no more survive. He submitted that the respondent authorities failed to file claims in response to statutory public notice issued by the Resolution Professional. The first demand by the authorities was raised only after the plan was approved by the Committee of Creditors. It was argued on behalf of the appellant that if such a view is accepted then it will frustrate the entire object of the I&B Code and the revival of the debtor companies would be impossible if the successful Resolution Applicants are sprung with the surprise dues which are not part of the Resolution Plan.

42. The Supreme Court in Paragraph-49 onwards of its decision in ***Ghanshyam Mishra and Sons (supra)*** referred to several judgements passed by it earlier considering various provisions of the I&B Code including judgement in ***Innoventive Industries Ltd. Versus ICICI Bank and Another (2018) 1 SCC 407,*** where it was held that one of the important objectives of the I&B Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up the insolvency process. The Scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the Insolvency Resolution Process begins. Such debt maybe financial debt or an operational debt. Application under Section-7 or Section-9 can be filed and the moment the Adjudicating Authority is satisfied that a default has occurred the application must be admitted. Such debt may be in the form of a payment which actually became due or in the form of a claim which becomes payable unless it is disputed. The entire process is to be completed within a specified period from the date of admission of the application and extension of time for completion of CIRP under Section 12 can only be for a limited time period on specific reasons to be indicated in the order so made. As soon as the application is admitted, a moratorium in respect of Section 14 of the Code is to be declared by the Adjudicating Authority and a public announcement is made stating inter alia the last date for submission of claims and the details of the Interim Resolution Professional who shall be vested with the management of the corporate debtor and be responsible for receiving the claims. This IRP must now manage the operations of the corporate debtor as a going concern. The decision of the Committee of Creditors appointed under Section 21 of the Act ought to be taken by a vote of not less than 75% of the

voting share of the financial creditors. Under Section 28, the IRP is given wide powers to raise finances, create security interest, etc subject to prior approval of the Committee of Creditors. Under Section 30 any person who is interested in putting the corporate body back on its feet may submit a Resolution Plan to the Resolution Professional who may then place them before the Committee of Creditors. Once the Committee of Creditors approves such Resolution Plan, it becomes binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. The moment the Adjudicating Authority approves the Resolution Plan, the moratorium order passed by the Authority under Section 14 shall cease to have effect.

43. The Supreme Court went on to observe that the commercial wisdom of the Committee of Creditors has been given paramount status without any judicial intervention for ensuring the completion of the stated processes within the timelines prescribed by the I&B code. The legislature has consciously not provided any ground to challenge the commercial wisdom of individual financial creditors or their collective decision before the Adjudicating Authority which is made non-justiciable.

44. The Supreme Court in paragraph 58 thereafter observed thus: -" ...

".....A bare reading of Section 31 of the I&B Code would make also make it abundantly clear, that once the Resolution Plan is approved by the Adjudicating Authority, after it is satisfied that the Resolution Plan as approved by the COC meets requirements as referred to in Subsection (2) of Section 30, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is revival of corporate debtor and to make it a running concern."

The Supreme Court in paragraph 64 of the said judgement observed thus: -

"As held by this Court in the case of Principal Commissioner of Income Tax Versus Monnet Ispat and Energy Ltd., in view of the provisions of Section 238 of the I&B Code, the provisions thereof will have an overriding effect, if there is any inconsistency with any of the provisions of the law for the time being in force or any instrument having effect by virtue of such law. As such , Vide Section 7 of Act No.26 of 2019, with effect from 16 August 2019 , the following words have been inserted in Section 31 of the I&B Code-" including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed."

After the amendment any debt in respect of payment of dues arising under any law for the time being in force including the ones owed to the Central Government, any State Government or any local authority, which does not form a part of the approved Resolution Plan, shall stand extinguished - -"

45. The Supreme Court in Paragraph-95 thereafter answered the questions framed by it by saying that *"once a Resolution Plan is duly approved by the Adjudicating Authority under Subsection (1) of Section 31, the claims as provided in the Resolution Plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any*

State Government or any local authority, guarantors and other stakeholders. On the date of approval of the Resolution Plan by the Adjudicating Authority, all such claims which are not part of the Resolution Plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings With respect to a claim which is not part of the Resolution Plan; that the 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the I&B Code has come into effect. Consequently, all dues including the statutory dues owed the Central Government, any State Government, or any local authority, if not part of the Resolution Plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under section 31 could be continued."

46. In ***Committee of Creditors of Essar steel India Ltd. Versus Satish Kumar Gupta and others,*** learned counsel for the petitioners has placed reliance upon paragraph 107 and 127 of the said judgement. However no judgement can be read ignoring the context in which it was delivered. The facts as are necessary to determine the context in which observations in paragraph 107 and 127 of the judgement have been made in brief are; that several appeals and petitions were before the Supreme Court with respect to the role of Resolution Applicants, Resolution Professional, the Committee of Creditors which are constituted under the I&B Code. The Court also considered the question of jurisdiction of the Adjudicating Authority and the Appellate Authority i.e. the National Company Law Tribunal and National Company Law Appellate Tribunal qua Resolution Plans that have been approved by the Committee of Creditors. The constitutional validity of Section 4 and 6 of the I&B Code (Amendment Act of 2019) had also been challenged. Several petitions with respect to the Resolution Plans of various companies" Corporate Insolvency Resolution Process were dealt with individually. The Court first considered the role of Resolution Professional who had to verify and determine the claims by operational creditors, financial creditors, other creditors, workmen and employees and guarantors.

47. In paragraph 67 it set aside the impugned NCLAT judgement where it had left it open for claims that may have existed apart from those decided on merits by the Resolution Professional and by the Adjudicating Authority/Appellate Tribunal to be decided now by an appropriate forum in terms of Section 60 Subsection (6) of the I&B Code saying that such observation made by the NCLAT militates against the rationale of Section 31 of the I&B Code. It observed -

"a successful Resolution Applicant cannot suddenly be faced with "undecided" claims after the Resolution Plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective Resolution Applicant who successfully takes over the business of the corporate debtor. All claims must be submitted to and decided by the Resolution Professional so that a prospective Resolution Applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate

debtor. this the successful Resolution Applicant does on a fresh slate, as has been pointed out by us here in above...."

48. The learned counsel for the petitioner has placed reliance upon ***Ebix Singapore (Pvt) Ltd Vs. Committee of Creditors of Educomp Solutions Ltd., Civil Appeal No.3224 of 2020***. The Supreme Court in Ebix Singapore (supra) has quoted with approval the observations made by it in *Committee of Creditors of Essar Steel India Ltd (supra)* where Section 12 of the IBC was considered and it was held that the Insolvency Resolution Process should be completed in 270 days with an outer limit of 330 days. It was held that *"...it is only in such exceptional cases that the time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation".*

49. The Supreme Court in Ebix (supra) was considering the rejection by the NCLAT of the permission for withdrawal of Resolution Plan submitted by the Resolution Applicant in respect of Educomp, the corporate debtor, given by the NCLT. While considering the purpose of law on insolvency the Supreme Court referred to the earlier provisions which were used by defaulting companies to enjoy extended moratorium periods and failure to enforce timelines meant legal proceedings would drag on for years and not result in recovery of stressed assets. It observed that *"....an analysis of the framework of the Statute and Regulations provides an insight into the dynamic and comprehensive nature of the Statute. Upholding the procedural design and sanctity of the process is critical to its functioning. The interpretative task of the Adjudicating Authority, the Appellate Authority, and even this Court, must be cognisant of, and allied with that objective..."*

50. In paragraph 126 of its judgement the Supreme Court observed that the CIRP is a time bound process with the specific aim of maximising the value of assets. The IBC and the regulations made under it laid down strict timelines which need to be adhered to by all the parties, at all stages of the CIRP. The CIRP is expected to be completed within 180 days under Section 12 (1) of the IPC in terms of subsection (2) and (3) of Section 12 and extension can be sought from the Adjudicating Authority for extending this period up to 90 days. The First Proviso to Section 12 (3) clarifies that such an extension can only be granted once.

It observed thus:-

"....In Arcelor Mittal (India) (P) Limited versus Satish Kumar Gupta (2019) 2 SCC 1, this Court had held that the time taken in legal proceedings in relation to the CIRP must be excluded from the timeline mentioned in Section 12. Since this could extend the CIRP indefinitely, the Insolvency and Bankruptcy Code (Amendment) Act 2019 inserted a Second Proviso to Section 12 (3) with effect from 16.08.2019 to state that the CIRP in its entirety must be mandatorily completed within 330 days from the insolvency commencement date, including the time taken in legal proceedings. A legislative amendment that takes away the basis of a judicial finding is indicative of the strong emphasis of the IBC on its timelines and its attempt to thwart the prospect of stakeholders engaging in multiple litigations, solely with the intent of causing undue delay. Delays are also a

cause of concern because the liquidation value depletes rapidly, irrespective of the imposition of moratorium, and a delayed liquidation is harmful to the value of the corporate debtor, the recovery rate of the COC and consequently, the economy at large. In Essar steel (supra) a three-judge bench of this Court, emphasised the rationale of the Insolvency and Bankruptcy Code (Amendment) Act 2019, which introduced the Second Proviso to Section 12 (3). The Court adverted to the BLRC report which underscored delays in legal proceedings as the cause of the failure of the previous insolvency regime under the SICA and the recovery mechanism in SARFAESI....".

51. The Supreme Court in *Ebix (supra)* also extracted the speech of the Union Minister in the Rajya Sabha to explain the proposal for Amendment in 2019, which was to avoid the same pitfalls in the IBC.*" The Supreme Court quoted paragraph 119 of the judgement in Essar Steel (supra) and then went on to observe that:- "the decision in Essar Steel (supra) while reiterating the rationale of the IBC for ensuring timely resolution of stressed assets as a key factor, had to defer to the principles of actus curiae neminem gravabit i.e. no person should suffer because of the fault of the court or the delay in the procedure. ".....In spite of this Court's precedents which otherwise strike down provisions which interfere with the litigants fundamental right to non-arbitrary treatment under Article 14 by mandatory conclusion of proceedings without providing for any exceptions, this Court refused to strike down the Second Proviso to Section 12 sub-clause (3) in its entirety. It noted that the previous statutory experiments for insolvency had failed because of the delay as a result of extended legal proceedings and chose to only strike down the word "mandatorily", keeping the rest of the provision intact. Therefore the law as it stands, mandates the conclusion of the CIRP - Including time taken in legal proceedings, within 330 days with a short extension to be granted only in exceptional cases.*

52. However, the Court had warned that this discretion must be exercised sparingly and only in the following situations:

"However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate tribunal under the Code that only a short period is left for completion of the Insolvency Resolution Process beyond 330 days, and that it would be in the interest of all the stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the delay cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal the delay or a large part of being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend the time beyond 330 days. - - - - it is only in such exceptional cases that the time can be extended, within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation."

53. The Supreme Court observed in paragraph 128 of Ebix (supra) that the evolution of the IBC framework through an interplay of legislative amendments,

regulations and judicial interpretations, consistently emphasises the predictability and timelines of the IBC. It noted the amendment made in Regulation 40 with effect from 20.04.2020, which excluded the period of lock down during Covid 19 pandemic from the timeline that has been stipulated under the statutory framework to observe *"...,we cannot afford to be swayed by abstract conceptions of equity and contractual freedom of the parties to freely negotiate terms of the Resolution Plan with unfettered discretion, that are not grounded in the intent of the IBC."*

54. The Supreme Court in *Ebix (supra)* after considering the entire provisions of the Act and the Regulations framed under it observed in paragraph 143 thus: -

"143. The statutory framework governing the CIRP seeks to create a mechanism for resolving insolvency in an efficient, comprehensive and timely manner. The IBC provides a detailed linear process for undertaking CIRP of the corporate debtor to minimise any delays, uncertainty in procedure and disputes. The roles and responsibilities of the important actors in the CIRP are clearly defined under the IBC and its regulations. In Innoventive industries Ltd versus ICICI Bank (2018) 1 SCC 407, a three-judge Bench of this Court observed that "one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process". ...Recently, in Gujarat Urja Vikas Nigam Ltd 2020 (1) SCC online 194 a three-judge bench of this court observed that a "delay in completion of the insolvency proceedings would diminish the value of the debtor's assets and hamper the prospects of a successful reorganisation or liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner." The stipulation of timelines and a detailed procedure under the IBC ensures a timely completion of CIRP and introduces transparency, certainty and predictability in the Insolvency Resolution process.....".

55. The Supreme Court observed further after noticing the swift amendments made to the Act and the Regulations following the Covid 19 pandemic on 20 April 2020, 5 June 2020, and on 23 September 2020, excluding delays for the purpose of adherence to the otherwise strict timeline and the IBC amendment Ordinance of 2021 promulgated with effect from 04.04.2021,that

"despite the clamour on behalf of successful Resolution Applicants who no longer wish to abide by the terms of the submitted Resolution Plans that are pending approval under Section 31, on account of the economic slowdown that impacted every business in the country, no legislative relief for enabling withdrawals or renegotiation as has been provided, in the last 18 months. In the absence of any provision under the IBC allowing for return of the Resolution Plan while a successful Resolution Applicant, vesting the Resolution Applicant with such a relief through a process of judicial interpretation would be impermissible. Such a judicial exercise would bring in the evils which the IBC sort to obviate through the back door.."

56. Having heard the learned counsel for the parties this Court has carefully gone through the order impugned and finds that,

the learned counsel for the respondent in support of his case for consideration of its counter claim simultaneously with the petitioner's claim had submitted that it had filed its defence and counterclaim before the Learned Tribunal under Section 23 (2-A) of the Act of 1996. The moratorium under Section 14 of the I&B Code would have affect only up to the time of completion of the Corporate Insolvency Resolution Process (hereinafter referred to as the "CIRP"), relying upon judgement rendered by the NCLAT in ***Jharkhand Bijli Vitaran Nigam Ltd versus IVRCL Ltd*** (corporate debtor) ***2018 SCC online NCLAT 891***; and by the Delhi High Court in ***Power Grid Corporation of India Limited versus Jyoti Structures Ltd*** (2017 SCC online Delhi 1289) and ***SSMP Industries Ltd versus Perkan Food Processors (Private) Limited*** (2019 SCC online Delhi 9339). It was submitted by the learned counsel for the respondent that the arbitration proceedings had not yet reached a stage which can be said to be in violation of Section 14 (1) a of the I&B Code. Such a stage would only arise only after the determination of dispute and adjudication of the claim as well as the counterclaim and on occasion of passing of an Award to the extent that would lead to execution proceedings and recovery action against the assets of the corporate debtor.

57. The learned counsel for the claimant had argued that since no counterclaim was filed during the period when the IRP had asked for such claims to be filed before it through public notice, no such claim could be filed before any other authority including the Tribunal. The IRP had issued a public notice that he had to collect all claims submitted by all creditors. If the respondent had any claim it should have submitted the same to the IRP. The IRP on collation of all claims was required to constitute a Committee of Creditors under Section 21 of the I&B Code. Such time having lapsed, it was not open for the respondent to file a counterclaim and for the Learned Tribunal to adjudicate upon it as the Resolution Plan has already been approved by the Committee of Creditors and submitted before the adjudicating authority for its orders.

58. The learned counsel for the respondent had argued that in reply to the claimant's demand of more than 45 crores of rupees not only the defence of the respondent but also its counterclaim of more than 144 crores rupees was permissible under the Scheme of Section 23 of the Act of 1996, it has to be taken on record and it has to be adjudicated upon and it cannot be rejected. The learned counsel for the respondent relied upon observations made by the National Company Law Appellate Tribunal in *Jharkhand Bijli Vitaran Nigam Limited (supra)* that the claim of the corporate debtor can be determined only after determination of counter claim made by the appellant in the very same arbitral proceedings and if the counterclaim or a part of it is set off with the claim made by the corporate debtor, both the claim and counterclaim of the parties should be heard together by the Arbitral Tribunal in the absence of any bar under the I&B Code. However, if on determination of such counterclaim it is found that corporate debtor is liable to pay certain amount, in such a case no recovery can be made during the period of moratorium.

59. The learned counsel for the petitioner had argued before the Tribunal that (i) connected arbitration proceeding pending before another sole Arbitrator a

preliminary objection has been raised by the respondent itself that such arbitration cannot proceed in view of the provisions under Section 9 read with Section 14 of the I&B Code. Such a finding was also recorded by the sole Arbitrator on 25.03.2021 in such other proceedings. (ii)Section 238 of the I&B Code had an overriding effect over all laws that are inconsistent with its provisions. (iii) In Jharkhand Bijli Vitaran Nigam Limited the parties had consented for the adjudication of the counterclaim before the sole Arbitrator. In PGCIL (supra), a petition was filed under Section 34 of the Arbitration and Conciliation Act 1996 challenging the Award passed in favour of the corporate debtor who was under CIRP but PGCIL (supra) is no longer good law in the light of observations made by the Supreme Court in ***P Mohan Raj and others versus Shah Brothers Ispat Private Limited,*** 2021 (6) SCC 258, decided by a three-judge bench of the Supreme Court. Similarly, judgement rendered in *SSMP Industries (supra)* by the Delhi High Court had placed reliance upon PGCIL (supra) which has been held to be no longer good law by three-judge decision of the Supreme Court in P Mohan Raj (supra). (iv) the maximum period of 330 days as given in Section 12 of the I&B Code 2016 has been read down and treated as not mandatory by the Supreme Court in *Committee of Creditors of Essar Steel Ltd versus Satish Kumar Gupta and others* 2020 (8) SCC 531 where the Supreme Court observed that the provision would otherwise remain intact except the word "mandatorily" used under Section 12 as it would be manifestly arbitrary under Article 14 of the Constitution, being an excessive and unreasonable restriction on the litigants right to carry on business under Article 19 (1)g of the Constitution.

60. After considering the arguments raised by the counsel for the parties the Learned Tribunal considered whether a counterclaim can be rejected as prayed by the claimant in the circumstances of the case. It dealt with Section 23 of the Act of 1996 which provides for Statement of Claim and for Statement of defence by the respondents. It quoted Section 23 in its entirety and then found that under Section 23 (2-A), added by way of Amendment in the Act, the respondent in support of his case, may also submit a counterclaim or plead a setoff which shall be adjudicated upon by the Arbitral Tribunal. Such counterclaim or setoff falls within the scope of the arbitration agreement. The learned Tribunal came to the conclusion that the Section itself provides that first of all the claimant shall file a claim. Thereafter the respondent shall file his defence. After Section 23(2-A) being added with effect from 23.10.2015 the respondent in support of his case may also submit a counterclaim which has to be also adjudicated upon by the Tribunal. It held therefore that the language of Section 23 (2-A) of the Act made it clear that both claim and counterclaim should be decided together by the Arbitral Tribunal. It also observed that in a proceeding before the Arbitral Tribunal, if the respondent wants to file a counterclaim it can only file the same before the Arbitral Tribunal along with his defence of a claim. It held that the respondent had a right to move a counterclaim. It also held that the Arbitral Tribunal had a duty to adjudicate the same along with the claim.

61. The learned Tribunal thereafter looked into the I&B Code and the language of Section 14 which provides for a moratorium. It quoted the entire Section 14 and held that from the language of Section

14 (1) (a), it was clear that on the date of commencement of the CIRP, the NCLT could impose a moratorium prohibiting the institution of a suit or continuation of a pending suit or proceeding against the corporate debtor including execution of any judgement, decree or order in any court of law, Tribunal, Arbitral Panel or other Authority. It referred to the observations made by the High Court of Delhi in *Power Grid Corporation of India Ltd (supra)* and its interpretation of sub-clause (a) of sub-section (1) of Section 14 of the I&B Code which intended to prohibit debt recovery actions against the assets of the corporate debtor and that "*Proceedings*" did not mean all proceedings. Continuation of proceedings which do not result in adversely affecting the assets of the corporate debtor are not prohibited under Section 14(1)(a) of the I&B Code. The term "including" is clarificatory of the scope and ambit of the term "*proceedings*". The term "*proceedings*" would be restricted to the nature of action that follows it, i.e., recovery action against the assets of the corporate debtor. The use of the narrower phrase "*against the corporate debtor*" used in Section 33(5) of the I&B Code further makes it evident that Section 14 (1) (a) is intended to have restricted meaning and applicability. The Arbitration Act draws a distinction between proceedings under Section 34 (i.e. objections to the Award,) and under Section 36 (i.e. the enforceability and Execution of the Award). The "*proceedings*" refers to steps take under Section 34 are a step prior to the execution of an Award. Only after determination of objections under Section 34, the party may move a step forward to executing such Award and in case the objections are settled against the corporate debtor, then its enforceability against the corporate debtor certainly shall be covered by the moratorium of Section 14(1) (a). The Learned Tribunal thereafter observed that it is clear from a perusal of the observations made by the Delhi High Court that until and unless the effect of continuation of proceedings results in endangering, dissipating or adversely affecting the assets of the corporate debtor, it would not be prohibited under Section 14 (1) (a) of the I&B Code 2016. In the case of *Jharkhand Bijli Vitaran Nigam Ltd (supra)* the NCLAT had also observed that unless and until the counterclaim is itself determined, the claim could not be determined and, hence both deserved to be heard and disposed off together.

62. The learned Tribunal in the order impugned has gone on to observe that in the case of SSMP industries Ltd (supra) the Delhi High Court observed in paragraphs 8 and 9 that not only the plaint/claim but also the written statement/counterclaim have to be considered as a whole in order to determine as to whether the suit or the counterclaim would be liable to be decreed. A counterclaim would be in the nature of a suit against the plaintiff which was the corporate debtor. The Tribunal also observed that strictly speaking thus under Section 14 (1) (a) of the Code a counterclaim would be covered by the moratorium which prohibits the institution of suit or continuation of pending suits or proceedings against the corporate debtor, and counterclaim would be a proceeding against the corporate debtor, however, the counterclaim raised against the corporate debtor is integral to the recovery sought by the Corporate Debtor and is related to the same transaction. Section 14 has created a piquant situation i.e. the corporate debtor undergoing Insolvency proceedings can continue to pursue its claim but the counterclaim would be barred under

Section 14 (1)(a). When such situations arise, the Court has to see whether the purpose and intent behind the imposition of the moratorium is being satisfied or defeated. A blinkered approach cannot be followed and the Court cannot blindly stay the counterclaim and refer the defendant to the NCLT/Resolution Professional for filing its claims. The nature of a counterclaim is such that it requires proper pleadings to be filed, defences and stands of both the parties to be considered, evidence to be recorded, then issues have to be adjudicated. The proceedings before the NCLT are summary in nature and the Resolution Professional does not conduct a trial. The Resolution Professional really determines what payment can be made towards the claims raised, subject to the availability of funds. The NCLT/RP cannot be burdened with the task of entertaining claims of the defendant which are completely uncertain, undetermined and unknown. Moreover, the question as to whether the defendant is in fact entitled to any amount if determined by the NCLT prior to the adjudication of the plaintiff's claim for recovery, would result in the possibility of conflicting views in respect of the same transaction. The Learned Tribunal thereafter observed that the petitioner's claim as well as the respondent's counterclaim should be adjudicated comprehensively by the same forum. At the point of such determination, i.e. , till such defence is adjudicated, there is no threat to the assets of the corporate debtor. When the counterclaim is adjudicated and the amount to be paid/recovered is determined, at that stage or in an execution proceeding, Section 14 could be triggered. Till such adjudication of claim and counterclaim is carried out by the appropriate forum i.e. the Arbitral Tribunal, Section 14 would not come into play.

63. The Learned Tribunal rejected the argument raised by the learned counsel for the claimant that after the judgement in *PGCIL* (supra) which was also relied upon in *SSMP Industries Ltd* (supra) was set aside by the Supreme Court in the case of *P. Mohan Raj* (supra), the Learned Tribunal cannot place reliance upon it. It was observed by the Learned Tribunal that the Delhi High Court in SSMP Industries had only referred to the PGCIL case and the High Court had not based its findings totally upon it. The High Court of Delhi decided the SSMP case on a totally different reasoning. Though it observed that strictly speaking from the language of Section 14 (1)(a) of the I&B Code it appears that the counterclaim which is in the nature of a suit, cannot be considered during the operation of the moratorium, but it also observed that the claim and counterclaim are interlinked with with each other and relate to the same transaction hence they need it to be decided together. It cannot be said that the claim alone should be continued to be determined but the counterclaim would be barred. Just as a claim required proper pleadings and evidence in support of its case, in the same way a counterclaim also required proper pleadings and evidence in support of the case. Points of determination have to be decided after all evidence is led. The NCLT in summary proceedings, or the Interim Resolution Professional, are not capable of conducting a trial.

64. The Learned Tribunal also observed that mere consideration of claim and counterclaim and adjudicating the facts as claimed there in, would not violate the moratorium. It is only after determination of counterclaim when the amount is determined or the execution proceedings

are initiated, the provisions of Section 14 of the I&B Code 2016 would come into play.

65. It was also observed by the Tribunal that under sub-section (4) of Section 14 the order of moratorium does not continue indefinitely but has effect only from the date of order initiating CIRP till completion of the said process which in turn is time bound. It was quite clear that the Resolution and plan had been submitted by the IRP before the Adjudicating Authority on 11.06.2021 and the proceedings before the NCLT Delhi were in the final stages. It may be possible that by now the proceedings before the Adjudicating Authority must have come to an end.

66. The learned counsel for the petitioner has placed reliance upon judgement rendered in ***Surendra Kumar Singhal and others versus Arun Kumar Bhalotia and others,*** rendered by the Delhi High Court on 25.03.2021.

The Delhi High Court in paragraph 24 of its judgement in *Surendra Kumar Singhal* (supra) thereafter observed - -

"A perusal of the above mentioned decisions, shows that the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenge to orders by an Arbitral Tribunal including orders passed under Section 16 of the Act.

i) An Arbitral Tribunal is a Tribunal against which a petition under Article 226/227 would be maintainable;

ii) the non-obstante clause in Section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a constitutional provision;

iii) for interference under Article 226/227, there have to be exceptional circumstances;

iv) though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction,the writ court would not interfere;

v) interference is permissible only if the order is completely perverse,that is, that the perversity must stare in the face;

vi) High Court ought to discourage litigation which necessarily interferes with the arbitral process;

vii) excessive judicial interference in arbitral process is not encouraged;

viii) It is prudent not to exercise jurisdiction under Article 226/227;

ix) the power should be exercised in exceptional rarity or if there is bad faith which is shown;

x) efficiency of arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided."

67. The learned counsel for the petitioner on the basis of these observations of the Delhi High Court has tried to convince this Court that since the learned Tribunal's order is perverse as the Tribunal is patently lacking the jurisdiction in the light of Section 14 (i) (a) of the I& B Code, this Court should interfere in the order impugned the direct the Tribunal only to consider the claim of the petitioners during the pendency of the CIRP and the moratorium and ignore the counterclaim submitted by the respondent.

68. However, this Court finds that in *Surendra Kumar Singhal* (supra), the Delhi High Court relied upon ***Punjab State Power Corporation Limited versus Emta Coal Ltd and another,*** (SLP decided on 18.09.2020) where after referring to the

observations made in the Deep Industries' case, the Supreme Court had observed - -

"we are of the view that a foray to the writ court from a Section 16 application being dismissed by the Arbitrator can only be if the order passed is so perverse that the only possible conclusion is that there is a patent lack of inherent jurisdiction. Here patent lack of inherent jurisdiction requires no argument whatsoever - it must be the perversity of an order that must stare one in the face. Unfortunately, parties are using this expression mentioned in our judgement in Deep Industries Ltd to go to the 227 Court in matters which do not suffer from a patent lack of inherent jurisdiction. This is one of them. Instead of dismissing the writ petition on the grounds stated, the High Court would have done well to have referred to our judgement in Deep Industries and dismissed the 227 petition on the ground that there is no such perversity in the order which leads to a patent lack of inherent jurisdiction. The High Court ought to have discouraged similar litigation by imposing heavy costs .....We dismiss this Special Leave Petition with costs of Rs.50,000/- to be paid to the Supreme Court Legal Services committee within two weeks".

69. The learned counsel for the petitioner has also argued that the learned Tribunal has relied upon Delhi High Court Judgments in PGCIL (supra) and SSMP Industries (supra) which have not been found to be good law by the Supreme Court in its judgment in *P. Mohan Raj* (supra).

This Court shall now consider the case of ***Power Grid Corporation of India Limited Versus Jyoti Structures 2017 SCC Online Del 12729***. A coordinate bench of the Delhi High Court was considering the question regarding whether proceedings under Section 34 of the Act could be allowed to be continued by the corporate debtor. The Court considered the argument that if the proceedings are stayed the respondent would be unable to execute the Award given in its favour for an extended period till the moratorium exists and it shall be unable to recover its dues thereby further impeding its financial condition. It was in this context the Court interpreted the word "proceedings" used in Section 14 (1) a of the Code restrictively to mean only a particular type of legal proceedings for example Debt recovery action which may have an effect of dissipating or diminishing the debtors assets during the period of its insolvency resolution. It observed that the object of the Code is to provide relief to the corporate debtor through a standstill period during which its assets are protected from dissipation and during which it can strengthen its financial position. The meaning and purpose of subclause (a) of Section 14 (1) of the I&B Code has to be considered along with and in the context of subclause (b),and (c) and (d) of Section 14 (1) of the I&B Code also. All these are clauses related to encumbering, relating to recovery from any assets,security interest, or property of the corporate debtor. It held that Section 14 of the I&B Code would not apply to proceedings which are in the benefit of the corporate debtor as the conclusion of such proceedings would not endanger, diminish, dissipate or impact the assets of the corporate debtor in any manner whatsoever. The important question that the Court needs to consider is the nature of the proceedings i.e. whether it is in favour or against the corporate debtor. Proceedings against an Award in favour of the corporate debtor would be like stalling the Corporate debtor's efforts to recover its money and hence would not fall within the embargo of Section 14 (1) a of the I&B

Code. If a counterclaim is allowed then section 14 (1) (a) of the Code would immediately come into play and the decree would not be Executable against the corporate debtor.

70. The Delhi High Court considered the order of the *National Company Law Appellate Tribunal in Jharkhand Bijli Vitaran Nigam Ltd. Versus IVRCL Ltd and Another* (Company Appeal (Insolvency) 285/2018 decided on 3 August 2018). It also considered the judgement of the coordinate bench of the Delhi High Court in Power Grid Corporation of India Versus Jyoti Structures Ltd. Manu/DE/5162/2017. It thereafter observed that the claim of the plaintiff was much higher than that of the defendant but both the claim and counterclaim arose out of the same transaction between the parties, and would require to be adjudicated on the basis of evidence being placed on the Court's record. The Court would have to first determine the question as to whether any amount at all was due to the plaintiff. It observed that the plaintiff's claim being higher, even if the counterclaim is decreed fully and the claim of the plaintiff is also allowed, the plaintiff would in fact be entitled to recover and not the defendant. The possible outcome of the suit and a counterclaim was not something that could be predicted before actual adjudication. It was clear that the plaint and the counterclaim were interlinked with each other. It went on to observe that in Power Grid Corpn, a Coordinate Bench had held that not all proceedings are barred under Section 14 (1) a of the Code. Only such proceedings are barred which would result in endangering, diminishing, dissipating or adversely impacting the assets of the corporate debtor. As such, the adjudication of the claim and the counterclaim together was not barred till such time that an Award is made in favour of the defendant and debt recovery action against the assets of the corporate debtor is initiated. As such, proceeding under Section 34 which was meant for determination of objections against the Award could continue and in case the objections are settled against the corporate debtor the enforceability of the Award against the corporate debtor would then certainly be covered by the moratorium of Section 14 (1) a.

71. Similarly in *Jharkhand Bijli Vitran Nigam Limited*, the NCLAT had held that until and unless the counterclaim is itself determined, the claim and the counterclaim deserve to be heard together and there is no bar to the same being adjudicated in the Court.

The Delhi High Court referred with approval the observations made by the NCLAT that as the claim of the corporate debtor can be determined only after determination of counterclaim in the very same arbitral proceedings, and if the counterclaim or a part of it is set off with the claim made by the corporate debtor, then alone question would arise as to whether the corporate debtor was liable to pay certain amount. Indeed no recovery can be made during the period of moratorium. After considering the arguments made by the learned counsel for the plaintiff and the defendant the Court took a pragmatic view of the matter and observed that the plaint and the written statement/counterclaim had to be adjudicated together and to be considered as a whole in order to determine as to whether the suit or the counterclaim would be liable to be decreed. Strictly speaking, even though a counterclaim would be a "*proceeding*" against the corporate debtor, it had to be considered in view of the recovery sought by the plaintiff

as it related to the same transaction. If the court holds that Section 14 only allowed institution of claim by the corporate debtor and did not allow institution of Suit/ Counterclaim by the defendant, it would result in a very iniquitous situation. The counterclaim had to be considered and a blinkered approach could not be followed by the Court and the Court could not blindly stay a counterclaim and refer the defendant to NCLT/RP for filing its claims. The Delhi High Court also observed in paragraph 9 that the nature of the counterclaim is such that it required proper pleading to be filed and the defences and stance of both the parties had to be considered, evidence had to be recorded and then issues had to be adjudicated. It observed that the proceedings before the NCLT are summary in nature and the Resolution Professional also does not conduct trial. The Resolution Professional merely determines what payment can be made towards the claims raised subject to availability of funds. The NCLT/Resolution Professional cannot be burdened with the task of entertaining claims of the defendant which are completely uncertain, undetermined and unknown. The Court was of the opinion that the plaintiff and the defendant"s claim ought to be adjudicated comprehensively by the same forum. Till such time that the defences are adjudicated there is no threat to the assets of the corporate debtor and the continuation of the counterclaim would not adversely impact the assets of the corporate debtor. Only when an Award is made execution proceedings, depending upon the situation prevalent, would be stayed during the pendency of the Section 14 moratorium.

72. In ***SSMP Industries Ltd. Versus Purple Food Processors Private Limited*** MANU/DE/ 2362/2019, The Delhi High Court was considering the question as to whether a counterclaim can be considered by it when a moratorium is in operation under Section 14 of the Insolvency and Bankruptcy Code 2016. The plaintiff company had filed the suit for recovery of Rs.1,61,47,336. The defendant filed its written statement/counterclaim in which it averred that no amount was due and payable by it to the plaintiff and in fact it was entitled to recover Rs.59,51,548 from the plaintiff. The plaintiff company had since gone into insolvency and a Resolution Professional had been appointed. The question that arose was whether the adjudication of the counterclaim would be liable to be stayed in view of Section 14 of the I&B Code. The learned counsel had argued that the plaintiffs' claim and that of the defendant was intertwined and interlinked. It was not an independent claim by the defendant but had to be adjudicated in the light of the claims made by the plaintiff in the suit. Since the claim itself had not yet been adjudicated it was not even clear whether any amount would be recoverable by the plaintiff, hence the suit and the counterclaim ought to be adjudicated together instead of the defendant being forced to approach the Resolution Professional for recovery of its claims.

73. In ***P Mohan Raj and others versus Shah Brothers Ispat Private Limited, AIR 2021 Supreme Court 1308,*** a three judges bench of the Supreme Court was considering whether criminal complaints filed by the respondent against the Company and the appellants under Section 138 read with Section 141 of the Negotiable Instruments Act could be allowed to continue during the moratorium period. The NCLAT had held that Section 138, being a criminal law provision, cannot

be held to be a "proceeding" within the meaning of Section 14 of the IBC. The Supreme Court observed that Section 138 proceedings although a criminal proceeding is in essence initiated only to recover an amount of the bounced cheque against the assets of the Company, and would therefore be included in the term "*proceedings*" against the corporate debtor. So long as there is a judgement by any court of law which results in coercive steps being taken against the assets of the corporate debtor, all such "*proceedings*" are necessarily subsumed within the meaning of Section 14(1)(a). It observed in paragraph 10 that the language of Section 14 (1) makes it clear that subject to the exceptions contained in Sub-section (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall mandatorily, by order, declare a moratorium to prohibit what follows in clauses (a) to (d). Importantly, under 14(4) this order of moratorium does not continue indefinitely, but has effect only from the date of the order declaring moratorium till the completion of the Corporate Insolvency Resolution Process, which is time bound, either culminating in the order of the Adjudicating authority approving a Resolution Plan or in liquidation.

74. The Court observed in paragraph 53 of P. Mohan Raj (supra) that after going through all the judgements that were cited by both the sides it was evident that a proceeding under Section 138, though cast in language making *"the act complained of an offence, is really in order to get back through a summary proceeding, the amount contained in the dishonoured cheque together with interest and costs, expeditiously and cheaply. It is the victim alone who can file the complaint which ordinarily culminates in the payment of fine as compensation which may extend to twice the amount of the cheque which would include the amount of the cheque and interest and costs there upon.'*

It's thereafter observed -

"given our analysis of Chapter 17 of the Negotiable Instruments Act together with the amendments made thereto and the case laws cited hereinabove, it is clear that it was a criminal proceeding that is contained in Chapter 17 of the Negotiable Instruments Act would, given the object and context of Section 14 of the I&B Code, amount to a proceeding within the meaning of Section 14 (1)(a), the moratorium therefore attracting to such proceedings".

75. After referring to various sections of the I&B Code which were also in the nature of a moratorium on various actions being brought against corporate debtor and negating in the arguments made by the counsel appearing on behalf of the Respondent which had initiated action against the appellant for dishonouring of more than 50 cheques due to insufficient funds under Section 138 of the Negotiable Instruments Act, on most of the case laws cited by him, the Supreme Court also referred to the argument raised by Shri Mehta (ASGI) on the basis of PGCIL versus Jyoti Structures as aforesaid where the Delhi High Court had held that a Section 34 application to set aside an Award under the Act of 1996 would not be covered by Section 14 of the I&BC, the Supreme Court observed that the said-

"...judgement does not state the law correctly as it is clear that a Section 34 proceeding is certainly a proceeding against the corporate debtor which may result in an Arbitral Award against the corporate debtor being upheld, as a result of which, monies would then be payable by

the corporate debtor. Section 34 proceeding is a proceeding against the corporate debtor in a court of law pertaining to a challenge to an Arbitral Award and would be covered just as an appellate proceeding in a decree from a suit would be covered. This judgement does not, therefore, state the law correctly..."

76. It is evident from the careful consideration of the entire judgement rendered in P Mohan Raj (supra) that the observations made by the Supreme Court were in the context of the facts of the case where it had been argued before it by the respondents that criminal proceedings as well as quasi-criminal proceedings can go on against the corporate debtor or its directors as they do not strictly fall within the definition of proceeding under Section 14 (1) of the Act. The court held that a Section 138/141 proceedings under the Negotiable Instruments Act is against the corporate debtor is covered by Section 14 (1)(a) of the I&B Code. It however clarified that in the case before it such proceedings under the Negotiable Instruments Act could continue against the company as well as the Appellants for the reason that the Insolvency Resolution Process did not involve a new management taking over and the moratorium period had come to an end.

77. This Court having considered all the judgements cited by learned counsel for the parties and also the impugned order of the Tribunal finds that Article 227 of the Constitution of India, the supervisory role assigned to this Court is extremely limited. The Supreme Court has repeatedly emphasised in its judgements the importance of keeping handsoff approach where arbitration matters are concerned. This Court finds that the learned Tribunal has decided an application made to it by the petitioner and the orders squarely falls under the provisions of Section 16 of the Act of 1966. Therefore, it cannot be said to be an order patently lacking in jurisdiction and therefore perverse and liable to be interfered with by this Court under Article 227 of the Constitution.

78. This petition is ***dismissed*** as not maintainable.

79. No order as to Costs.

(2022) 9 ILRA 826
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.09.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Matters Under Article 227 No. 24693 of 2020

M/S Zapdor-Ubc-Abnjv Delhi ...Petitioner

Versus

U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Anil Srivastava, Divyam Krishna, Utkarsh Srivastava

Counsel for the Respondents:
Mrs. Suniti Sachan, Brijesh Kumar Shukla, Pratyush Chaube

Civil Law- Constitution of India,1952- Article 227- The Arbitration and Conciliation Act, 1996- Section 34 - Petitioners Application for Return of Arbitration Application filed under Section 34 by the Railways against Award of the Arbitral Tribunal- Petition under Article 227 of the Constitution is maintainable against the order rejecting an application for return of Application under Section 34 of the Act of 1996-Conduct of the parties

which is very relevant for a decision to be taken - Instead of any written agreement or conditions in the Contract or even in the correspondence between the parties, specifying the seat of arbitration, the Railways agreed to participate in the arbitration proceedings at New Delhi without any protest. The Railways hence can be said to have waived their right to object and by their conduct determined the venue of arbitration at New Delhi to be also the seat of the arbitration proceedings-Failure to specifically mention a Seat of Arbitration and participation in Arbitration proceedings at New Delhi by the Railways without any protest shall be considered as determination of the Venue of arbitration as also the Seat, giving exclusive jurisdiction to the Courts at New Delhi to supervise the Arbitral proceedings including any attack on the Award-The Commercial Court at Lucknow has entertained the Section 34 Application without jurisdiction. Such inherent lack of jurisdiction makes the proceedings before it also liable to be set aside.

It is the conduct of the parties to the arbitration that is relevant for determining the venue as well as the seat of arbitration and where one of the parties waives off its right to object and protest and participates in the arbitration proceedings then the place (New Delhi) where such arbitration takes place shall be determined as the venue and seat of arbitration hence, order passed by the Lucknow Commercial Court will be without jurisdiction , therefore petition under Article 227 shall be maintainable. (30, 95, 97, 98)

Petition Allowed. (E-3)

Case Law/Judgements relied upon:-

1. Bhartiya Alluminium Co. Ltd. Vs Kaiser Aluminium Technical Services 2012 (9) SCC 552

2. BGS SGS Soma JV Vs NHPC Ltd. 2004 (4) SCC 234

3. QUIPPO Construction Equipment Ltd. Vs Janardan Nirman Pvt. Ltd. (2020) SCC online SC 419

4. Om Prakash & ors. Vs Vijay Dwarka Dass Verma 2020 SCC online Bom. 796

5. L&T Finance Vs Manoj Pathak (2020) SCC online Bom. 177

6. TNGQ Projects Ltd. Vs Balaji Projects (2021) SCC Online Madras 409

7. Chief Postmaster General & ors. Vs Living Media India Ltd. 2012 (3) SCC 563

8. Mankastu Impex Pvt. Ltd. Vs Air Visual Ltd. 2020 (5) SCC 399

9. Hasmukh Prajapati Vs Jai Prakash Associates Ltd. Matter under Article 227 of the Constitution No. 6890 of 2021

10. Inox Renewables Ltd. Vs Jayesh Electricals Ltd 2021 SCC Online SC 448

11. United Bank of India Vs Naresh Kumar & ors. 1996 (6) SCC 660

12. Reliance Industries Ltd. Vs U.O.I 2014 (7) SCC 603

13. Indus Mobile Distribution (Pvt) Ltd. Vs DataWind Innovation (Pvt) Ltd. 2017 (7) SCC 678.

14. Fuerst Day Lawson Ltd. Vs Jindal Exports Ltd. 2011 (8) SCC 333

15. U.O.I Vs McDonnell Douglas Corp. 1993 (2) Lloyd's Report 48

16. U.O.I Vs Hardy Exploration and Production (India) Inc 2019 (13) SCC 472

17. ManKastu Impex Pvt. Ltd. Vs Air Visual Ltd 2020 (5) SCC 399

18. Quippo Construction Equipment Ltd. Vs Janardan Nirman Pvt. Ltd. 2020 SCC Online SC 419

19. Ravi Ranjan Developers Pvt. Ltd. versus Aditya Kumar Chatterji 2022 SCConline Supreme Court 568

20. Hindustan Construction Company Ltd. Vs NHPC 2020 (4) SCC 234

21. Civil Appeal No.4130 of 2022: BBR (India) Private Limited Vs SP Singla Constructions (Private) Ltd.

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

1. Heard Sri Divyam Krishna and Sri Utkarsh Srivastava for the Petitioners and Sri Brajesh Kumar Shukla along with Pratyush Chaubey for the Respondents. The Petitioners have challenged the order passed by the Learned District Judge/Commercial Court, Lucknow dated 12.12.2019 rejecting the Petitioners Application for Return of Arbitration Application filled under Section 34 by the Railways against Award of the Arbitral Tribunal dated 06.03.2019, and allowing the Application for Condonation of Delay moved by the Respondents.

2. The facts as mentioned in the petition briefly are that on 30.10.2015 the Respondents floated a Tender Notice entitled "Design, Supply, Erection, Testing and Commissioning of 25 KV, 50 Hz Single Phase, Electrification works including OHE And TSS composite Electrical Works (hereinafter referred to as the Tender Paper ELCORE) The Petitioner's bid was adjudged viable and a Letter of Acceptance awarding the contract for a total value of more than Rs.30 crores 27 lakhs was issued by the Chief Electrical Engineer/P&D Central Organisation for Railway Electrification (CORE) at Allahabad 19.04.2016. An Agreement was executed on 14.7.2016 between the Petitioner and Chief Project Director Railway Electrification Lucknow, as the contract was to be operated for the composite electrification works in Jafrabad - Akbar Pur - Tanda Section under the supervision and control of Divisional Headquarters at Lucknow.

3. The contract was terminated by the Respondents because of slow progress as only 8 % of the work was completed in seven and a half months as opposed to hundred percent target for fifteen months.

4. The Petitioner invoked the Arbitration clause and Arbitral Tribunal was constituted through letter dated 01.12.2017 comprising of Three senior officers of the Railways. The entire arbitral proceedings were conducted in New Delhi at the CORE office. The Arbitral Tribunal rendered an Award of more than three crore rupees along with interest at the rate of 10% in favour of the Petitioner which was signed and delivered at New Delhi on 6 March 2019. Arbitration Application No. 925 of 2019 was filed on 30 August 2019 under Section 34 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as "the 1996 Act") by the Respondents against the Arbitral Award before the Commercial Court at Lucknow along with an Application for Condonation of Delay duly supported by an affidavit. Subsequently the Petitioner preferred an Execution petition/Enforcement Application under Section 36 of the 1996 Act before the High Court at Delhi on 17.09.2019. The Petitioner filed an Application for Return of Arbitration Application on 19.11.2019. It also moved an Application containing objections to the Application for Condonation of Delay in the Section 34 Application. A Reply to both the Applications was filed by the Respondents on 04.12.2019. The Learned Commercial Court by its order dated 12.12.2019 rejected the Petitioner's Application for Return of Arbitration Application, and allowed the Application for Condonation of Delay moved by the Respondents by a composite order.

5. It is the case of the Petitioners that such order has been passed by the Commercial Court at Lucknow exercising a jurisdiction not vested in it by law, causing grave injustice to the Petitioner and no Appeal under Section 37 of the Act of 1996 lies against the impugned order so far as return of plaint (Arbitation Application) under Section 34 of the Act read with Order VII Rule 10 CPC is concerned. Hence, a petition under Article 227 of the Constitution of India has been filed before this Court. It is the case of the Petitioners that Clause 4.0 of the Letter of Acceptance dated 19.04.2016 specifically mentioned "the contract shall be governed by the terms and conditions given in the Tender Paper Number ELCORE/OHE and TSS/group 199 with ANC slip number 1".

The agreement executed between the parties after Letter of Acceptance also referred to the said Tender Paper as governing the contract. The Tender Paper ELCORE contains the subclause 1.2 .54 which provides under subclause (k) the *"Venue for Arbitration shall be the place from which the Letter of Acceptance of Tender is issued or such other place as the purchaser at his discretion may determine."*

6. The learned counsel for the Petitioners argued that the arbitral proceedings were held exclusively at New Delhi and the Arbitral Award was signed and delivered at New Delhi hence the Commercial Court at Lucknow lacked territorial jurisdiction to entertain the Application under Section 34 of the Act of 1996. The supervisory territorial jurisdiction for the purposes of Section 34 cannot be determined on the basis of location of cause of action. As per clause 1.2 .54 (K) the place of Arbitration can be either at Prayagraj where the Letter of Acceptance was issued or at New Delhi where the Arbitration was actually held and Award delivered. In so far as Section 34 of the Act of 1996 is concerned no part of cause of action arose within the territorial jurisdiction of the Commercial Court at Lucknow. The Learned Commercial Court has relied upon General Conditions of Contract and Clause 64 (i) (iii) (d) which provides- *"The place of Arbitration "would be within the geographical limits of the Division of the Railway where the cause of action arose, or the headquarters of the concerned, or any other place with the written consent of both the parties."*

7. It has been argued that the Learned Commercial Court has erroneously interpreted paragraph 96 of the judgement rendered by the Constitution Bench in ***Bhartiya Alluminium Company Ltd. vs Kaiser Aluminium Technical Services 2012 (9) SCC 552***; to say that supervisory territorial jurisdiction for the purpose of Section 34 accrues to Courts situated both at the place of Arbitration, as well as where the cause of action has occurred. In other words, the jurisdiction is concurrent and not exclusively restricted to those courts located in place of Arbitration agreed to by the parties. Such an interpretation of paragraph 96 of BALCO (supra) is against a long line of judgements rendered by the Supreme Court and by various High Courts interpreting paragraph 96 to hold that supervisory jurisdiction under Section 34 is not concurrent and must be restricted to Courts in the location selected by the parties as place of Arbitration exclusively, irrespective of where the cause of action arose.

8. The Learned counsel for the Petitioner has placed reliance upon paragraphs 20, 45, 54, 57, 58, 82, 97 and 98

of the judgement rendered by the Supreme Court in ***BGS SGS Soma JV versus NHPC Ltd, 2004 (4) SCC 234;*** and has also placed reliance upon paragraph 19, 22 and 31 of judgement rendered by the Supreme Court in ***QUIPPO Construction Equipment Ltd versus Janardan Nirman Private Limited (2020) SCC online SC 419;*** *and* ***Om Prakash and others versus Vijay Dwarka Dass Verma 2020 SCC online Bombay 796, L&T Finance Vs. Manoj Pathak (2020) SCC online Bombay 177*** *and* ***TNGQ Projects Ltd. Vs. Balaji Projects (2021) SCC Online Madras 409.***

9. It has been argued by the learned counsel for the Petitioner that the clauses of contract are determinative of the seat of Arbitration. The seat of Arbitration alone would be important for determination of the place where Section 34 Application would lie. He has also argued that where the clauses of contract leave it open for the parties to choose, and the contract did not specifically mention some place, even then the conduct of the parties would determine the seat of Arbitration. It has been argued that the parties when they entered into the contract had referred to two clauses, the first clause in the Tender Document itself i.e. clause 1.2 .54 (K) related to the Venue of Arbitration being either at Allahabad or at a place determined by the purchaser, and the second clause ie, clause number 64.1.(iii)(d) which refers to 3 possibilities, the last one being determined by a written agreement between the parties. Since there was no written agreement between the parties, then the conduct of the parties would be relevant for a determination of the seat of Arbitration.

10. It has been argued for the petitioners that the judgement rendered by the Constitution Bench in BALCO having been interpreted by subsequent Benches of the Supreme Court later on, it was not open to the Learned Commercial Court to give its own interpretation to paragraph 96 thereof. Also ,the Tender Paper ELCORE clearly mentioned the parties intention to exclude any clause which is similar or identical to clause 64 (i)(iii)(d) of the General Conditions of Contract which has been relied upon by the Learned Commercial Court in holding that cause of action arose both at New Delhi and at Lucknow. Even if a part of cause of action did arise in Lucknow due to the execution of the project at Lucknow, that in itself is legally insufficient to confer upon the Learned Commercial Court at Lucknow any supervisory jurisdiction under Section 34 of the Act of 1996.

11. The learned counsel for the Petitioner has also drawn attention of this Court to the affidavit filed along with the Application for Condonation of Delay by the Respondents wherein the delay in approaching the Learned Commercial Court under Section 34 of the Act of 1996 has been explained as time having been taken in *"collecting documents and completing the formalities"*. It has been argued that government departments cannot take the defence of bureaucratic setup in their offices to get delay condoned. The Petitioner had relied upon judgement rendered by the Supreme Court in the case of ***Chief Postmaster General and others versus Living Media India Ltd 2012 (3) SCC 563***, but such argument has been arbitrarily rejected by the Commercial Court on the ground that in the case relied on by the Petitioner the delay was more than 427 days but in the case of the Respondents they had approached the Commercial Court with the delay of 26 days only.

12. Sri Brajesh Kumar Shukla appearing for the Respondents has raised a preliminary objection as to the maintainability of the petition filed on behalf of a Joint Venture by the Director of only one of the companies constituting it. It has been argued that the Deponent of the affidavit filed in support of the petition is one Mr Amresh Anand, who is the Director of only one of the companies which forms part of the Joint Venture. He has not been authorised by other members of the Joint-Venture for filing any petition before the High Court. He was authorised only to deal with matters relating to the bid offer and the completion of proceedings of tender and correspondence related thereto. The learned counsel for the Respondent has argued that Amresh Anand may have had the competence to have entered into contract as per the Authority letter given to him by all the partners of the Joint Venture, but this Authority ended with the signing of the Contract and was limited to the same only. There is no separate Authority Letter issued to Amresh Anand by the other two partners of the Joint Venture to file this Petition on their behalf. Mr Amresh Anand may be authorised only to sign the Application and to negotiate with the Railways for the contract but he could not file the petition on behalf of the other two partners of the Joint-Venture.

13. The learned counsel for the Respondent has also argued that this petition is not maintainable under Article 227 of the Constitution as the learned Commercial Court has passed an order under the provisions of Section 34 of the Act of 1996 against which remedy of appeal under Section 37 of the Act is available in case the order of admission of Application under Section 34 of the Act is treated to be of such nature as to give finality to the the rights of the parties under litigation. The Act of 1996 is a special act and a complete code in itself and no petition under Article 227 of the Constitution is maintainable against interlocutory orders.

14. With regard to the delay in approaching the Commercial Court the learned counsel for the Respondent has placed reliance upon Sub-Section (3) of Section 34 and the proviso thereof, which is that an Application may be filed even after three months from the date of receipt of the Award but within 30 days thereafter, subject to satisfaction of the Court regarding the reason for delay. The Award was received by Speed Post on 03.05.2019 and the Application under the Section 34 should have been filed ideally within three months that is latest by 03.08.2019, however, due to delay in collecting of documents and completing necessary formalities it could only be filed on 28th of August, causing a delay of 26 days in approaching the Commercial Court. The learned Commercial Court has considered the delay and also the judgement rendered by the Supreme Court in the case of *Chief Post Master General (supra)* and found that it was not a case of huge delay but only a case of slight delay which could be condoned looking into the facts and circumstances of the case.

15. On the merits of the case, Sri Pratiyush Chaube for the Respondents has pointed out from various clauses of the Agreement (a complete copy of which has been filed along with the Supplementary Affidavit) that in this case the purchaser is the President of India and he alone has been empowered to determine the seat of Arbitration. He has determined the seat of Arbitration at the place where the

Headquarter of the Division of Railways is situated which has to supervise the work. The Learned counsel for the Respondent has referred to Tender Paper ELCORE and Clause 17 of the Preamble which says that the *"Indian Railways Standard General Conditions of Contract- July 2014"* with addendum and corrigendum slips issued by the Railway Board" shall be applicable to the contract which may be obtained by the tenderer /contractor on payment from the Divisional Railway Manager's Office of the concerned Railway. In case of any difference between the provisions of General Conditions of Contract and any conditions contained in the tender documents, the provisions of General Conditions of Contract will prevail.

16. The learned counsel for the Respondent has also referred to Chapter 2 of the Tender Paper ELCORE Which contains the conditions of contract. It specifies that conditions of contract shall be governed not only by the Preamble to the Tender Paper, but also the instructions to tenderers and conditions of tendering as included in Part I of Chapter I and Conditions of Contract as included in Chapter II and also other specifications and conditions contained in following Chapters of the Tender Paper ELCORE.

The Learned counsel for the Respondent has referred to paragraph 1.2.54 (k) which provides that the Venue for Arbitration shall be the place from which the Letter of Acceptance of Tender is issued, or such other place as the purchaser at his discretion may determine; and has also referred to Clause 64 (i) (iii) (d) which refers to place of Arbitration as being within the geographical limits of the Division of the Railways where the cause of action arose, or the Headquarters of the concerned Railway, or any other place with the written consent of both the parties. It has been argued that since there was no written consent of both the parties to Arbitration being held at New Delhi and the Arbitral Tribunal held the proceedings at New Delhi only for convenience sake it cannot be said that New Delhi was agreed upon by the parties as being the place of Arbitration. Hence the preceding phrases relating to geographical limits of the Division of the Railway where the cause of action arose, or the Headquarters for the concerned Railway should be treated as determinative of the place of Arbitration. Both these phrases relate to Lucknow, and therefore the place of Arbitration should be treated as Lucknow, conferring supervisory jurisdiction under Section 34 of the Act of 1996 upon the Commercial Court at Lucknow.

17. The learned counsel for the Respondent has referred to Clause 7.0 of the Preamble of the Tender Paper ELCORE which directs performance Guarantee to be submitted by the contractor amounting to 5% of the contract value to the Chief Project Director, Railway Electrification Lucknow after the issuance of Letter of Acceptance but before signing of the Agreement in terms of Clause 19 of the Preamble. Reference has also been made to clause 11 of the Preamble which states that the contract will be operated by the Chief Project Director, Railway Electrification, Lucknow. The agreement had been signed and delivered at Lucknow for and behalf of the Respondents on 14.07.2016. The cause of action arose at Lucknow and since the contract was operated at Lucknow as the project of electrification had to be conducted under the Divisional Headquarters with supervision and Lucknow was the place of correspondence. After the Award of contract a major part of

cause of action arose at Lucknow. Reference has been made to clause 15 of the Preamble where all correspondence has to be undertaken after award of contract with the Chief Project Director, Railway Electrification, Lucknow in respect to matters relating to particular design, working and drawing, matters relating to basic design and drawing for fitting, components equipment and prototype test, and matters relating to progressing of fieldwork, scheduling of quantities and submission of bills. Under clause 1.1.2 which relates to Interpretation of Contract Agreement, "Purchaser" has been defined as the President of India acting through his accredited officers or anyone of them including the General Manager in charge of Railways Electrification and also the Chief Project Director. It has been argued that Section 31 sub-clause (4) and Section 20 of the Act of 1996 would be in applicable as no written consent was ever given to change the place of Arbitration by any of the parties.

18. The learned counsel for the has also placed reliance upon judgement rendered by the Supreme Court in the case of ***Mankastu Impex Private Limited versus Air Visual Ltd 2020 (5) SCC 399***; and has read out paragraphs 10 to 13, 17 to 20, and 24 to 26 of the judgement and has also read out the impugned order passed by the Commercial Court.

19. The learned counsel for the Respondent has also placed reliance upon judgement rendered by Coordinate Bench of this Court in ***Hasmukh Prajapati versus Jai Prakash Associates Limited*** in a Petition under Article 227 of the Constitution No. 6890 of 2021, decided on 17.02.2022, where a distinction has been drawn between seat of Arbitration and venue of Arbitration. It has been argued that the venue of Arbitration may have been in New Delhi, in the case of the Petitioner, however the seat of Arbitration would only be determined on the basis of Clause 64 (1)(iii)(d) of the General Conditions of Contract.

20. It has also been informed to this Court that subsequent to the filing of the Application under Section 34 of the Act of 1996 before the Commercial Court at Lucknow the Petitioner preferred an Execution petition/Enforcement Application under Section 36 of the Act on 17.09.2019 before the Delhi High Court. The Delhi High Court while issuing notice to the Respondents has directed them to deposit the entire awarded amount with up-to-date interest before the Registrar General of the High Court of Delhi by its order dated 18.09.2019, passed ex parte. Further, the High Court of Delhi was pleased to release 50% of the deposited amount under the Arbitral Award to the Petitioner by its order dated 24.12.2019 subject to the outcome of the Objections filed by the judgement debtor. The decree holder had to submit a personal bond executed by all its Directors and supported by a Board Resolution that in the event of the decree holder being directed to refund the amount by the Court in the Objections under Section 34 of the Arbitration and Conciliation Act, the decree holder shall refund the amount along with interest at such rate as directed by the Court within eight weeks of the order, irrespective of the right to challenge the order passed in proceedings under Section 34 of the 1996 Act. The balance 50% of the amount had to be kept in fixed deposit till further orders. In compliance of the order passed by the Delhi High Court on 24.12.2019, 50% of the amount was released against the

personal bond of the Directors only. The Petitioner has filed an Application stating that it is not in a position to furnish bank guarantee to secure the judgement debtor against the payment of any funds. Further, after hearing on several dates and entertaining the Application under Section 34 of the Act of 1996, the Learned Commercial Court at Lucknow has been pleased to stay the operation and implementation of the Award dated 6.03.2019 by its order dated 09.02.2021. Subsequently the Petitioner has filed a further Application for seeking release of the remaining 50% of the amount before the Delhi High Court on which the Delhi High Court has been pleased to issue notice to the Respondents by its order dated 05.11.2020. After having approached Delhi High Court in this manner, the Petitioner has approached this Court in this petition under Article 227 only on 08.12.2020, after a lapse of almost one year from the date of the impugned order, 12.12.2019.

21. In rejoinder the learned counsel for the Petitioner has reiterated his earlier arguments and said that it is no doubt true that General Conditions of Contract would prevail over Tender Document ordinarily, however, in this case there is the phrase *"with the written consent of both the parties"*. The counsel for the Petitioner argued that in this case the Tender document is the written consent, and would override the General Conditions of Contract. The learned counsel for the Petitioner has placed reliance upon several judgements to say that even though the cause of action or part of cause of action may have arisen at Lucknow that would not determine the seat of Arbitration and has referred to the importance of the determination of the seat of Arbitration as discussed by the Supreme Court in the judgement rendered in BGSSGS Soma (supra). The Learned counsel for the Petitioner has argued that in this case the conduct of the parties would give rise to the presumption that it is a separate contract condition to hold Arbitration at Delhi, that was agreed upon between the parties, and the subsequent condition so created by implication would override the written consent given in the contract. It has also been argued that the judgement rendered in *Mankastu Impex* (supra) would not apply as it related to international Arbitration, whereas the controversy before this Court has been raised with respect to an Arbitration that has been held in India between the parties and is governed by Part I of the Act of 1996.

22. It has also been argued by the learned counsel for the Petitioner that where there is a conflict between written agreement among the parties and the conduct of the parties, the conduct of the parties would prevail. The learned counsel for the Petitioner has referred to judgement rendered by the Supreme Court in ***Inox Renewables Ltd versus Jayesh Electricals Ltd 2021 SCC Online SC 448***, and has relied upon paragraphs 11, 16 and 17 of the judgement.

23. With regard to the argument of the Learned counsel for the Respondent that this petition under Article 227 is not maintainable having been filed through Director of one of the companies constituting the Joint Venture, it has been argued that the contract was awarded to a Joint-Venture partnership between three companies. The deponent of the affidavit in this petition is the Director of Zapdor / Under Order XXX Rule 2 C.P.C. and Order XXIX Rule 1 C.P.C., Amresh Anand is

competent to file the Application/petition before this Court.

24. After hearing the parties at length, this Court finds that there are four issues which must be considered by this Court to decide this petition.

a) Whether this petition under Article 227 is maintainable ?

b) Whether Cause of Action or subject matter of the Suit would determine the Court which could exercise supervisory jurisdiction to decide the Section 34 petition?

c) Whether it would be the 'Venue' or the 'Seat' of Arbitral proceedings which would determine the Court which can exercise supervisory jurisdiction over the Arbitral proceedings ?

d) Whether in the absence of a specific mention in the contract agreement regarding 'Seat' of Arbitration, the conduct of parties would determine the 'Seat' and therefore act as an exclusionary clause for Courts at all other places to exercise supervisory control over the Arbitral proceedings ?

25. With regard to the first issue of maintainability of the petition on behalf of the J.V. Company filed only by one Director of one company, this Court finds that with regard to the question of maintainability of the petition on behalf of the Joint Venture company/ consortium; it has been argued by the learned counsel for the Petitioner that three Companies had come together to make a bid for the contract relating to electrification of Jafarabad-Akbarpur-Tanda Section. The Director of Zapdor Mr Amresh Anand had been authorised by the Directors of all three Companies to enter into correspondence for the Award of Contract and also to do all that was needful with regard to arbitration proceedings. Mr Amresh Anand had been authorised by all to place their case before the Arbitrator. No objection was raised by the Railways with regard to the appearance of Mr Amresh Anand before the Arbitrator for pursuing the case of the Joint Venture. Now a challenge is being raised for the first time regarding the capacity of Mr Amresh Anand to file the petition. The learned counsel for the Petitioner has placed reliance upon judgement rendered by the Supreme Court in the case of ***United Bank of India versus Naresh Kumar and others 1996 (6) SCC 660***, where the appellant Bank had instituted a Suit for recovery of loan advanced to the Respondent together with interest thereon. The Suit having been filed in the name of the appellant bank, full amount of Court fees had been paid. The trial of the Suit also proceeded. Although the Trial Court found the Appellant Bank had indeed advanced money to the Respondent and its claim was justified, it rejected the claim of the bank only on the ground that the plaint was not duly signed and verified by a competent person. The First Appeal and Second Appeal were also dismissed. The Bank approached the Supreme Court.

26. The Supreme Court observed that procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. It also observed in paragraph 10 as follows -

"10. It cannot be disputed that a Company like the appellant can sue and be sued in its own name. Under Order VI Rule 14 of the Code of Civil Procedure, pleading is required to be signed by the party and its counsel if any. As a Company is a juristic entity it is obvious that some person has to sign the pleadings on behalf of the company.

Order XXIX Rule 1 of the Code of Civil Procedure, therefore, provides that in a Suit by or against a Corporation, the Secretary or any Director or other principal officer of the Corporation who is able to depose to the facts of the case might sign and verify on behalf of the Company. Reading Order VI Rule 14 together with Order XXIX Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed, a person referred to in Rule 1 of Order XXIX can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition there to under Order XXIX Rule (1) of the Code of Civil Procedure, as a Company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf , and this would be regarded as sufficient compliance with the provisions of Order VI Rule 14 of the Code of Civil Procedure. A person may be expressly authorised to sign the pleadings on behalf of the Company, for example by the Board of Directors passing a Resolution to that effect, or by the power of attorney executed in favour of any individual. In the absence thereof, and in cases where the pleadings have been signed by one of its officers, a corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleadings by its officer..."

This Court is of the opinion that considering the facts and circumstances of the case as pleaded and the substantial questions of law that arise, the petitioner cannot be nonsuited on technical grounds alone.

27. With regard to the issue of maintainability of this petition under Article 227 of the Constitution, this Court is bound by the observations of the Supreme Court in Soma JV (supra) where the project site was located in the States of Assam and Arunachal Pradesh and the agreement was signed at Faridabad. With regard to dispute resolution through Arbitration, the parties agreed that it shall be settled finally in accordance with the provisions of the 1996 Act and the Arbitration proceedings shall be held at New Delhi/Faridabad, India.

On 16.05.2011 the notice of Arbitration was issued to the Petitioner in regard to payment of compensation for losses suffered due to delays. The Arbitral Tribunal was constituted which held 71 sittings at New Delhi and then delivered a unanimous Award again at New Delhi, by which the claims of the Petitioner were allowed together with simple interest at the rate of 14% per annum till the date of actual payment. The Responden being aggrieved filed an Application under Section 34 before the Court of District and Sessions Judge, Faridabad Haryana. The Petitioner filed an Application under Section 151 read with Order VII Rule 10 of the C.P.C. and Section 2 (1) (e) (i) of the 1996 Act seeking a Return of the petition under Section 34 for presentation before the appropriate Court at New Delhi, and/or the District Judge at Dhemaji Assam. The Special Commercial Court Gurugram, allowed the Application of the Petitioner to return the Section 34 petition for presentation before the proper Court having jurisdiction in New Delhi. The Respondent filed an appeal under Section 37 of the 1996 Act before the Punjab and Haryana High Court which held the appeal to be maintainable and also that Delhi was only a convenient **"venue"** where arbitral

proceedings were held and not the **"seat"** of arbitral proceedings at Faridabad would have jurisdiction on the basis of cause of action having arisen in part in Faridabad. The Petitioner challenged such order before the Supreme Court.

28. It was argued that an order which allowed an Application under order VII Rule 10 CPC cannot amount to an order refusing to set aside an arbitral Award under Section 34 of the 1996 Act. it was also argued that even if both New Delhi and Faridabad had jurisdiction on the basis of part of cause of action arising at New Delhi and at Faridabad, the ratio laid down in the Constitution Bench decision in the case of BALCO (supra) would apply as understood by two subsequent decisions of the Supreme Court in ***Reliance Industries Ltd versus Union of India 2014 (7) SCC 603***; and in ***Indus Mobile Distribution (Private)Limited versus DataWind Innovation (Private)Limited 2017 (7) SCC 678***. It was also argued by the learned counsel for the Petitioners that the place of Arbitration as determined in accordance with Section 20 of the 1996 Act was New Delhi therefore this being the **seat** as determined by the Tribunal in the case, challenge under Section 34 of the 1996 Act could only be made in the courts at New Delhi.

On the other hand the Additional Solicitor General supported the judgement under appeal saying that an order passed under Order VII Rule 10 C.P.C. would amount to refusal to set aside an Award and therefore appeal would be maintainable. Moreover the Arbitration clause only referred to the convenient **venue** and the fact that the sittings were held at New Delhi would not make New Delhi the **seat** of Arbitration under Section 20 (1) of the Act 1996. A part of cause of action clearly arose in Faridabad, as a result of which the Court in Faridabad would be clothed with jurisdiction to decide Section 34 Application.

29. The Supreme Court in Soma JV (supra) considered the question of maintainability of appeal under Section 37 of the Act and referred to Sub-clause (1) (a),(b) and (c), and held that the order passed by the Commercial Court at Gurugram was not referable to Section 8 or Section 9. It could also not amount to setting aside or refusing to set aside an Award under Section 34(1) (c). Therefore, Appeal under Section 37 would not be maintainable. It compared the provisions of Section 13 of the Commercial Courts Act and Section 37 of the Act of 1996. Section 13 of the Commercial Courts Act referred to grounds enumerated under Order 43 of the C.P.C. and Section 37 of the 1996 Act. Referring to judgement rendered in ***Fuerst Day Lawson Ltd versus Jindal Exports Ltd, 2011 (8) SCC 333;*** it held that Section 13 of the Commercial Courts Act was a general provision vis-a-vis Arbitration, relating to appeals arising out of commercial disputes and since Section 37 of the Act of 1996 was expressly included in the proviso to Section 13 (1), the Court held that the special statute that is the 1996 Act would be applicable vis-a-vis the more general statute namely the Commercial Courts Act. The general statute being left to operate in spheres other than Arbitration. Section 37(1) makes it clear that the appeals only lie from orders set out in sub clause (a), (b) and (c) and from no others. The refusal to set aside and arbitral Award must be under Section 34 , i.e., after the grounds set out in Section 34 have been applied to the Arbitral Award in question and after the Court has turned down such grounds. Admittedly on the facts of the

case there was no adjudication under Section 34 of the 1996 Act - all that was done was that the Commercial Court at Gurugram had allowed an Application filed under Section 151 read with Order VII Rule 10 C.P.C., determining that Commercial Court at Gurugram had no jurisdiction to proceed further with the Section 34 Application, and therefore such Application would have to be returned to the competent Court situated at New Delhi. By virtue of the impugned order the Arbitral Award had not been set aside. The Supreme Court therefore held appeal under Section 37 before the Punjab and Haryana High Court was not maintainable.

30. This Court after the dictum as aforesaid of the Supreme Court in Soma JV (supra) is of the considered opinion that this petition under Article 227 of the Constitution is maintainable against the order rejecting an application for return of Application under Section 34 of the Act of 1996.

31. This Court shall now consider the issues c, d and e jointly by referring to various case laws relied upon by the counsel for the parties and recent developments of law, after case was heard and judgement was reserved by me. The first such judgment being that of the Constitution Bench in BALCO Vs. Kaiser Alluminium (supra). The Supreme Court in BALCO (supra) was considering an agreement between the Appellant and the Respondent which had a dispute resolution Clause in Article 17 which stated that the arbitration proceedings will be governed by English arbitration law and Arbitration shall be held wholly in London and use English language in the proceedings. Clause 22 of the Agreement stated that the agreement shall be governed by the prevailing law of India and in case of Arbitration, the English Law shall apply. Therefore the aforesaid clause indicated that by reason of the agreement between the parties, the governing law of the agreement was the prevailing law of India. However, the settlement procedure for adjudication of rights or obligation under the Agreement was by way of Arbitration in London and the English Arbitration law was made applicable to such proceedings. Disputes arose between the parties and arbitration proceedings were held in London. The Arbitral Tribunal made two awards in London.

32. The appellant thereafter filed applications under Section 34 of the 1996 Act for setting aside the aforesaid two Awards in the Court of District Judge Bilaspur. The District Judge Bilaspur, held such applications filed under Section 34 to be not maintainable and dismissed the same. Aggrieved by the two judgements, the appellant filed two miscellaneous Appeals before the High Court of Chhattisgarh. The Division Bench dismissed the appeals by a common order. Such decision was challenged before the Supreme Court. The Supreme Court considered the questions that arose in several Special Leaves to Appeal which were connected with the main Appeal after its reference to the Constitution Bench and referred to such questions as: -

"a) what is meant by the place of arbitration as found in Section 2 (2) and 20 of the Arbitration Act 1996?"

"b) What is the meaning of the words "under the law of which the Award is passed" under Section 48 of the 1996 Act ?

"c) Does Section 2 (2) bar the application of Part I of the Arbitration Act

1996 to arbitration where the place is outside India?"

"d) Does part I apply at all stages of arbitration that is pre, during and post stages of the arbitral proceedings in respect of all arbitration, except for areas specifically falling under Part II and III of the 1996 Act ?"

"e) Whether a Suit for preservation of assets pending an arbitration proceeding is maintainable?"

33. The Supreme Court clarified the use of the words "place", "seat", "situs", and "venue" in the context of arbitration and discussed the same in paragraphs 75, 76 and 95 to 100 of the judgement and Section 20 of the 1996 Act was referred to which recognised such distinction. The Supreme Court observed that the seat of arbitration or the situs of arbitration or the place of arbitration indicates the jurisdiction or legal seat of arbitration which determines the Curial law i.e. the law that shall govern the arbitration proceedings. The Supreme Court said further that if the legal or Juridical seat of arbitration is outside India, Part I of the 1996 Act shall be inapplicable to such operations; and even in case a clause in the arbitration agreement purports to apply Part I of the 1996 Act to an arbitration where juridical seat of arbitration is outside India, Part I shall be inapplicable to the extent inconsistent with the arbitration law of the seat of arbitration. *"Venue of arbitration "* as distinguished from the place or the seat or the situs, is the actual physical location where the Arbitrators/ Arbitral Tribunal for reasons of convenience et cetera, might actually conduct their proceedings, which may be a location physically outside the jurisdiction or legal seat of arbitration.

34. The Supreme Court answered the reference by observing that the 1996 Act had accepted the territoriality principle which had been adopted in the UNCITRAL Model Law. Section 2 sub-clause (2) of the 1996 Act makes a declaration that Part I of the Act shall apply to all arbitration which take place within India. Part I of the 1996 Act would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in part II of the 1996 Act. There can be no overlapping or intermingling of the provisions contained in part I with the provisions contained in part II of the 1996 Act . In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 of the 1996 Act or any other provision of Indian law, as applicability of part I of the Act is limited only to all arbitration which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India on the basis of an international commercial arbitration with its seat outside India. Hence Part I of the Act is applicable only to all the arbitrations which take place within the territory of India.

35. The Supreme Court also observed *"the subject matter of Arbitration"* in Section 2(1) (e) of the 1996 Act cannot be confused with *"subject matter of the suit"*. The term "subject matter" in Section 2 (1) (e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify Courts having supervisory control over the Arbitration proceedings. Hence, it refers to a Court which would essentially be at the **seat** of the Arbitration process. The provision in Section 2(1)(e) has to be

construed keeping in view the provisions in Section 20 which gives recognition to party autonomy. The legislature has intentionally given jurisdiction to two courts ie the Court which would have jurisdiction where the cause of action is located ,and the courts where the Arbitration takes place. This was necessary as on many occasions the agreement may provide for a **seat** of Arbitration at a place which would be neutral to both the parties. Therefore, the courts where the Arbitration takes place would be required to exercise supervisory control over the arbitral process.For example, if the Arbitration is held in Delhi, when neither of the parties are from Delhi (Delhi having been chosen as a neutral place as between a parties from Mumbai and the other from Kolkata) and the Arbitral Tribunal sitting in Delhi passes an interim order under Section 17 of the 1996 Act, the appeal against such an interim order under Section 37 must lie to the Court at Delhi being the Court having supervisory jurisdiction over the Arbitration proceedings and the Tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only Arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction ie the Court within whose jurisdiction the subject matter of the suit is situated and the Courts within the jurisdiction of which the dispute resolution ie Arbitration is located.

36. The object of selection of a neutral **seat** or place of Arbitration within India by the parties would be frustrated partially at least, if not wholly, if courts having jurisdiction over the said neutral **seat** of Arbitration did not have supervisory jurisdiction over such Arbitration. After all, the whole point of agreeing to a neutral **seat** of Arbitration is to avoid mutual inconvenience. It is certain that the parties cannot by agreement confer jurisdiction on a Court which does not otherwise have jurisdiction over the matter concerned; the parties can only restrict jurisdiction over the matter concerned to only one of the courts that otherwise have jurisdiction. The supervisory jurisdiction of the Court is located at the legal **seat** of Arbitration which can be said to be created by the parties by choosing that as the **seat** in the Arbitration agreement. The Supreme Court having held that the Court which has jurisdiction over the seat of Arbitration would have supervisory jurisdiction of Arbitration in addition to courts where the cause of action might have arisen clarifies the law.

37. One of the questions that the Constitution Bench dealt with was "what is meant by the place of Arbitration as found in Section 2(2) and 20 of the Arbitration Act 1996?

In paragraph 75 of the judgement the Supreme Court observed that the seat of Arbitration decides the applicability of law for regulation of the Arbitration. This however does not mean that all proceedings of Arbitration to have to take place at the seat of Arbitration. The arbitrators at times hold meetings at more convenient locations. This is necessary as arbitrators may often come from different countries. It may therefore be convenient to hold some of the meetings in a location which may be convenient to all. The Supreme Court referred to English caselaw with approval where it was observed:-

*"the preceding discussion has been on the basis that there is only one "**place**" of Arbitration. This will be the*

*place chosen by, or on behalf of the parties; and it will be designated in the Arbitration agreement or the terms of the reference, or the minutes of proceedings, or in some other way as the place or "**seat**" of the Arbitration. This does not mean however that the Arbitral Tribunal must hold all its meetings or hearings at the place of Arbitration. ....It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country for instance for the purpose of taking evidence....In such circumstances each move of the Arbitral Tribunal does not of itself mean that the **seat** of Arbitration changes. The **seat** of Arbitration remains the place initially agreed by or on behalf of the parties."*

These observations were subsequently followed by the Supreme Court in the case of ***Union of India versus McDonnell Douglas Corporation 1993 (2) Lloyd's Report 48***, where the Supreme Court observed that the laws of the land of the country where the Arbitration took place usually govern the regulation of Arbitration. Part I of the Act of 1996 only applies when the seat of Arbitration is in India, irrespective of the kind of Arbitration.

38. While dealing with the arguments made by the learned counsel for the appellant regarding the Act being *"subject matter centric*" and not *"seat centric"* and therefore seat is not the centre of gravity as far as Arbitration Act 1996 is concerned, the Court observed in paragraph 96 while dealing with the definitions clause 2 (1) (e) that-

*"subject matter of the Arbitration" cannot be confused with "subject matter of the suit." The term subject matter in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the Arbitration proceedings. Hence, it refers to a Court which would essentially be a Court of the **seat** of Arbitration process.....where Arbitration is located. "*

The Supreme Court observed in paragraph 97 -

"The definition of Section 2(1)(e)includes "subject matter of the Arbitration" to give jurisdiction to the courts where the Arbitration takes place, which otherwise would not exist. - - - This has a clear reference to a Court within whose jurisdiction the asset/ person is located, against which the enforcement of international arbitral Award is sought."'

39. The Supreme Court thereafter observed in paragraph 98 -

"We now come to Section 20, which is as under:

*"20. **Place of Arbitration** - (1) The parties are free to agree on the place of Arbitration.*

(2) failing any agreement referred to in Sub-Section (1) the place of Arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) notwithstanding sub-Section (1) or sub-Section (2), The Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

A Plain reading of Section 20 leaves no room room for doubt that where the place of Arbitration is in India, the

parties are free to agree to any place or seat within India, New Delhi or Mumbai et cetera. In the absence of parties agreement thereto, Section 20 sub-clause (2) authorises the Tribunal to determine the place/seat of such Arbitration. Section 20(3) enables the Tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties."

40. The Supreme Court thereafter considered the question of "venue " and observed in paragraph 99 -

"99. The fixation of most convenient ***venue*** *is taken care of by Section 20(3). Section 20(3)has to be read in the context of Section 20(2)which places a threshold limitation on the applicability of Part 1 where the place of Arbitration is in India. ...."*

The Court observed in paragraph 100-

"True, that in an international commercial Arbitration, having its seat in India, hearings may be necessitated outside India. In such circumstances, the hearing of the Arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of Arbitration which would remain in India.

The Supreme Court thereafter referred to the commentary of Redfern and Hunter, *"The Law and Practice of International Commercial Arbitration"*, and the following passage under the heading *"the place of Arbitration":-*

"the preceding discussion has been on the basis that there is only one place of Arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the Arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or seat of the Arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of Arbitration. International commercial Arbitration often involves people of many different nationalities, from many different countries. In the circumstances it is by no means unusual for a tribunal travelling to hold meetings - or even hearings, in a place other than the designated place of Arbitration, either for its own convenience or for the convenience of the parties or their witnesses - - - it may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country - for instance, for the purpose of taking evidence ...in such circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of Arbitration changes. The seat of Arbitration remains the place initially agreed by or on behalf of the parties."

"This in our view, is the correct depiction of the practical considerations and the distinction between "seat" as given in Section 20 (1)and subsection 20 (2)and the Venue as given in Section 20 (3)."

41. Subsequently in 2018, the Supreme Court in the case of ***Union of India versus Hardy Exploration and Production (India) Inc 2019 (13) SCC 472***; considered an agreement relating to a production sharing contract between the parties. The arbitration agreement provided that the venue of conciliation or arbitration proceedings, unless the parties otherwise agreed, would be Kuala Lumpur and the arbitration proceedings shall be conducted in accordance with UNCITRAL Model law on International Commercial Arbitration.

The arbitration proceedings were held in Kuala Lumpur and the Award was

signed and delivered in Kuala Lumpur. The Union of India sought to challenge the Award under the Act of 1996 before the Delhi High Court. It contended that Kuala Lumpur was merely the venue and New Delhi was the seat of arbitration. The Supreme Court held that the parties had not chosen the seat of arbitration and the Arbitral Tribunal had also not determined the seat of arbitration. It held that :-

"Kuala Lumpur was the venue of arbitration but it did not imply that it had become the seat of arbitration by any express agreement between the parties. The venue could not by itself assume the status of the seat; instead a venue could become the seat only if something else is added to it as a concomitant."

42. The Five Judges Bench decision in BALCO (supra) has been interpreted and followed by Five Judges Bench in *Soma JV* (supra). The Supreme Court in *BALCO Vs. Kaiser Alluminium* (supra) referred to the observations made in ***Braes of Doune Wind Farm (Scotland) Ltd v Alfred MacAlpine Business Services Ltd 2008 EWHC 426 (TCC)*** by the Queen Bench Division that a detailed examination is required to be undertaken by the Court to determine from the agreement and the surrounding circumstances the intention of the parties as to whether a particular place mentioned refers to 'Venue' or 'Seat' of the Arbitration. In that case, the Court upon consideration of the entire material, concluded that Glasgow was a reference to the Venue and the Seat of the Arbitration was held to be in London,England. The Court reiterated the principle that the selection of a 'place or seat' for an Arbitration will determine what "curial law"or "lex Fori" or " Lex arbitri "will be. It was also further concluded that where in substance the parties agreed that the law of one country will govern and control a given Arbitration, the place where the Arbitration is to be heard will not dictate what the governing law or controlling law will be.

43. The Supreme Court further observed that the ratio in *Alfred MacAlpine* was followed is *Shashoua v Sharma* 2009 EWHC 957(Comm). In the Shashoua case the Court was concerned with the construction of the shareholders agreement between the parties which provided that *"the venue of Arbitration shall be London, United Kingdom"*. Whilst providing that the Arbitration proceedings would should be conducted in English in accordance with the ICC Rules, and that the governing law of the shareholders agreement itself would be the law of India. The claimants made an Application to the High Court in New Delhi seeking interim measure of protection under Section 9 of the Arbitration Act 1996, prior to the institution of Arbitration proceedings. Following the commencement of the Arbitration, the defendant and the Joint-Venture Company raised the challenge to the jurisdiction of the Arbitral Tribunal, which the Tribunal heard as a preliminary issue. The Tribunal rejected the jurisdictional objection. The Tribunal then made an Award for the defendant to pay more than £300,000. The English Court gave leave to the claimant to enforce the Award as a judgement. The defendant applied to the High Court of Delhi under Section 34 (2)(a) of the Arbitration Act 1996 to set aside the Award. In the meantime, the claimant had obtained the charging order, which had been made final over the defendant's property in England. The defendant applied to the Delhi High Court for an order directing the claimants not to take any action to execute the charging order, pending the final disposal

of Section 34 petition in Delhi seeking to set aside the Award. The defendant had sought unsuccessfully to challenge the Award in the Commercial Court under Section 68 and Section 69 of the UK Act and to set aside the order giving leave to enforce the Award.

44. The Supreme Court in Soma J.V. then referred to paragraph 110 of BALCO as follows: -

"110. Examining the fact situation in the said case, the Court observed as follows: (Shashua)

"The basis for the Court"s grant of an anti-suit injunction of the kind sought depended upon the seat of the Arbitration. An agreement as to the seat of an Arbitration brought in the law of that country as the curial law, and was analogous to an exclusive jurisdiction clause. Not only was there an agreement to the Curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the Arbitration, so that, by agreeing to the seat, the parties agreed that any challenge to an interim or final Award was to be made only in the courts of the place designated as the seat of Arbitration.

*Although, "**venue**" was not synonymous with "**seat**", in an Arbitration clause which provided for Arbitration to be conducted in accordance with the Rules of ICC in Paris (a supranational body of rules), a provision that "the venue of Arbitration shall be London, United Kingdom" did amount to the designation of the Juridical Seat...." The Queens Bench Division observed that **"a choice of seat for the Arbitration must be a choice of forum for remedies seeking to attack the Award".***

(emphasis supplied)

45. The Supreme Court in BALCO observed thereafter that this principle was followed in ***Union of India Vs. McDonnell Douglas Corporation. In Union of India versus McDonnell Douglas Corpn (1993) Lloyds Rep 48***; the agreement provided that the *"Arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any re-enactment or modification thereof.... The seat of arbitral proceedings shall be London, United Kingdom.*

Considering the aforesaid clause, the Supreme Court held that by agreement the parties have chosen English law as a law to govern their Arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with internal conduct of their Arbitration and which are not inconsistent with the choice of English arbitral procedure in law. The Supreme Court followed the Queens Bench Decision which laid stress upon the location of the **seat of Arbitration** as an important factor in determining the proper law of the Arbitration agreement.

46. The Supreme Court thereafter in Soma J.V. (supra) referred to paragraph-116 of BALCO that

"the legal position that emerges from a conspectus of all the decisions, seems to be, that the choice of another country as the seat of Arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of Arbitration will apply to the proceedings."

47. The Three Judges Bench of this Supreme Court in Soma JV (supra) was considering the question whether the **seat** of Arbitration proceedings was New Delhi or Faridabad, consequent upon which a petition under Section 34 of the Arbitration

Act 1996 could be filed dependent on where the **seat** of Arbitration is located.

48. While considering the question of determination of the **seat** of the arbitral proceedings between the parties, it was observed that it is important to lay down the law on what constitutes "juridical seat" of the arbitral proceedings, and once the **seat** is delineated by Arbitration Agreement, the Courts at the place of the seat would alone thereafter have exclusive jurisdiction over the arbitral proceedings.

49. The Supreme Court considered the Arbitration Act 1940 which did not refer to Juridical **seat** of Arbitration proceedings at all. After the UNCITRAL Model law on International Commercial Arbitration was adopted by this country the concept of "**place**" or "**seat**" of arbitral proceedings was introduced. The 1996 Act adopted the Model Law and referred to the **place** of Arbitration and defined the **Court** and indicated which courts have jurisdiction in relation to arbitral proceedings in several sections in Part I.

50. The Supreme Court referred to the Definition clause under Section 2 (1) (e) and Sub-clause (i) and (ii) thereof, and then to Section 20, 31 (4) and 42 of the 1996 Act.

51. The Supreme Court in Soma JV (supra) referred to the Five Judges Bench in *BALCO* (supra) because in earlier decisions of the Court it had not properly distinguished between **seat** and **venue** of an arbitral proceeding. After referring to paragraphs 75, 76, 96, 110, 116, 123 and 194 of BALCO (supra), the Supreme Court observed in paragraph 38 as follows: -

*"38. A Reading of paras 75, 76, 96, 110, 116, 123 and 194 of BALCO would show that where parties have selected the "**seat**" of Arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the courts at the "**seat**" would alone have jurisdiction to entertain challenges against the arbitral Award which have been made at the **seat**. - - - the BALCO judgement, when read as a whole, applies the concept of **seat** as laid down by the English judgements (and which is in Section 20 of the Arbitration Act 1996) by harmoniously construing Section 20 with Section 2 (1)(e), so as to broaden the definition of "Court "and bring within its ken Courts of the "seat" of the Arbitration."*

52. The Supreme Court thereafter considered the import and purport of paragraph 96 of the BALCO (supra) in paragraph 39 to 43, and came to the conclusion that :-

"a judgement must be read as a whole, so that conflicting parts maybe harmonised to reveal the true ratio of the judgement. However, if this is not possible, and it is found that the internal conflicts within the judgement cannot be resolved, then the first endeavour that must be made is to see whether Ratio Decidendi can be culled out without the conflicting portion. If not, then as held by Lord Denning in Harper versus National Coal Board, the binding nature of the precedent on the point on which there is a conflict in a judgement, comes under a cloud "

It thereafter observed in paragraph-44 as follows:-

"44. If para 75, 76, 96, 110, 116, 123 and 194 of BALCO ought to be read together, what becomes clear is that Section 2 (1)(e)has to be construed keeping in view Section 20 of the Arbitration Act 1996, which gives recognition to party

autonomy- the Arbitration Act 1996 having accepted the territoriality principle in Section 2 (2), following the UNCITRAL Model Law. The narrow construction of Section 2 (1) (e) was expressly rejected by the Five Judges Bench in BALCO (supra). This being so, what has then to be seen is what is the effect Section 20 would have on Section 2 (1) (e) of the Arbitration Act 1996."

53. The Supreme Court then considered the observations made by it in ***Union of India Vs. Reliance Industries Ltd 2015 (10) SCC 213*** which relied upon ***Videocon Industries Ltd versus Union of India 2011 (6) SCC 161***; and judgement rendered by the Court of Appeal in ***C v D, 2007 EWCA Civ 1282 (CA)***; which was subsequently followed by the High Court of Justice, Queens Bench Division. The English courts had held that the effect of choice of **seat** of Arbitration would mean conferring exclusive jurisdiction for the purpose of regulating arbitral proceedings arising out of the agreement between the parties on the courts situated in that "**seat**" alone.

54. The Supreme Court in Soma JV referred to the observations made by it in ***Indus Mobile Distribution Private Limited versus Datawind Innovations Private Limited (2017) 7 SCC 678***; distinguishing between **seat** of an arbitral proceedings and **venue** of such proceeding. In Indus Mobile (supra), the Supreme Court referred to the 246th Report of the Law Commission of India and the recommendations made with regard to amendment to be carried out in Section 20 of the 1996 Act replacing the word "**place**" by the word "**seat**".

55. The Court in Indus Mobile (supra) observed that amendment as proposed by the Law Commission could not be made because *"....the BALCO judgement in no uncertain terms had referred to the "place" as juridical seat for the purpose of Section 2 (2) of the Act. It had further made it clear that Section 20 (1) and Section 20 (2) where the word "**place**" is used refers to the juridical seat, whereas Section 20 (3) the word "**place**" is equivalent to **venue**. .."*

56. The Supreme Court referred to paragraph 19 of *Indus Mobile* (supra) where it was observed that *"the moment the **seat** is designated, it is akin to an exclusive jurisdiction clause. "Even if a part of cause of action had not arisen in such **seat**, nevertheless the courts situated in the **seat** will have "exclusive jurisdiction for the purpose of regulating arbitral proceedings arising out of the agreement between the parties."*

57. The Supreme Court referred to judgement rendered in ***Brahmani River Pellets Limited versus Kamatchi Industries Ltd 2020 (5) SCC 462***; where judgement rendered in *Indus Mobiles* (supra) was followed. The Supreme Court observed in paragraph 49 of judgement rendered in Soma JV (supra) that if any other interpretation is taken for example, the interpretation given by the Respondents that Courts where a part of cause of action action had arisen would also have jurisdiction would mean that -*".....,if part of cause of action arose in five places, even though the parties have contemplated that a neutral seat be chosen as the **seat** so that the courts of that place alone would have jurisdiction, yet, any one of the five other Courts in which a part of cause of action arises, including courts in remote corners of the country, would also be clothed with jurisdiction. This obviously cannot be the case. If therefore, the conflicting portion of*

*the judgement of BALCO in para 96 is kept aside for a moment, the very fact that the parties have chosen a place to be the **seat** would necessarily carry with it the decision of both parties that the courts at the **seat** would exclusively have jurisdiction over the entire arbitral process."*

(emphasis supplied)

58. The Supreme Court further observed in paragraph 50:-

*"50. In fact, subsequent Division Benches of this Court have understood the law to be that where the **seat** of Arbitration is chosen, it amounts to an exclusive jurisdiction clause, in so far as the Courts at the **seat** of Arbitration are concerned. In **Enercon (India) Limited versus Enercon GMBH, 2014 (5) SCC 1**; this Court approved the dictum in Shashoua as follows:-*

"126. Examining the fact situation in the case, the Court in Shashoua observed as follows:

*"The basis for the Court"s grant of an anti-suit injunction -- ...,depended upon the **seat** of the Arbitration. An agreement as to the **seat** of an Arbitration brought in the law of that country as the Curial law and was analogous to an exclusive jurisdiction clause. Not only was their agreement to the Curial law of the **seat**, but also to the courts of the **seat** having supervisory jurisdiction over the Arbitration, so that, by agreeing to the **seat**, the parties agreed that any challenge to an interim order or final Award was to be made only in the courts of the place designated as the **seat** of the Arbitration.*

*Although, "**venue**", was not synonymous with "**seat**", in an Arbitration clause which provided for Arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the **venue** of the Arbitration shall be London, United Kingdom did amount to the designation of a juridical **seat**..."*

(emphasis supplied)

59. After referring to several paragraphs of Enercon (supra), the Supreme Court in paragraph 51 observed as follows: -

"51. The Court in Enercon concluded:

*"138. Once the **seat** of Arbitration has been fixed in India, it would be in the nature of exclusive jurisdiction to exercise the supervisory powers over the Arbitration ."*

60. Referring to the test for determination of **seat** the Supreme Court observed that the English courts have examined the concept of juridical **seat** of the arbitral proceedings, and have laid down several important tests in order to determine whether the **seat** of the arbitral proceedings has in fact been indicated in the agreement between the parties. Referring to judgement in Shashoua v Sharma, the Court observed that wherever there is an express designation of **Venue** and no designation of any alternative place as the **Seat** combined with a supranational body of rules governing the Arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated **venue** is actually the juridical **seat** of the arbitral proceedings. The Supreme Court thereafter referred to the McDonnell Douglas judgement and Enercon judgement and judgement rendered in ***Dozco(India) Private Limited v Doosan Infracore Company Ltd 2011 (6) SCC 179***; and the *Commentary of Redfern and Hunter on International Arbitration, and Alfred*

MacAlpine (supra), and came to the conclusion that if the parties failed to mention any place as the juridical **seat** but only mentioned the **venue** or without mentioning the **venue** hold the entire sittings of the Arbitral Tribunal at any particular place, such place shall be treated as **"seat for the Arbitration"** and must also be the forum of choice for remedies seeking to attack the Award.

61. The Supreme Court observed in paragraph 82 as follows: - "

*"82. On a conspectus of the aforesaid judgements, it may be concluded that whenever there is the designation of a place of Arbitration in an Arbitration clause as being the **venue** of the Arbitration proceedings, the expression Arbitration proceedings would make it clear that the **venue** is really the **seat** of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the Arbitration proceedings as a whole, including the making of an Award at that place....This, coupled with there being no other significant contrary indicia that the stated **venue** is only a **venue** and not the **seat** of the arbitral proceedings, would then conclusively show that such a clause designates a seat of the arbitral proceedings...."*

62. The Supreme Court in *Soma JV* (supra) also approved of the judgement rendered in *Shashoua versus Sharma*, which according to it was also approved by the Constitution Bench in BALCO.

63. The Supreme Court again in a Three Judges decision in ***ManKastu Impex Private Limited versus Air Visual Ltd 2020 (5) SCC 399***; was considering an application by ManKastu an Indian company, for appointment of sole Arbitrator. The arbitration agreement provided that the arbitration shall be administered in Hong Kong and the place of arbitration shall be Hong Kong, but at the same time stated that the Memorandum of Understanding would be governed by laws of India and the courts at New Delhi should have jurisdiction. Learned counsel for the Petitioner had argued that since Indian law was governing law and the courts at Delhi had jurisdiction, the seat of arbitration was New Delhi. It relied on *Hardy Exploration* for this purpose. On the other hand Air Visual contended that since arbitration agreement provided the place of arbitration to be Hong Kong and the arbitration had to be administered in Hong Kong, the seat of arbitration was Hong Kong accordingly Indian courts had no jurisdiction to appoint an Arbitrator. The Respondent relied on *Soma JV* for this purpose. The Supreme Court instead of affirming *Soma JV*, decided to adopt another way to determine the issue. It observed that the use of the expression *"place of arbitration"* could not decide the intention of the parties to designate that particular place as a seat of arbitration and such intention had to be determined from other clauses in the agreement between the parties and their contract . But because the parties had also agreed that such arbitration was to be administered in Hong Kong, the Supreme Court ultimately held that the parties had chosen Hong Kong as the seat of arbitration. The Supreme Court observed in ManKastu that the Memorandum of Understanding is clearly silent on the proper and Curial law of arbitration. It observed in paragraph 19 and 20 as follows: -

"19. The seat of arbitration is a vital aspect of any arbitration proceedings. Significance of the seat of arbitration is that it determines the applicable law when

deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is based or where hearings will be held. But it is all about which Court would have supervisory power over the arbitration proceedings. In Enercon (India)Ltd versus Enercon GMBH the Supreme Court had held that: (SCC pp 43 and 46 para 97 and 107)

"The location of the seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings."

It was further held that the seat normally carries with it the choice of that country's arbitration/Curial law "

"20. It is well settled that the seat of arbitration and venue of arbitration cannot be used interchangeably. It has also been established that mere expression "place of arbitration "cannot be the basis to determine the intention of the parties that they have intended that place as the seat of arbitration. The intention of the parties as to seat should be determined from other clauses in the agreement and the conduct of the parties."

64. The Supreme Court declined to give a specific finding with regard to whether Hardy Exploration (supra) is no longer good law in view of the observation made by a Coordinate Bench in Soma JV or whether Soma JV could have declared Hardy Exploration to be per incuriam in view of the law of binding precedents and in paragraph 13 it observed

"...however, considering clause 17 of MOU in the present case and the definite clauses therein and in the facts and circumstances of the case, we are not inclined to go into the question on the correctness of BGS Soma or otherwise."

65. The Supreme Court observed that clause 17.2 in the Memorandum Of Understanding between the parties had provided that in case of a dispute it shall be referred to and finally resolved by arbitration administered in Hong Kong which clearly suggested that the parties had agreed that the arbitration be seated at Hong Kong, and that the laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award.

The Supreme Court placed reliance upon its earlier decisions in **Eitzen Bulk A/S versus Ashapura Minechem Ltd 2016 (11) SCC 508**, and *Indus Mobile* (supra), to say that when the parties have chosen a place of arbitration in a particular country, that choice brings with it submission to the laws of that country. Once the seat is determined only that jurisdictional Court would have exclusive jurisdiction.

66. In ***Inox Renewables Ltd versus Jayesh Electricals Ltd, 2021 SCCOnline Supreme Court 448***, a Two Judges Bench was considering the appeal arising out of judgement rendered by the High Court of Gujarat at Ahmedabad wherein the application under Section 34 filed by the appellant was rejected on the ground that the courts at Jaipur, Rajasthan would have jurisdiction to decide such application. The facts of the case were that a purchase order was entered into between Messers Gujarat Fluorochemicals Ltd and the Respondent Jayesh Electricals Ltd for manufacture and supply of power transformers at windfarms. The arbitration clause contained in the purchase order mentioned the venue of arbitration to be Jaipur. A package sale of the entire business of Gujarat Fluorochemicals Ltd took place by way of business transfer agreement between the

appellant and GFL to which the Respondent was not a party. In this business transfer agreement the arbitration clause designated Vadodara as the seat of arbitration and the Court at Vadodara to have exclusive jurisdiction qua disputes arising out of the agreement.

67. On an application filed by the Respondent under Section 11 of the Act the High Court of Gujarat at Ahmedabad appointed a retired High Court judge as Arbitrator. The Arbitrator passed an Award. A Section 34 petition was filed by the appellant in Ahmedabad which was resisted by the Respondent referring to the business transfer agreement and stating that the courts at Vadodara did not have jurisdiction. The Commercial Court at Ahmedabad accepted the respondents' plea and referring to the business transfer agreement returned the application saying that the courts at Vadodara alone would have exclusive jurisdiction. The appellant filed a Special Civil Application No.9536 of 2019 against the said order. The High Court referred to the arbitration clause contained in the purchase order and held that the courts in Rajasthan would have exclusive jurisdiction looking into the exclusive jurisdiction clause and observed that even assuming that Ahmedabad would have jurisdiction, exclusive jurisdiction being vested in the courts at Rajasthan, the appropriate Court would be the Court at Jaipur. The Special Civil Application being dismissed as not maintainable at Ahmedabad, the appellant approached the Supreme Court. It was argued that the business transfer agreement was between Gujarat Fluorochemicals and the appellant and the Respondent was not a party to the same . Hence the arbitration clause in the business transfer agreement was irrelevant however the impugned judgement had failed to consider that the Arbitrator had recorded in the arbitral award that the venue/place of arbitration was shifted by mutual consent to Ahmedabad as a result of which the place of arbitration or seat of arbitration became Ahmedabad resulting in the courts at Ahmedabad having exclusive jurisdiction in view of the laws set up by the Supreme Court in the case of Soma JV. On the other hand it was argued by the Respondent that even if the place of arbitration is shifted by mutual agreement, it cannot be done so without a written agreement between the parties. It was argued that the finding that the venue was shifted by mutual consent from Jaipur to Ahmedabad has reference only to Section 20(3) of 1996 Act as Ahmedabad was in reality a convenient place for the arbitration to take place, the seat of arbitration always remaining at Jaipur. The Court having heard both the parties referred to the Award of the Arbitrator wherein it was mentioned that -"as per the arbitration agreement, the venue of the arbitration was to be Jaipur. However, the parties have mutually agreed irrespective of a specific clause , as to the venue of the arbitration would be Ahmedabad and not at Jaipur. The proceedings, thus have been conducted at Ahmedabad on the constitution of the Tribunal by the learned nominee Judge of the Honourable High Court of Gujarat."

68. The Court observed in paragraph 11 that-

"it is clear from the arbitral award that by mutual agreement parties have specifically shifted the venue/place of arbitration from Jaipur to Ahmedabad. This being so, it is not possible to accede to the argument made by the learned counsel for the Respondent that this could only have been done by written agreement and

that the Arbitrator is finding would really have reference to a convenient venue and not the seat of arbitration. "

69. The Supreme Court after referring extensively to *Soma JV* wherein *Indus Mobile* (Supra) and *Videocon* (supra) judgements were considered in detail; observed in para 16&17 that

"the moment the seat is chosen as Ahmedabad, it is akin to an exclusive jurisdiction clause, thereby vesting the Court at Ahmedabad with the exclusive jurisdiction to deal with Arbitration . Once the seat of arbitration is replaced by mutual agreement to be at Ahmedabad, the courts at Rajasthan are no longer vested with the jurisdiction as exclusive jurisdiction is now vested in the courts at Ahmedabad, given the change in the seat of arbitration."

70. In ***Quippo Construction Equipment Ltd versus Janardan Nirman Private Limited 2020 SCCOnline Supreme Court 419***; the Supreme Court was considering an appeal from the judgement of the High Court at Calcutta. There were four agreements entered into from time to time between the appellant and the Respondent for taking on rent construction equipment. In the general terms and conditions appended to the aforesaid agreements, for resolution of disputes between the parties an arbitration clause was provided. The parties agreed to refer such dispute to arbitration under Construction Industry Arbitration Association Rules and Regulations and the venue for holding such arbitration proceedings would be New Delhi.

On the other hand the relevant arbitration clause in the agreement that followed recorded that only Courts and Tribunals at Kolkata shall have exclusive jurisdiction in dispute arising out of terms of the agreement or its interpretation. The sole Arbitrator was appointed in terms of the arbitration clause who conducted the proceedings at New Delhi. A notice was issued to the Respondent who denied the existence of any agreement between the parties and it did not take any steps to participate in the arbitration proceedings. The Respondent on the other hand filed a Title Suit at Sealdah, praying that the agreements be declared as null and void and for a Permanent Injunction restraining the appellant from relying upon the arbitration clauses contained in the agreements. Initially a restraint order was passed by the Trial Court as a result of which the proceedings before the Arbitrator were stayed. Later on the Trial Court accepted the application filed under Section 5 and 8 of the 1996 Act by the appellant. The Trial Court observed that the plaintiffs had signed a series of agreements and now they were claiming that they were non-existing. Therefore the dispute between the parties regarding of payments was within the scope of arbitration clause. The defendant was justified in referring the matter to arbitration. The Trial Court dismissed the suit as it had no jurisdiction to hear it. The plaint was directed to be returned.

71. The Respondent filed Miscellaneous Appeal before the Additional District Judge, Sealdah. During the pendency of the application for interim relief an ex parte Award was given by the Arbitrator accepting the claim preferred by the appellant. Soon after the Award a petition was filed by the appellant before the High Court of Delhi seeking relief under Section 9 of the Act. The Respondent being aggrieved by the Award filed a

petition under Section 34 of the Act before the High Court at Calcutta. The said petition was then dismissed. The Respondent thereafter filed a Section 34 application in the Court of District Judge, Alipore. It was alleged that the venue of arbitration in terms of the agreement was at Kolkata. The Appellate Court dismissed the appeal as not maintainable. A petition was filed by the Respondent against the order of the Additional District Judge before the High Court at Calcutta. Such a petition was allowed by the High Court. An appeal was filed before the Supreme Court and the Supreme Court observed that though each of the four agreements provided for arbitration, in one of the agreements the venue was stated as Kolkata, yet the proceedings were conducted at New Delhi. At no stage objections were raised by the Respondent before the Arbitrator and the Respondent had let the arbitration proceedings to conclude and culminate in an ex parte award. The Court thereafter considered Sections 4, 16 and 20 of the 1996 Act. Section 4 related to waiver of right to object. Section 16 related to the competence of the Arbitral Tribunal to rule on its jurisdiction, and Section 20 related to place of arbitration. Having quoted the three sections the Supreme Court observed that it was open for the Respondent to raise an objection at initial stage of the arbitration regarding its maintainability at New Delhi however, it let the proceedings continue without raising any objections therefore it would be deemed that the Respondent had waived its right and it could not be allowed to object at a later stage. Moreover, the matter had not arisen from an arbitration petition preferred under Section 11 (6) of the Act. In the case before the Supreme Court however, the question was of a domestic and institutional arbitration where Construction Industry Arbitration Association was empowered to and did nominate the Arbitrator.

72. The Supreme Court observed in para 30 that-

"The specification of place of arbitration may have significance in an international commercial of arbitration, where the place of arbitration may determine which Curial law would apply. However, in the present case the applicable substantive as well as Curial law would be the same..."

The Supreme Court there after observed in paragraph 31 as follows: -

"31. It was possible for the Respondent to raise submissions that arbitration pertaining to each of the agreements be considered and dealt with separately. It was also possible for him to contend that in respect of the agreement where the venue was agreed to be at Kolkata, the arbitration proceedings be conducted accordingly. Considering the facts that the Respondent failed to participate in the proceedings before the Arbitrator and did not raise any submission that the Arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the Respondent must be deemed to have waived all such objections."

73. The learned counsel for the Petitioner has also placed reliance upon judgements of High Courts of Bombay and Madras and Delhi which have followed the judgement in Soma JV, ie ; *L&T Finance Ltd versus Manoj Pathak and another*; 2020 SCC online Bombay 177; *Om Prakash and others versus Vijay Dwaraka Das Varma* 2020 SCC online Bombay 796; *Engineering Projects India versus Balaji Projects* 2021 SCConline Madras 409; and *S.P. Singla Constructions Pvt Ltd versus*

Construction and Design Services UP Jal Nigam ARB.P450/2021 decided on 23.9.2021; where the High Courts had held that subsequent to the signing of the agreement where the seat has been designated, it is the conduct of the parties which is important. If the venue is shifted to some place else where the entire arbitration proceedings are held then the place at which such arbitration proceedings are held would be deemed to be the seat of arbitration raising an exclusive jurisdiction clause and the courts situated in that place alone would have jurisdiction to deal with any application under Section 34/37 of the Act of 1996.

Even where no place of arbitration is specified in the arbitration clause the parties could agree to a place of arbitration separately in writing and even in the absence of such place being specified in writing, it could be ascertained from the conduct of the parties. If the parties do not object before the Arbitrator appointed by a High Court and participate in the proceedings then such particular place by their conduct , would become the seat of arbitration creating an exclusionary jurisdiction clause for the courts situated in that place to have supervisory jurisdiction.

74. A Two judges bench of the Supreme Court in ***Ravi Ranjan Developers Private Limited versus Aditya Kumar Chatterji 2022 SCConline Supreme Court 568***; decided on 24.03.2022, was considering an order of the Calcutta High Court appointing a sole Arbitrator under Section 11 (6) of the 1996 Act. The appellant and the Respondent had entered into a development agreement for a property situated at Muzaffarpur in Bihar. Dispute arose in relation to such development agreement. The Respondent sent a notice to the appellant invoking arbitration clause under the development agreement. Notice was sent to the registered office of the appellant at Patna in Bihar outside the jurisdiction of the Calcutta High Court. Thereafter, the Respondent moved a petition under Section 11 sub-Section (6). The appellant denied that the Calcutta High Court had territorial jurisdiction to entertain such application. It submitted that the development agreement was executed and registered in the State of Bihar. The registered office of the appellant was also situated outside the jurisdiction of the Calcutta High Court. However, the Respondent submitted that the parties had agreed to submit to the jurisdiction of the Calcutta High Court by fixing Kolkata as the place for arbitration proceedings to be held.

The Respondent had relied upon *Soma JV* and *Indus Mobile* and ***Hindustan Construction Company Limited versus NHPC*** 2020 (4) SCC 234, to argue that whenever there is designation of a place of arbitration in an agreement as being the venue of the arbitration proceedings, the expression arbitration proceedings would make it clear that the venue is really the seat of arbitral proceedings, and it would create an exclusionary clause with respect to the courts situated at such seat having exclusive supervisory jurisdiction over disputes arising out of five attrition agreement.

75. The Supreme Court observed in paragraph 37, 38, 39, 40, 41 as follows: -

"37.The Question before the Constitution Bench was whether Part I of the Arbitration and Conciliation Act applied to the arbitration, where the place of arbitration was outside India.

"38. As observed by the Constitution Bench, Section 2 (2) of the

Arbitration and Conciliation Act places a threshold limitation on the applicability of Part I, where the place of arbitration is not in India. The Constitution Bench in effect and substance drew a distinction between venue and place of arbitration, as contemplated in Section 20 and held that only if the agreement of the parties was construed to provide for seat/place of arbitration in India, hen Part I of 1996 Act be applicable. If the seat/place was outside India, Part I would not apply, even though the venue of a few sittings may have been in India, or the cause of action may have arisen in India.

"39. The judgement of this Court in Soma JV (supra) .....was also rendered in the context of Section 2 (2) of the Arbitration and Conciliation Act and the applicability of Part I of the Arbitration and Conciliation Act to an international commercial arbitration,where the seat of arbitration was not in India.

"40. In Hindustan Construction Company Ltd (supra), this Court held that where the seat of arbitration is designated, the same operates as an exclusive jurisdiction clause and only courts within whose restriction the seat was located, would have jurisdiction to the exclusion of all other courts. In the facts and circumstances of that case this Court found that courts at New Delhi alone would have jurisdiction for the purpose of challenge to the award.

"41. It is well settled that a judgement is a precedent for the issue of law that is reached and declared decided. The judgement has to be construed in the backdrop of the facts and circumstances in which the judgement has been rendered. Words, phrases and sentences in a judgement, cannot be read out of context. Nor is a judgement to be read and interpreted in the manner of a statute. It is only the law as interpreted in an earlier judgement, which constitutes a binding precedent and not every thing that the judges say".

76. The Supreme Court in Ravi Ranjan Developers (supra) thereafter observed that on careful perusal of the development agreement it was evident that the parties to the arbitration agreement had agreed to hold the sittings of the Arbitral Tribunal in Kolkata.

Referring to *Union of India versus Hardy Exploration and ManKastu Impex* that mere expression "place of arbitration "cannot be the basis to determine the intention of the parties that they have intended that place as a "seat of arbitration", the Supreme Court held that Kolkata was only the venue for the sittings of the Arbitral Tribunal . In this case the parties had not agreed to refer their disputes to the jurisdiction of the courts in Kolkata. Referring to the Code of Civil Procedure and Sub-Section (2) of Section 2 of the 1996 Act, the Supreme Court observed that the Court having jurisdiction to decide the questions forming the subject matter of the arbitration subject to pecuniary and other limitations would be either where the immovable property was situated or where the defendant voluntarily resides or carries on business. A suit may also be instituted in a Court within whose jurisdiction the cause of action arises either wholly or in part. Admittedly the immovable property was situated at Muzaffarpur in Bihar and admittedly no part of cause of action had arisen within the territorial jurisdiction of the Calcutta High Court.

77. It observed in paragraph 28 as follows--

"28. It could never have been the intention of Section 11(6)of the Arbitration and Conciliation Act that arbitration

proceedings should be initiated in any Court in India, irrespective of whether the Respondent resided or carried on business within the jurisdiction of that High Court, and irrespective of whether any part of cause of action arose within the jurisdiction of that Court, to put an opponent at a disadvantage and steal a march over the opponent. "

78. The Supreme Court also observed that under Section 42 of the 1996 Act which was mandatory, any application under Part I of the Act if made to a Court, that Court alone would have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that agreement, and the arbitral proceedings, would have to be made in that Court and in no other Court, unless of course, the Court in which the first application had been instituted, inherently lacked jurisdiction to entertain that application.

79. In a recent decision dated 18.5.2022 rendered by Two Judges Bench in Civil Appeal No.4130 of 2022: ***BBR (India) Private Limited versus SP Singla Constructions (Private) Limited***; the Supreme Court was considering a case where under the arbitration agreement a retired Justice of the High Court was appointed as sole Arbitrator who heard the proceedings at Panchkula, Haryana. Later on he recused for personal reasons. Another retired High Court Judge was appointed who held the arbitration proceedings at New Delhi. The Award was signed and delivered at New Delhi. The Respondent was awarded more than 3crores 35 lakhs with interest at the rate of 15% per annum. The arbitration clause was silent and did not state the seat or venue of arbitration. The contract and the Letter of Intent had been executed at Panchkula, Haryana. The Respondent filed an application for interim order under Section 9 of the 1996 Act before the Additional District Judge Panchkula, Haryana in terms of the Award. The said application was dismissed by the Additional District Judge, Panchkula, on the ground of lack of territorial jurisdiction by observing that jurisdiction to entertain the application rests solely with Delhi High Court where a prior petition under Section 34 had been filed by the appellant and was pending. The petition under Section 9 being a subsequent petition would be barred under Section 42 of the Act. Such order was set aside by the High Court of Punjab and Haryana with finding that the Courts of Delhi did not have jurisdiction to entertain the objection under Section 34 of the Act and the Court at Panchkula, Haryana had the jurisdiction to deal with the case.

80. Such order was challenged before the Supreme Court. The Supreme Court observed after quoting Section 2(1)(e) and Section 20 and Section 42 of the 1996 Act and judgement rendered by the five judges in BALCO, that there was a distinction between jurisdictional seat and venue in the context of International arbitration. The arbitrators at times hold meetings at more convenient locations. The Court also noticed the three judges decision in Soma JV versus NHPC Ltd, where paragraph 96 of BALCO judgement had been interpreted and clarified by the Supreme Court. In Soma JV, the Supreme Court had observed that the term *"subject matter of the suit"* used in clause (1) is for the purpose of identifying the Court having supervisory control over the judicial proceedings . Hence, the clause refers to a Court which would be essentially a Court of the seat of the arbitration process. The seat of arbitration process has to be determined in terms of Section 20 of the Act as such that

the term Court as defined in Sub-Section (1) of Section 2 which refers to the subject matter of arbitration is not necessarily used as finally determinative of the Court"s territorial jurisdiction to entertain proceedings under the Act. In Soma JV the Supreme Court had observed that any other construction of the provisions would render Section 20 of the Act nugatory. The Court had held that the legislature had given jurisdiction to two courts: the Court which should have jurisdiction where the cause of action is located; and a Court where the arbitration takes place. The seat of arbitration need not be the place where any cause of action has arisen as the parties may choose a neutral place for holding arbitration proceedings. However under Section 20 subsection (1), party autonomy to fix such seat of arbitration by agreement is recognised. It was therefore held that an agreement as to the seat of arbitration draws in the law of that country as the Curial law and is analogous to an exclusive jurisdiction clause.

81. The Supreme Court in *Singla Construction* (supra) observed that the principles relating to the seat of arbitration and the exclusive jurisdiction clause as in international arbitration was applied to domestic arbitration in the case of *Soma JV* (supra) and quoted paragraph 38 and 40 of the said judgement. It referred to judgement rendered in *Indus Mobile versus Datawind Innovations and Brahmani River Pellets Ltd versus Kamatchi Industries Ltd* and observed in para 20 thus:-

".....in the context of domestic arbitrations it must be held that once the seat of arbitration has been fixed, then the courts at the said location alone will have exclusive jurisdiction to exercise the supervisory powers over the arbitration. The courts at other locations would not have jurisdiction, including the courts where cause of action has arisen. As observed and held in Soma JV (supra), and Indus mobile (supra), the moment the parties by agreement designate the seat, it becomes akin to an exclusive jurisdiction clause. It would then vest the Court at that seat with the exclusive jurisdiction to regulate arbitration proceedings arising out of the agreement between the parties."

82. Referring to the judgement in *Soma JV* (supra), the Supreme Court in *Singla Constructions* observed that the said judgement also dealt with a situation where the parties have not agreed on or have not fixed the jurisdictional seat of arbitration. In Soma JV, the test to determine the seat of arbitration which would determine the location of the Court that would exercise supervisory jurisdiction was given in paragraph 61 Where it was observed*:-"*.. *It will thus be seen that wherever there is an express designation of a venue, and no designation of any alternative place as the seat, combined with a supra national body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceedings"*

83. The Supreme Court in S.P. Singla (supra) observed

"- - accordingly, In Soma JV (supra), the law as applicable, where the parties by agreement have not fixed jurisdictional seat, is crystallised as under:

"82. On a conspectus of the aforesaid judgements it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the venue of the arbitration

proceedings, the expression arbitration proceedings would make it clear that the venue is really the seat of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. - - - - further the fact that arbitral proceedings shall be held at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary Indicia, that the stated venue is merely a venue and not the seat of the arbitral proceedings, would then conclusively show that such a clause designates a seat of the arbitral proceedings. - - - in a national context, this would be replaced by the Arbitration Act 1996 as applying to the stated venue which then becomes the seat for the purpose of arbitration.."

84. In paragraph 22 of S.P. Singla (supra), the Supreme Court referred to the observations made in *Soma JV* that the reasoning given in *Hardy Exploration and Production* (supra) is *per incuriam* as it contradicts the ratio as laid down in *BALCO* (supra). The Supreme Court thereafter considered the facts of the case before it where the earlier appointed sole Arbitrator had held hearing at Panchkula in Haryana and on his recusal, another sole Arbitrator was appointed who held the arbitration proceedings at Delhi, and delivered the award at Delhi. It referred to the arguments raised by the learned counsel for the appellant that on the appointment of the new Arbitrator the venue being fixed at Delhi, the juridical seat of arbitration had changed from Panchkula in Haryana to Delhi. The Supreme Court observed that in so far as sub-Section (1) of Section 20 of the 1996 Act is concerned, the observations made by the Supreme Court in *Inox Renewable* (supra) is correct, but they cannot be read as a precept in cases governed by sub-Section (2) of Section 20 of the Act. Inox Renewable would apply in cases where the parties by consent agree mutually that the seat of arbitration would be located at a particular place. It would not apply when the Arbitrator fixes the seat in terms of sub-Section (2) of Section 20 of the Act. Once the Arbitrator fixes the seat in terms of sub-Section (2) of Section 20 of the Act, the Arbitrator cannot change the seat of arbitration, except when and if the parties mutually agree and state that the seat of arbitration should be changed to another location, which is not so in the present case.

85. The Supreme Court observed in paragraph 25 and 26 of its judgement in S.P. Singla that any other interpretation would lead to *"uncertainty and confusion resulting in avoidable esoteric and hermetic litigation as to the jurisdictional seat of arbitration."* It observed that *".., it would create a recipe for litigation and what is worse confusion which was not intended by the Act. The place of jurisdiction over the seat must be certain and static and not vague or changeable, as the parties should not be in doubt as to the jurisdiction of the courts for availing of judicial remedies. Further, there would be a risk of parties rushing to the courts to get first hearing or conflicting decisions that the law does not contemplate and is to be avoided."*

86. The Supreme Court further observed in S.P. Singla in para 28 thus:-

"....the legal question raised in the case must be answered objectively or

not subjectively with reference to the facts of a particular case. Otherwise, there would be lack of clarity and consequent mixup about the courts that would exercise jurisdiction. There could be cases where the arbitration proceedings were held at different locations but the seat of arbitration, as agreed by the parties or as determined by the Arbitrator, may be different, and at that place ,"the seat",only a few hearings or initial proceedings may have been held. This would not matter, and would not result in shifting of the jurisdictional seat. Arbitrators can fix the place of residence, place of work, or in case of recusal , arbitration proceedings may be held at two different places, as in the present case. For clarity and certainty, which is required when the question of territorial jurisdiction arises, we would hold that the place or the venue fixed for arbitration proceedings, When subsection (2) of Section 20 applies, will be the jurisdictional seat and the Court having jurisdiction over the jurisdictional seat would have exclusive jurisdiction. This principle would have exception that would apply when by mutual consent the parties agree that the jurisdictional seat should be changed, and such consent must be express and clearly understood and agreed by the parties."

(emphasis supplied)

87. It further observed that paragraph 42 of the judgement in Soma JV supports the *"..reasoning that once the jurisdictional seat of arbitration is fixed in terms of subsection (2) of Section 20 of the Act, then, without the express mutual consent of the parties to the arbitration, the seat cannot be changed...."*

88. The learned counsel for the Respondent Railways has placed before this Court a judgement of a coordinate Bench of this Court in a petition under Article 227 No.6890 of 2021:*Hasmukh Prajapati versus Jaiprakash Associates Ltd*; decided on 17.2.2022.

89. The Petitioner before the Coordinate Bench had challenged the order passed by the Presiding Officer Commercial Court Gautam Budh Nagar, in an application preferred under Section 34 of the 1996 Act arising out of Award dated 16.02.2019 passed by the Arbitral Tribunal at New Delhi. The Petitioner had booked a flat with the respondents and had made full payment by taking a housing loan from a Non Banking Finance Company with interest at the rate of 13% per annum. The possession had to be delivered in three years. Jaypee Associates however did not deliver possession for more than nine years. The Petitioner preferred an arbitration application before this Court and this Court appointed a Retired Judge having his office at New Delhi, under Section 11(6) of the 1996 Act as there was no dispute between the parties that the place of arbitration will be New Delhi. The Arbitral Award was passed in favour of the Petitioner against which the Respondent preferred an arbitration application under Section 34 before the District Judge Gautam Budh Nagar. An application was filed by the Petitioner praying for Return of Plaint on the ground that it was not maintainable. Such application was rejected by the Commercial Court Gautam Budh Nagar. The Petitioner thereafter approached this Court in the aforesaid Article 227 petition.

90. This Court while considering the issue whether the Commercial Court at Gautam Budh Nagar had jurisdiction to hear the case under Section 34 of the 1996 Act recorded that the arbitral award having

been passed at New Delhi after completion of entire arbitration proceedings at Delhi. The counsel for the Petitioner argued that in the arbitration agreement the seat of arbitration had not been specified. The venue of arbitration had been chosen to be New Delhi by both the parties out of convenience. In the absence of specified seat of arbitration in the agreement, the venue of arbitration will be the juridical seat of arbitration proceedings. The learned counsel for the Petitioner had placed reliance upon judgement rendered by three judges bench in *Soma JV* where the Court had interpreted the Constitution Bench judgement in *BALCO* and paragraph 96, to say that if both parties had chosen a seat of arbitration the courts situated in such seat will have exclusive jurisdiction to entertain and decide dispute under Section 34 of the Act. Since no seat of arbitration was specified in the agreement and the parties agreed upon the venue of arbitration to be New Delhi, the stated venue will be the Juridical seat of arbitration as held also in the case of *Roger Shashoua versus Mukesh Sharma and others* 2017 (14) SCC 722.

91. The Coordinate Bench went on to observe that the judgement in Hardy Exploration (supra) was rendered by Three Judges Bench. However in Soma JV which came in later, another Three-Judges Bench observed that the decision in Hardy Exploration is per incuriam. The Coordinate Bench thereafter observed that *"....there is uncertainty whether decision in Hardy Exploration or Soma JV holds the field as a concurrent bench could not have overruled the judgement in Hardy Exploration.."*

92. The Coordinate bench of this Court observed in paragraph 31 as follows:-

"31. From the above consideration of the judgement of the honourable Supreme Court regarding the seat and venue controversy, this Court finds that the judgement of the honourable Supreme Court in the case of BALCO (supra) still holds good. The judgement in the case of Hardy Exploration (supra) or Soma JV (supra) are of two Coordinate Benches of three Honble judges and their ratios are contrary to each other. While Hardy Exploration stipulated that a chosen venue could not by itself assume the status of seat of arbitration in the absence of additional Indicia, Soma JV (supra) prescribed that the chosen seat of arbitration proceedings would become the seat of arbitration in the absence of any significant contrary indicia. The recent judgement in the case of Messers Inox Renewables Ltd (supra) follows Soma JV (supra)."

93. The Coordinate Bench there after observed that in BALCO it was held that there was concurrent jurisdiction conferred on the courts seized with the subject matter in dispute and the courts where the arbitration was carried out. However, such concurrent jurisdiction will not replace *"significant contrary indicia test" as per Shashoua principle.*

94. It thereafter interpreted the clauses in the contract where under Clause 10.6 the governing law and jurisdiction of the Courts would be the Courts of Gautam Budh Nagar in UP; whereas such clause was made subject to Clause 10.9 of the Standard Terms and Conditions. The exception regarding Clause 10.9 constituted *"significant contrary indicia"* as per Shashoua principle in agreement regarding treating the venue of arbitration (New Delhi) as seat of arbitration proceedings

and not Gautam Budh Nagar where the cause of action arose. The Arbitrator conducted the arbitration proceedings at the agreed venue of New Delhi and passed the Award. The parties never clearly stated about the seat of arbitration but from Clause 10.6 of the agreement, the courts at Gautam Budh Nagar, UP India were agreed to have jurisdiction over all matters arising out of or relating to allotment/provisional allotment. This clause proved that the parties had chosen the seat of arbitration as Gautam Budh Nagar and venue of arbitration as New Delhi India. Moreover, the Petitioner had approached this Court for appointment of Arbitrator under Section 11 of the Act. It had also moved execution proceedings under Section 36 of the Act before the Court at Gautam Budh Nagar. If it was held by the Court now that the seat of arbitration was at New Delhi, it would create an exclusionary clause, and the appointment of the Arbitrator itself by this Court at Allahabad would become non est. The Coordinate Bench thereafter held that New Delhi was only the Venue of Arbitration and Gautam Buddh Nagar was the Seat of Arbitration and the Courts at Gautam Buddh Nagar had exclusive jurisdiction to deal with the challenge to the Award.

95. This court is of the considered opinion that the judgement rendered in *Soma J V* (supra) has been reiterated by the Supreme Court in *Quippo constructions* (supra) and *Singla Constructions* (supra) and the reason for following Soma JV as against *Hardy Exploration* (supra) have also been stated with quite clarity and definiteness in Singla Constructions. Soma JV (supra) was sought to be questioned by the Respondents in *ManKastu Impex* but the three judges Coordinate Bench refused to make any observations with regard to the failure to follow the law of binding precedents in Soma J V. The Court observed in *ManKastu* while looking at the clauses of the contract, and the judgement rendered in *Shashoua* case held that the language of the contract gave sufficient indication of the intent of the parties to hold arbitration proceedings at Hong Kong which would therefore be also the juridical seat.

96. This Court has also considered observations made in *Ravi Ranjan Developers* (supra) but finds that the judgement in *Ravi Ranjan Developers* turned on its on facts where the respondents had themselves approached the courts in Bihar first, and hence were bound by *Non Obstante clause* in Section 42 of the 1996 Act . In any case, a Two Judges decision in Ravi Ranjan Developers could not be said to have decided the law against what has already been settled by three Judges Bench in *Soma J V* while following to 5 Judges Bench in *BALCO*.

97. This court has also considered the conduct of the parties which is very relevant for a decision to be taken,in view of what has been stated hereinabove with regard to Section 4 and Section 20 of the 1996 Act. The contract being governed by the Tender Paper ELCORe, It was open for the parties, more specifically the Railways, to determine the place of arbitration by way of written agreement. Instead of any written agreement or conditions in the Contract or even in the correspondence between the parties, specifying the seat of arbitration, the Railways agreed to participate in the arbitration proceedings at New Delhi without any protest. The Railways Hence can be said to have waived their right to object and by their conduct determined the venue of arbitration at New Delhi to be also

the seat of the arbitration proceedings. Issues b, c, and d consequently are also decided in favour of the petitioner and it is held that failure to specifically mention a Seat of Arbitration and participation in Arbitration proceedings at New Delhi by the Railways without any protest shall be considered as determination of the Venue of arbitration as also the Seat, giving exclusive jurisdiction to the Courts at New Delhi to supervise the Arbitral proceedings including any attack on the Award.

98. The order impugned dated 12.12.2019 is held to be vitiated and liable to be set aside. The Commercial Court at Lucknow has entertained the Section 34 Application without jurisdiction. Such inherent lack of jurisdiction makes the proceedings before it also liable to be set aside.

99. This petition stands ***allowed***.

100. The order impugned dated 12.12.2019 is set aside. Consequences to follow.

(2022) 9 ILRA 861
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2022

BEFORE

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

Writ A No.652 of 2019

Balavant Singh Yadav ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Siddhartha Srivastava, Mrs. Kamla Singh, Sri Satyendra Kumar Singh

Counsel for the Respondents:
C.S.C.

Civil Law - Service Law - Discharge from service - suppression of information regarding criminal case / false declaration in verification affidavit - mere suppression of material/false information in a given case does not mean that the employer can arbitrarily discharge/terminate the employee from service (Para 11)

Petitioner applied for the post of Constable (Civil Police) & submitted an affidavit stating that no criminal case was registered against him & no police investigation was pending - on enquiry it was found that two criminal cases were indeed against the petitioner, as a result, petitioner was not sent for training - petitioner learnt about the criminal cases only when he inquired from the authorities about the reason for not being sent for training after being selected - Held - Petitioner's selection was rejected without proper inquiry as to whether the petitioner had knowledge about the criminal cases pending against him and he deliberately concealed the same - also no notice and opportunity of hearing was given to him - Additionally, both criminal cases against the petitioner had already been quashed - matter sent back for reconsideration based on the law established in the Avtar Singh and Pawan Kumar cases by the Supreme Court (Para 13, 14)

Allowed. (E-5)

List of Cases cited:

1. Avtar Singh Vs U.O.I. & ors. 2016 (8) SCC 471

2. Pawan Kumar Vs U.O.I. & anr., 2022 0 Supreme (SC) 391

3. St. of U.P. & ors. Vs Vijay Kumar & ors. Special Appeal (Def.) No. 734 of 2016

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

1. Heard Mrs. Kamla Singh, learned counsel for the petitioner and Mr. Pranav Ojha, learned Additional Chief Standing Counsel for the State-respondents.

2. By means of the present writ petition, the petitioner has questioned the order dated 13th December, 2018 (Annexure No. 19 to the writ petition) passed by the Superintendent of Police, Chandauli i.e. respondent no.4. Further, the petitioner has prayed for a direction upon respondent no.4 to send the petitioner on training immediately for the post of Police Constable pursuant to his final selection.

3. It is the case of the petitioner that pursuant to the advertisement No. PRPB-8(82) dated 29th December, 2015, which was issued by the Uttar Pradesh Police Recruitment and Promotion Board, Lucknow for "Direct Recruitment Constable (Civil Police) & Constable (PAC) (Male)-2015, petitioner applied for the post of Constable (Civil Police) under Other Backward Class Category i.e. non-creamy layer category, after completing requisite formalities, through online. After evaluation of the high school and intermediate results of the petitioner, he was called for physical efficiency test, which was held on 3rd May, 2016. In the said physical efficiency test, the petitioner was declared successful and he was called for verification of his documents. The petitioner appeared before the authority concerned for the said verification. A select list was declared by the Uttar Pradesh Police Recruitment and Promotion Board, Lucknow on 15th May, 2019. Thereafter the petitioner was called by respondent no.4 on 9th June, 2018 to appear in the medical examination at Chandauli, which was held on 14th June, 2018. The petitioner appeared in the said medical examination and was declared successful. On 9th July, 2018, a final select list was uploaded on the official website of the Uttar Pradesh Police Recruitment and Promotion Board, Lucknow in which the name of the petitioner has been placed at serial no. 14753. For the purposes of character verification, the petitioner was required to furnish an affidavit on the prescribed form, which was duly submitted by him before respondent no.4 on 11th June, 2018.

4. Learned counsel for the petitioner submits that as the petitioner was not offered appointment letter for sending him on training at Azamgarh, which was allotted, pursuant to the final select list dated 9th July, 2018, he made a representation before respondent no.4 on 27th July, 2018. Thereafter the petitioner was informed that as two criminal cases i.e. Crime No. 111 of 2017 and Crime No. 44 of 2018, were pending against him, therefore, his claim for issuing him appointment letter on the said post cannot be considered. In the applications filed by the petitioner under Section 482 Cr.P.C., two different Coordinate Benches of this Court, on the basis of compromise, have quashed the entire proceedings of aforesaid two criminal cases vide orders dated 13th and 18th September, 2018, copies of which have been enclosed as Annexure No. 13 and 14 to the present writ petition. As entire proceedings of both the aforesaid criminal cases have been quashed, the petitioner made another representation dated 26th September, 2018 before respondent no.4 along with copies of both the aforesaid orders. On the said representation, respondent no.4 wrote a letter to the Superintendent of Police, Azamgarh i.e. respondent no. 5 to take further action in the matter. However,

neither respondent no.4 nor respondent no.5 had taken any decision on the representation of the petitioner dated 26th September, 2018, due to which the petitioner filed Writ-A No. 24703 of 2018 (Balwant Singh Yadav Vs. Sate of U.P. & Others). The said writ petition was finally disposed of by a Writ Court vide order dated 22nd November, 2018 requiring the petitioner to make a fresh representation before respondent no.4, who inturn was also required to decide the same in accordance with law. Pursuant to the order of the Writ Court dated 22nd November, 2018, the petitioner made his representation on 30th November, 2018 before respondent no.4, which has been rejected by him vide order dated 13th December, 2018. It is against this order that the present writ petition has been filed.

5. Learned counsel for the petitioner submits that respondent no.4, without application of mind and in a mechanical manner, has passed the order impugned while rejecting the claim of the petitioner merely on the basis of declaration as made by the petitioner in paragraph nos. 2 and 9 of the affidavit, which was furnished by him at the time of verification of his documents, where in paragraph no.2 the petitioner made declaration "that to my knowledge, no criminal case/matter was ever registered against him neither any police investigation is pending".

6. Learned counsel for the petitioner further submits that though, while passing the order impugned, respondent no.4 has recorded the fact of concealment of criminal cases but has not recorded any finding qua prior knowledge of the same to the petitioner while he filed affidavit dated 11th June, 2018. It was categorical case of the petitioner that when he was not sent for training, on enquiry being made by him, he came to know about the aforesaid criminal cases, entire proceedings of which have already been been quashed by this Court referred to above, as such there is no question of concealment of fact on the part of the petitioner.

7. On the cumulative strength of the aforesaid, learned counsel for the petitioner submits that in view of the law laid down by the Apex Court in **Avtar Singh Vs. Union of Indian and others**, reported in 2016 (8) SCC 471, which has been followed by the Division Bench of this Court in **Special Appeal (Def.) No. 734 of 2016 (State of U.P. and others Vs. Vijay Kumar and others)**, his claim for appointment on the post of Constable (Civil Police) pursuant to the selection referred to above, is liable to be allowed after quashing the order impugned, which cannot be legally sustained in the eyes of law.

8. On the other-hand, learned Standing Counsel for the State-respondents submits that as the petitioner has concealed the pendency of aforesaid two criminal cases against him in his affidavit, which was submitted by him at the time of verification, there is no illegality or infirmity in the impugned order passed by respondent no.2. However, the learned counsel for the petitioner could not controvert the submissions made by the learned counsel for the petitioner and the case laws referred by him.

9. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present writ petition.

10. The Apex Court in the case of **Avtar Singh (Supra)** has opined that non-

disclosure of conviction in a case of trivial nature, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse. While summarizing the conclusion, the Apex Court has laid down broad guidelines, which has to be taken note of by the appointing/competent authority in dealing with the matters where there is a suppression of material information or disclosure of false information. The guidelines which have been laid down by the Apex Court **Avtar Singh (supra)**, read as follows:

"38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:

38.1 Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2 While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3 The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4 In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourse appropriate to the case may be adopted : -

38.4.1 In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2 Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3 If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5 In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6 In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its

discretion may appoint the candidate subject to decision of such case.

38.7 In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8 If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9 In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10 For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11 Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

11. Following the judgment in the case of **Avtar Singh (Supra)**, the Apex Court in its latest judgment in the case of **Pawan Kumar Vs. Union of India & Another**, reported in 2022 0 Supreme (SC) 391, has opined that mere suppression of material/false information in a given case does not mean that employer can arbitrarily discharge/terminate an employee from service. All matters cannot be put in a straitjacket and a degree of flexibility and discretion which vests with the authorities, must be exercised with care and caution taking all facts and circumstances into consideration including the nature and type of lapse. Relevant paragraphs of the judgment in the case of **Pawan Kumar (Supra),** reads as follows:

"13. What emerges from the exposition as laid down by this Court is that ***by mere suppression of material/false information regardless of the fact whether there is a conviction or acquittal has been recorded, the employee/recruit is not to be discharged/terminated axiomatically from service just by a stroke of pen***. At the same time, the effect of suppression of material/false information involving in a criminal case, if any, is left for the employer to consider all the relevant facts and circumstances available as to antecedents and keeping in view the objective criteria and the relevant service rules into consideration, while taking appropriate decision regarding continuance/suitability of the employee into service. ***What being noticed by this Court is that mere suppression of material/false information in a given case does not mean that the employer can***

arbitrarily discharge/terminate the employee from service.

???.

18. The criminal case indeed was of trivial nature and the nature of post and nature of duties to be discharged by the recruit has never been looked into by the competent authority while examining the overall suitability of the incumbent keeping in view Rule 52 of the Rules 1987 to become a member of the force. Taking into consideration the exposition expressed by this Court in Avtar Singh (supra), in our considered view the order of discharge passed by the competent authority dated 24th April, 2015 is not sustainable and in sequel thereto the judgment passed by the Division Bench of High Court of Delhi does not hold good and deserves to be set aside."

(Emphasis supplied)

12. In the order impugned dated 13th December, 2018 passed by respondent no.4 rejecting the selection/appointment of the petitioner on the post of Constable, it has been noticed that it has specifically been mentioned, in the instructions issued by the Board qua the verification of character of candidates, that if the facts mentioned in the affidavit, which has to be submitted by all the candidates, are found to be false, then the candidature of the candidate concerned for selection/appointment shall be cancelled and if any wrong fact is found in future even after selection/appointment/recruitment of the candidate concerned, then his/her services from the post of Police Constable in U.P. Police shall stand automatically terminated without any reason and notice and legal action will also be taken against him/her. On the basis of the aforesaid, respondent no.4 has recorded that since in paragraph no.2 of the affidavit, the petitioner made declaration "that to my knowledge, no criminal case/matter was ever registered against him neither any police investigation is pending", whereas on enquiry it has been found that two criminal cases were pending against him, therefore, it has been found that the petitioner has suppressed the aforesaid fact. As such the selection/appointment of the petitioner on the said post stands cancelled. When as a matter of fact, it is the categorical case of the petitioner that when the petitioner enquired as to why he is not being sent for training after selection on the said post, he has come to know from the respondent authorities that two criminal cases were pending against him. As such, the allegation against the petitioner for concealment/suppression of material fact, has no leg to stand.

13. From bare combined reading of the order impugned as well as the law laid down by the Apex Court in the cases of **Avtar Singh and Pawan Kumar (Supras),** this Court is of the opinion that without any enquiry as to whether the petitioner has knowledge about the criminal cases pending against him and he has deliberately concealed the same in his affidavit submitted at the time of verification as also without any notice and opportunity of hearing to him, respondent no.4 has rejected the selection/appointment of the petitioner for sending him training on the post of Constable (Civil Police) while passing the impugned order in a mechanical and harsh manner. Respondent no.4 has also not recorded any finding as to on what basis he came to the conclusion that the petitioner has concealed the material fact of pendency of criminal cases

against him. Respondent no.4 has also not examined the guidelines framed by the Apex Court in the case of **Avtar Singh (Supra)**, while rejecting the selection/appointment of the petitioner under the order impugned. Even otherwise, proceedings of both the criminal cases pending against the petitioner have already been quashed by this Court on the basis of compromise, as has already been noticed herein above.

14. In view of the aforesaid, this finds that the order impugned passed by respondent no.4 cannot be legally sustained and is hereby quashed. Matter is remitted back to respondent no.4 for decision afresh in light of the law laid down by the Apex Court in the cases of **Avtar Singh and Pawan Kumar (Supras)**. While deciding the matter afresh, respondent no.4 shall pass a reasoned and speaking order, after affording opportunity of hearing to the petitioner, preferably within three months from the date a certified copy of this order is filed before him.

15. The present writ petition is allowed subject to the observations made above.

(2022) 9 ILRA 867
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ A No.3475 of 2022

Hari Ram Singh ...Appellant
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Shivendu Ojha, Sri Shatrughan Sonwal, Sri R.K. Ojha (Sr. Adv.)

Counsel for the Respondents:
C.S.C., Sri Abhishek Srivastava, Sri Ramesh Chandra Pandey

Advertisement for appointment of Technician Grade -II -qualification-High School along with two years diploma certificate issued by NCVT/SCVT-Petitioner had trade proficiency Certificate issued by Indian Armed force-which is equivalent-candidature rejected-mandatory NCVT/SCVT Certificate lacking.

W.P. dismissed. (E-9)

List of Cases cited:

1. Munesh Kumar & ors. Vs St. of U.P. & ors. (Writ A No. 52658 of 2012)

2. Sanjay Batra Vs St. of U.P. Throu. Prin. Secy. Energy Deptt. Lko & ors. (Service Single No. 460 of 2014)

3. Dinesh Kumar Shukla Vs Electricity Service Commission, Lucknow Thru. Chairman & ors. (Special Appeal Defective No. 392 of 2017)

4. Sudhir Singh Vs St. of U.P. & anr. (Special Appeal Defective No. 147 of 2021) dated 19.02.2021

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the petitioner, learned standing counsel for respondent no. 1, Sri Abhishek Srivastava, learned counsel for respondent nos. 2 and 3 and Sri Ramesh Chandra Pandey, learned counsel for respondent no. 4.

2. Learned counsel for the petitioner submitted that an advertisement dated 17.06.2020 was issued by respondent no. 3 for appointment of Technician Grade-II and as per advertisement, qualification for appointment was High School or equivalent

with Science and Math alongwith two years diploma certificate issued by National Council of Vocational Training (in short "NCVT") / State Council of Vocational Training (in short "SCVT"). Petitioner being Ex-serviceman, has applied for the same having certificate issued by Indian Armed Forces (Army) Trade Proficiency Certificate For Ex-Servicemen dated 29.02.2020, which is equivalent to the certificate issued by NCVT/SCVT, but his candidature has been rejected on the ground that certificate, so issued, is neither equivalent to certificate issued by NCVT/SCVT nor as per requirement of advertisement. He next submitted that Government of India, Ministry of Labour & Employment Directorate General of Employment & Training vide letter dated 4/13.03.2013 has directed all the Directors of State Government/ UT Administration dealing with Craftsman Training Scheme to treat the certificate issued by respective departments of Army, Air Force and Navy equivalent to the certificate issued by NCVT/ NCTVT. He next submitted that under such facts and circumstances, impugned order is bad and liable to be set aside.

3. Sri Ramesh Chandra Pandey, learned counsel appearing on behalf of newly impleaded respondent no. 4 has filed short counter affidavit, which is taken on record. He also relied upon the very same letter dated 4/13.03.2013 issued by Government of India, Ministry of Labour & Employment Directorate General of Employment & Training and submitted that this certificate is equivalent to the certificate issued by NCVT/ SCVT.

4. Sri Abhishek Srivastava, learned counsel for respondent nos. 2 and 3 vehemently opposed the submissions raised by learned counsel for the petitioner and submitted that it is required on the part of petitioner to fulfill the qualification whatsoever is mentioned in the advertisement and undisputedly, the requirement is to have two years training certificate issued by NCVT/ SCVT in Trade of Electrician, Electrical and Electrical (power distribution under skill development). He next submitted that undisputedly, petitioner is not having the certificate issued by NCVT/ SCVT as desired in the advertisement. Similar controversy came up before this Court on so many occasions and Court has taken the constant view that requirement of advertisement has to be completed.

5. He placed reliance upon the judgment of this Court in the matter of ***Munesh Kumar and others Vs. State of U.P. and others (Writ A No. 52658 of 2012)*** dated 28.09.2012 in which Court has held that under such circumstances, Court cannot proceed to exercise its authority to accord any relief.

6. He next placed reliance upon the judgment of this Court in the matter of ***Sanjay Batra Vs. State of U.P. Throu. Prin. Secy. Energy Deptt. Lko and others (Service Single No. 460 of 2014)*** dated 10.03.2015 and submitted that point no. 2 decided in the said judgment is the controversy of this petition. In that case too, three years diploma certificate was required whereas petitioner was having certificate issued by Indian Armed Forces (Army) and Court has again taken the very same view that if the petitioner is not holding any diploma of three years issued by authority mentioned in the advertisement, no relief can be granted.

7. Next, he placed reliance upon the judgment of Division Bench of this Court in the matter of ***Dinesh Kumar Shukla Vs.***

Electricity Service Commission, Lucknow Thru. Chairman and others (Special Appeal Defective No. 392 of 2017) dated 15.09.2017 in which issue was the same. In that case, petitioner is having certificate issued by the Indian Air Force on account of his serving with the Air Force from 20th September, 1991 to 20th September, 2011, but his candidature was not considered as it was not issued by authority mentioned in the advertisement. Petitioner has challenged the same by filing writ petition before this Court, which was rejected. Against that, he has preferred Special Appeal. Division Bench has affirmed the judgment of Single Bench by dismissing the appeal of the appellant. In the present case too, certificate of the very same nature as it was also issued to the petitioner on the basis of his proficiency acquired during his 6 years, 2 months and 27 days of service.

8. Lastly, he placed reliance upon another judgment of Division Bench of this Court in the matter of ***Sudhir Singh Vs. State of U.P. and another (Special Appeal Defective No. 147 of 2021) dated 19.02.2021***, which also shows that condition so mentioned in the advertisement has to be complied. In that case, appellant was having Diploma in Electrical Engineering issued by Indian Air Force. Court after considering the arguments so advanced, came to the conclusion that equivalence to any other course can be given by the council namely AICTE or the State Government for their service and not by any other body having no authority of it for general application. He next submitted that in present case, certificate so required is from NCVT/ SCVT of two years training course, but it has never declared by NCVT/ SCVT that certificate issued by the Indian Armed Forces (Army) is equivalent to certificate issued by the Institution, therefore, same cannot be treated equivalent and the petition may be dismissed.

9. I have considered the rival submissions made by learned counsel for the parties and perused the record. The only issue before this Court is as to whether certificate so submitted by the petitioner is fulfilling the terms of the advertisement or not, therefore, advertisement dated 17.06.2020 is being quoted herein below;

"

10. In paragraph 2 of the advertisement under Heading "Essential Educational Qualification", it is clearly mentioned that petitioner must have passed High School or equivalent examination with Science and Math subjects alongwith two years training diploma as regular student from NCVT/ SCVT. In the present case, there is no dispute on the point that petitioner was never a regular student of NCVT/ SCVT and obtained certificate as required by the respondent nos. 2 and 3. This Court in the matter of ***Munesh Kumar (supra***) has dealt with very same issue in which petitioners have completed the training in Electric in service and possess the certificate Proficiency Certificate and in N.A.C. Electrical which is equivalent to qualification as advertised. Lastly, Court has opined that once certificate issued in favour of petitioner is not accepted by the respondents, Court cannot proceed to exercise its authority of judicial review to accord any relief. In present case too, petitioner was issued Trade Proficiency Certificate For Ex-Servicemen issued by Indian Armed Forces (Army) based upon proficiency acquired during 16 years 2

months 27 days of service in the Army. Relevant paragraph of ***Munesh Kumar (supra)*** is being quoted below;

"This Court has occasion to consider the advertisement in question at page 17 of the paper book and as per the advertisement in question candidate desirous of being appointed has to have to his credit High School or equivalent examination certificate with Science and Math from U.P. High School Board or from any other equivalent Board with two years certificate in Electrician trade obtained from All India/State Vocational certificate. Accepted position is that petitioners are not at all having the aforementioned certificate and to the contrary petitioners are contending that they have completed the training in Electric in service and possess the certificate Proficiency Certificate and in N.A.C. Electrician which is equivalent to qualification as advertised. The advertisement in question at no point of time permits to furnish any equivalent certificate to be furnished as has been specifically provided for i.e. certificates issues in electrical trade obtained from All India and State vocational certificate. Once such is the factual situation that certificates issued in favour of the petitioner are not accepted to be certificate as is required in the advertisement then this Court cannot proceed to exercise its authority of judicial review to accord any relief, as equivalence is to be determined by the authorities, and that too when there is any room for the said purpose."

11. Again in the matter of ***Sanjay Batra (supra)*** issue was same and Court has framed point no. 2, whether Diploma held by the petitioner satisfies the requirement of advertisement. Lastly, Court has taken the very same view that petitioner is not holding a requisite Diploma as required under the advertisement and Diploma, which he is having is not recognized by the State of U.P. to be equivalent to the three years Diploma awarded by Pravidhik Shiksha Parishad, U.P. Relevant paragraphs are quoted below;

*"**Point-2:-** Whether the Diploma held by the petitioner satisfies the requirement of advertisement?*

The advertisement lays down the essential qualification for the candidates applying to the aforesaid post as under:-

(i) Three years Diploma examination in Electrical Engineering/ Electronics Engineering/ Telecommunication Engineering/ Civil Engineering awarded by Pravidhik Shiksha Parishad, Uttar Pradesh or a Diploma, equivalent thereto, recognized by the State Government, or

(ii) Three years All India Diploma Examination in Electrical Engineering/ Electronics Engineering/ Telecommunication Engineering/ Civil Engineering conducted by the All India Council for Technical Education (AICTE), or

(iii) Diploma Examination in Electrical Engineering/ Electronics Engineering/ Telecommunication Engineering/ Civil Engineering conducted by any of the Universities in India incorporated by an Act of the Central/ State legislature.

It may be noted that the petitioner is holding a Diploma in Electronics Radio Communication Engineering which he did from Communication Training Institute

(C.T.I.) Banglore. The said Diploma certificate has been issued to him by the Indian Air Force. The duration of the said Diploma course as stated in the certificate is two years i.e.1994-96.

In view of the aforesaid certificate it is clear that petitioner is not holding any Diploma of three years which has been issued either by the Pravidhik Shiksha Parishad, or All India Council for Technical Education or any Central or State University. Therefore, the petitioner is not holding a Diploma as envisaged in the advertisement as the minimum qualification for eligibility.

In the above circumstances, the only thing which is required to be seen is whether the Diploma which the petitioner is holding is equivalent to the Three Years Diploma awarded by the Pravidhik Shiksha Parishad,Uttar Pradesh.

In this connection, it is important to note that the Diploma which the petitioner is holding is of only two years duration and is not of three years. Secondly, there is nothing on record to establish that it has been recognized by the State of U.P. or any other authority equivalent to Three years Diploma examination in Electrical Engineering/ Electronics Engineering/ Telecommunication Engineering/ Civil Engineering awarded by Pravidhik Shiksha Parishad, Uttar Pradesh rather annexure-3 to the counter affidavit which is letter dated 14.10.2011 addressed by the Secretary Pravidhik Shiksha Parishad, Lucknow to the Secretary U.P. Power Corporation on the query made with regard to the similar certificates states that course in respect whereof certificates have been issued are not of three years, the same cannot be regarded as equivalent to the Three year Diploma certificate prescribed as the essential qualification under the advertisement.

The recognition to any Diploma as equivalent to Three Years Diploma in the desired subject awarded by Pravidhik Shiksha Parishad has to be by the State of U.P. There is no material to show that the State of U.P. has recognized the Diploma held by the petitioner as equivalent to the Three Years Diploma in the concern subject of the Pravidhik Shiksha Parishad.

Learned counsel for the petitioner has placed strong reliance upon the letter of the Secretary to the Government of India dated 31.12.1999 addressed to the Joint Director Directorate Ex-Service Welfare, Chennai which states that the Government of India have recognized the certificate in the Trade of Radio Fitter which is made equivalent to Diploma in Radio/ Electronics and Communication Engineering for the purposes of employment and as such a requesting to recognize it as equivalent to Diploma in Electronics/ Radio Communication Engineering. The said letter do recognize the Diploma certificate in Radio Fitter as equivalent to Diploma in Radio/ Electronics and Communication Engineering but this recognition is only by the Government of India and not by the Government of U.P. The requirement of equivalency has to be by the State Government.

In view of the aforesaid facts and circumstances, I am of the opinion that the petitioner is neither an Ex-Serviceman nor is holding a requisite Diploma as required under the advertisement and that the Diploma which he is holding is not

recognized by the State of U.P. to be equivalent to the Three Years Diploma awarded by Pravidhik Shiksha Parishad, U.P.

Accordingly, petitioner is neither entitle to the benefit of an ex-serviceman nor is qualified for the post in question as advertised. Thus, the respondents have rightly declined to accept him for interview.

The writ petition is devoid of merit and is accordingly dismissed with no orders as to costs."

12. This issue was also came before Division Bench of this Court in the matter of ***Dinesh Kumar Shukla (supra)*** and Division Bench repeated the same view. Relevant paragraphs of the said judgment are quoted below;

"Learned Single Judge dismissed the writ petition of the petitioner-appellant on the finding that he did not possess the requisite diploma qualification as was mentioned in the advertisement. Learned counsel for the appellant submitted that the appellant did possess the diploma in Electrical Engineering relying upon a certificate issued by the Indian Air force on account of his serving with the Air force from 20th September, 1991 to 20th September, 2011 and having undergone the prescribed training in the Trade of MS FIT (E). He further submits that in the certificate it is mentioned that if the candidate acquires 10 years technical experience in appropriate field alongwith the diploma it would become equivalent to the degree in engineering and that he would be eligible for applying to gazetted posts under Central or State Government. He submits that appellant worked for 20 years with the Indian Air force alongwith his technical training as such he was fully eligible for applying to the post of Junior Engineer (Electrical) with the U.P. Power Corporation. This aspect has been dealt with by the learned Single Judge and it did not find favour. The same was rejected on two grounds that the training period of Diploma was very short and not of 3 years as required and secondly the same was not recognised by the Competent Authority. We do not find any fault with the reasoning recorded by the learned Single Judge by rejecting the said argument and dismissing the writ petition.

13. Once again this Court has considered the very same issue in the matter of ***Sudhir Singh (supra)*** and reiterated its earlier view. Relevant paragraphs are quoted below;

"We otherwise find that the qualification prescribed under the rules and mentioned in para 5 of the advertisement was required to be possessed by the candidates. Equivalence to any other course can be given by the council namely AICTE or the State Government for their service and not by any other body having no authority of it for general application. The petitioner-appellant is not in possession of the qualification conferred either by an university incorporated by the Central or State Legislature or three years diploma course conducted by AICTE or for that State of U.P. There is nothing on record to show that the State of U.P. has given equivalence to the course/certificate obtained by the petitioner-appellant.

In absence of it, we do not find any error in the judgment to hold the petitioner-appellant to be ineligible. It otherwise goes without saying that the recognition of the institution and the course

remains under the domain of AICTE and not with anyone else. The equivalence of the course is also to be given by AICTE being the council competent to issue notification for technical education. It is pursuant to the provisions of All India Council for Technical Education Act, 1987. If the recognition or equivalence of a technical course is to be given, it has to be as per the provisions of All India Council for Technical Education Act, 1987 and not in violation of it."

14. Now coming to the present case. In this case also, advertisement is very clear which shows that certificate has to be issued by NCVT/ SCVT for a regular student who has attended two years training course, which is undisputedly lacking and certificate of petitioner is issued by Indian Armed Forces (Army) based upon 16 years experience of service. This issue have also been considered in the judgments cited before this Court and it is consistently held that Court cannot proceed to exercise its authority of judicial review to compel the respondents to accept the equivalence as claimed by the petitioner based upon the notification issued by the Central Government coupled with the fact that essential requirement is of two years regular training course for obtaining Diploma of NCVT/ SCVT. Therefore, in light of discussion made hereinabove as well as law laid down by the Courts, no interference is required.

15. Petition lacks merit and is accordingly **dismissed**. No order as to costs.

(2022) 9 ILRA 873
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ A No.6237 of 2022

Brahamnad Tyagi ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Kunal Shah, Sri Suvansit Kumar Jaiswal

Counsel for the Respondents:
C.S.C., Sri Rajesh Kumar Yadav, Sri Suresh C. Dwivedi

Civil Law - U.P. Agricultural Produce Market committees (Centralized) Services Regulations, 1984-Petitioner retired in 2018-chargesheet served on 2022-against this the present Petition- no provision under Rules, 1984 which empower to initiate disciplinary proceeding against a retired employee-impugned order set aside.

Held, *Even in case of adoption of rules applicable to the St. Government employees under Regulation 43 of Regulations 1984, once the service is not pensionable under Regulation 47 of Regulations 1984, no action can be taken against him under Article 351-A of CSR or any other rule adopted by respondents under Regulation 43 of Regulations 1984*. **(para 13)**

W.P. allowed. (E-9)

List of Cases cited:

1. Rajya Krishi Utpadan Mandi Parishad & anr. Vs Public Services Tribunal U.P. & ors., 2008 (2) ADJ 11 (DB)

2. S.P.S. Raghav Vs St. of U.P. & ors., 2018(6) ADJ 193 (DB)

3. Rajendra Prasad Singh Vs St. of U.P. & ors. passed in Writ-A No. 7517 of 2016 decided on 29.02.2016

(Delivered by Hon'ble Neeaj Tiwari, J.)

1. Heard Sri Kunal Shah, learned counsel for the petitioner, learned Standing Counsel for the respondent no. 1 and Sri S.C. Dwivedi, learned counsel for the respondent nos. 2, 3 and 4.

2. Present petition has been filed for following reliefs:-

"I. Issue a Writ, order or direction in the nature of Certiorari quashing the impugned order dated 07.07.2021, issued by Respondent No. 3, being wholly without jurisdiction.

II. Issue a Writ, order or direction in the nature of Certiorari quashing the impugned charge sheet dated 07.07.2022, issued by enquiry officer."

3. Learned counsel for the petitioner submitted that petitioner was employed in the establishment of respondent no. 3 on 01.04.1999 on the post of Head Clerk and he was retired on 30.04.2018. He further submitted that a charge sheet has been served upon petitioner on 07.04.2022, against which, petitioner filed present petition. He next submitted that service of the petitioner is governed by U. P. Agricultural Produce Market Committees (Centralized) Services Regulations, 1984 (hereinafter referred to as the Regulations, 1984) and Regulations, 1984 is having no provision to empower the respondent nos. 2 and 3 to initiate disciplinary proceeding against a retired employee. Therefore, disciplinary proceeding so initiated as well as impugned charge sheet dated 07.04.2022 is bad in law, without jurisdiction and liable to be quashed.

4. He further submitted that under Regulation 43 of Regulations, 1984 rules relating to disciplinary proceedings, appeals and representations against punishment, applicable to the employees of the State Government shall apply to the members of the Centralized Service. It is undisputed that as per Regulation 47 of the Regulations, 1984, service of the petitioner is not pensionable. Once the service of the petitioner is not pensionable, Article 351-A of U.P. Civil Service Regulations (hereinafter referred to as CSR) shall not be applicable in the case of petitioner and disciplinary proceeding cannot be initiated against him after retirement. He next submitted that assuming it to be correct that Article 351-A of CSR is applicable, even though no disciplinary proceeding can be initiated against the petitioner for the reason that charge sheet was issued after four years from the date of his retirement. He lastly submitted that the very same issue was challenged before this Court in the case of ***Rajya Krishi Utpadan Mandi Parishad and another Vs. Public Services Tribunal U.P. and others, 2008 (2) ADJ 11 (DB)***, in which this Court has framed four questions, which were answered. Relevant question was as to whether in absence of any rule or regulation, disciplinary proceeding can continue, after a charged employee attains the age of superannuation. The Court answered and held that under Regulations, 1984 there is no provision for disciplinary proceeding against a retired employee, therefore, no such proceeding can be initiated against a retired employee. Even if proceeding so initiated before retirement shall not continue and be dropped. In the matter of ***S.P.S. Raghav Vs. State of U.P. and others, 2018(6) ADJ 193 (DB)***, the Court has taken the same view and held that in absence of any rule, no disciplinary proceeding can be initiated against the retired employee. Similar issue was again came up before this Court in the

case of ***Rajendra Prasad Singh Vs. State of U.P. and 4 others passed in Writ-A No. 7517 of 2016 decided on 29.02.2016*** in which this Court has taken the same view.

5. Lastly, he submitted that under such facts and circumstances of the case as well as law laid down by this Court, the impugned order dated 07.07.2021 for initiating inquiry and subsequent charge sheet dated 07.04.2022 may be set aside.

6. Sri S.C. Dwivedi, learned counsel for the respondent nos. 2, 3 and 4 relying upon paragraph 14 of the counter affidavit submitted that as misconduct was traced out first time in the year 2016, therefore, disciplinary proceeding has been initiated against the petitioner, but could not dispute the legal submission made by learned counsel for the petitioner based upon Regulations 1984 as well as judgments of this Court.

7. I have considered the submissions made by learned counsels for the parties and perused the Regulations 1984 as well as judgment relied upon by learned counsel for the petitioner. The facts of the case are undisputed and only question before the Court is as to whether any disciplinary proceeding may be initiated against a retired employee under Regulations 1984 or not.

8. This legal issue first time came up before this Court in the matter of ***Rajya Krishi Utpadan Mandi Parishad (supra)*** in which Court has framed five questions to answer. Question No. 4 is relevant for deciding the present controversy, which is quoted below:-

"(iv) The contesting respondent reached the age of superannuation on 31.1.1994. In these circumstances, where at this stage any disciplinary inquiry can continue against the contesting respondent."

9. This Court after detailed discussions replied the same in paragraphs 24 to 36, which are being quoted below:-

"24. The Board, with prior approval of the State Government, has framed the Service Regulations. Regulation 43 relates to disciplinary proceeding. It is as follows:

"43. The rules relating to disciplinary proceeding, appeals and representations against punishment, applicable to the employees of the State Government shall mutatis mutandis apply to the members of the centralized service."

25. This regulation applies the rules relating to disciplinary proceeding, appeal and representations against punishment, applicable to the employees of the State Government, to the employees of the Board with appropriate changes that should be made in respect to the employees of the Board.

26. The following rules were applicable to the government servant at the time of disciplinary inquiry:

The Civil Services (Classification, Control, and Appeal) Rules, 1930 (as notified in the State of UP) (the 1930 Rules);

The Punishment and Appeal Rules for Subordinate Services Uttar Pradesh, 1932 (the 1932 Rules); and

Civil Services Regulation 351-A.

27. At present, UP Government Servant (Discipline and Appeal) Rules, 1999 (the 1999 Rules) are in force and the 1930 Rules and the 1932 Rules have been rescinded. The inquiry, if it is to be conducted then, has to be done in the light of the 1999 Rules {see Rule 17(2) of the 1999 Rules} and Civil Services Regulation 351-A. However, it is not material whether the 1930 and 1932 Rules or the 1999 Rules are applicable because there is no difference in them on the question whether disciplinary proceeding can continue after age of superannuation.

28. The counsel for the contesting respondent submitted that:

The contesting respondent reached the age of superannuation during pendency of the case before the Tribunal on 31.1.1994;

The disciplinary proceeding after date of superannuation can continue only if article 351-A of the Civil Services Regulations is applicable;

Article 351-A is applicable only to pensionable posts;

The post of the petitioner is not pensionable and as such article 351-A is not applicable;

There is no other provision under which disciplinary proceeding can continue after superannuation.

The entire disciplinary proceeding has become infructuous after superannuation and are to be dropped.

Article 351-A of Civil Services Regulations--Not Applicable

29. Article 351-A of the Civil Services Regulation empowers the Governor to, Withhold or withdraw pension or any part of it permanently or for the specified period; or

Order for recovery from the pension for any pecuniary loss caused to the government.

30. In case any post is not pensionable then Article 351-A is not be applicable as there is no question of any recovery from the pension of that person. The post of the petitioner is not pensionable and as such it is not applicable.

No Other Provision

31. No other rule or regulation has been pointed out to show that any deduction can be made from the post retirement benefits or disciplinary proceeding can continue after superannuation. The question is--in absence of any such provision--can disciplinary proceeding go on?

32. In this regard, the following cases were cited before us. In our opinion, they do not help in deciding the controversy: the reasons are as follows:

(a) Subhash Chandra Sharma v. Managing Director and another. 2000(1) UPLBEC 541 (paragraph 9); Babu Lal v. State of UP and Others. 2002 LabIC 3595 (paragraph 15); UP Cooperative Federation Ltd. v. LP Rai (2007) (7) SCC 81 (paragraph 5). These are the cases, where departmental inquiry was quashed and the court also held that the fresh inquiry can be done. There is no discussion on the question whether the disciplinary

proceeding can continue after superannuation or not.

(b) Union of India and Ors. v. Shri B. Dev JT 1998 (5) SC 480 and Krishna Kumar (dead.) through L.Rs. v. State of UP and Ors. 1998 (4) AWC 595. In these cases, the disciplinary proceeding was permitted to continue after superannuation. However, there was provision to continue the proceeding and deduction from pension could be made. It appears that posts were pensionable.

(c) Radhey Kant Khare v. UP Cooperative Sugar Factories Federation Ltd. 2003 (1) ESC 427 Town Area Committee, Jalalabad, v. Jagdish Prasad and Ors. AIR 1978 SC 1407. In these cases, the punishment order was quashed and further disciplinary proceedings were not held. However, no argument was advanced before the court whether disciplinary proceeding should be permitted to continue. There is no discussion on the question whether the disciplinary proceeding can proceed after age of superannuation or not.

(d) CL Verma v. State of MP and Ors. 1989 (59) FLR 786. This was the case, where disciplinary proceeding was started after retirement. The court held that as there is no provision for starting disciplinary proceeding after retirement, the charged employee can not be proceeded with. This case is not applicable here as in the present case not only the disciplinary proceedings were started at the time when the contesting respondent was in service but they were completed and the removal as well as appellate orders were passed when the contesting respondent was in service.

(e) BJ Shelat v. State of Gujrat and Ors. AIR 1978 SC 1109 (10) Union of India and Ors. v. Sayed Muzaffar Mir (1995) AIR 1995 SC 176 (4). In these cases, the employee had sought voluntary retirement. The government has option to refuse it on specific grounds and the fact that disciplinary proceedings are contemplated is one such ground. The government did not exercise the option to withhold the voluntary retirement within time. It is in this light that the court held that once an employee has voluntarily retired the disciplinary proceeding can not be started.

33. The counsel for the contesting responded has cited Bhagirathi Jena v. Board of Directors OSFC and Ors. (1999) AIR 1999 SC 1841 (the BhagirathiJena case); and the two other decisions of our court reported in Dr. RB Agnihotri v. State of UP and other 2000(2) ESC 915 and Ravindra Singh Rathor v. District Inspector of Schools Etawah and Ors. 2004 (1) AWC 310. The decisions of our court rely upon the BhagirathiJena case. These cases are relevant for deciding the issue involved in the present case.

34. In the BhagirathiJena case, the charged employee was suspended and disciplinary inquiry was started before his superannuation. However the inquiry could not finish before his superannuation. The charged employee was relieved after superannuation without prejudice to the claim of the employer. The disciplinary proceeding were continued after his superannuation. The charged employee filed a writ petition, which was dismissed by the High Court. The charged employee took the matter to the Supreme Court.

35. The Supreme Court, after noticing that there was neither any specific provision to deduct the amount from the provident fund nor any provision to continue disciplinary proceeding, held:

"In view of the absence of such provision in the above said regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30.6.95, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

36. The position in this case is similar. The effect of quashing of punishment order is that the disciplinary proceedings revive and are pending. No provision has been pointed out for continuing the departmental enquiry or making deduction from post retiral benefits (apart from Article 351-A, which we have held is not applicable). In view of the same, the disciplinary proceeding cannot go on: the petitioner is entitled to the salary and post retiral benefits (minus the subsistence allowance that he has already received)."

10. This issue was again came up before this Court in the case of ***S.P.S. Raghav (Supra)***. Paragraphs 9 to 14 of the said judgment are quoted below:-

"9. Here in this case, it is not clear that as to when Hon'ble Governor has accorded sanction for initiating the disciplinary proceeding but it is apparent that the date, on which sanction was accorded, is prior to commencement of Rules of 2011 for the reasons that the charge-sheet was served upon the petitioner through letter dated 3.3.2011 whereas Rule 2011 came into force in November 2011 i.e. on 11.11.2011. Therefore, it is clear that whenever sanction was accorded by Hon'ble Governor, the post of Chief Engineer was not pensionable.

10. Here the question would be as to whether the Rules of 2011 can be applied with retrospective effect for grant of sanction for initiating the disciplinary proceedings against a retired employee.

11. We have gone through the Rules of 2011 covering the field, in our view, the competence of an authority for exercising the power vested in, him is to be seen on the date when the power has been exercised and not on a subsequent date. Here, in this case, on factual matrix, it is not in dispute that the sanction was accorded, for initiating the disciplinary proceeding by Hon'ble the Governor, prior to the commencement of the Rules of 2011 and at that time, the post, which was held by the petitioner, was not pensionable whereas under Regulation 351-A, the Hon'ble Governor can withhold or withdraw a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave mis-conduct, or

to have caused pecuniary loss to Government by misconduct or Negligence, during his service, including service rendered on re-employment after retirement.

12. Learned counsel for the other side submitted that since the Rules of 2011 has been made applicable with retrospective effect, therefore there was no illegality in granting sanction, in our considered view, the argument advanced by learned counsel for the respondents is superfluous and does not carry any weight as relevant date for exercising the power will be the date on which it was exercised as discussed, herein, above and the same cannot be validated taking advantage of subsequent enactment. In our view, since on the date when Hon'ble Governor has accorded the sanction for initiating disciplinary proceeding was not having power as the post in question was not pensionable, therefore he could not accord the sanction.

13. The view taken by us, find support from paragraphs 28 and 30 of the judgement rendered by Division Bench of this Court in case of Rajya Krishi Utpadan Mandi Parishad (supra), in which one of us (Justice Ran Vijai Singh) was a member. For ready reference, para 28 and 30 of the judgement are being quoted herein below;

"28. The counsel for the contesting respondent submitted that:

The contesting respondent reached the age of superannuation during pendency of the case before the Tribunal on 31.1.1994;

The disciplinary proceeding after date of superannuation can continue only if article 351-A of the Civil Services Regulations is applicable;

Article 351-A is applicable only to pensionable posts;

The post of the petitioner is not pensionable and as such article 351-A is not applicable;

There is no other provision under which disciplinary proceeding can continue after superannuation.

The entire disciplinary proceeding has become infructuous after superannuation and are to be dropped.

30. In case any post is not pensionable then Article 351-A is not be applicable as there is no question of any recovery from the pension of that person. The post of the petitioner is not pensionable and as such it is not applicable."

14. It is well-settled law that any order without jurisdiction is a nullity and no legal consequence can flow from such order. Reference may be made to the decisions of the Apex Court in Managing Director, Army Welfare Housing Organization v. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619, Sarup Singh and another v. Union of India and another, (2011) 11 SCC 198, Division Bench decision of this Court in the case of Committee of Management Shri Jawahar Inter College and another v. State of U.P. and others in Special Appeal No. 164 of 2012 decided on 25.1.2012, Rajesh Kumar Shukla v. State of U.P. and others, 2017(7) ADJ 601 and Mithai Lal v. State of U.P. and others (Writ-A No. 24586 of 2014, decided on 12.10.2017).

11. Similar issue was again came up before this Court for consideration in the case of ***Rajendra Prasad Singh (supra).***

After considering the judgments of Apex Court as well of this High Court, this Court has taken the same view. Relevant portion of the said judgment is quoted below:-

"Counter affidavit has been filed by the respondent nos. 2 to 5, in which it is contended that since departmental enquiry has been initiated prior to the petitioner's superannuation, as such, it is legal for the respondents to conclude such proceedings, and order under challenge does not suffer from any illegality. Learned counsel for the respondents however, fairly states that on the legal position, there exists no provision in Service Rules, 1981 whereunder enquiry initiated against an employee could be continued or concluded even after an employee has attained the age of superannuation. Continuance of departmental enquiry, after superannuation, in the absence of enabling provision, has been considered in the case of ***Dev Prakash Tiwari Vs. Uttar Pradesh Cooperative Institutional Service Board, Lucknow and others, (2014), 7 SCC 260.*** *Hon'ble Supreme Court has been pleased to observe that in the absence of provision existing in the Service Rules, disciplinary proceedings cannot be allowed after attaining superannuation and action of respondents in continuing with such enquiry would be without jurisdiction. Following the aforesaid view, this Court in* ***Special Appeal Defective no. 31 of 2016, Banda District Cooperative Bank Limited and 2 others Vs. State of U.P. and 2 others,*** *decided on 3.2.2016, has been pleased to hold as under :-*

"On a pointed query of the Court, the learned counsel for the appellant candidly admitted that there was no provision under the U.P. Cooperative Service Regulation 1975, which may authorize continuance of the proceedings from the stage at which the defect has been noticed nor is there any provision in terms of which the proceedings may be continued and taken to their logical conclusion even after the retirement of the petitioner. We may in this connection refer to the law as laid down by the Supreme Court in Bhagirathi Jena Vs. Board of Directors, O.S.F.C. & others as reiterated by the Supreme Court in Deo Prakash Tewari Vs. U.P. Cooperative Institutional Service Board which clearly hold that once an employee has retired from service, in the absence of any authority vesting in the employer the right to continue disciplinary proceedings thereafter, the enquiry proceedings would be deemed to have lapsed and the employee would be entitled to all retiral benefits. In light of the above law laid down by the Supreme Court, we are unable to accede to the submission of the learned counsel for the appellant for a remit of the proceedings.

For the aforesaid reasons, we find no ground warranting interference with the judgement of the learned Single Judge. The special appeal is consequently dismissed."

In view of the law settled, it is not open for the respondents to proceed pursuant to show cause notice dated 21.1.2016 for the purpose of passing any order against the petitioner."

12. From perusal of the judgments of the Apex Court as well as this Court, it is very much clear that once there is no rule occupying the field for disciplinary proceeding against an employee after retirement, proceeding so initiated or continued after retirement, is not

sustainable as it de-hors the rules and liable to be set aside.

13. In the present case too, petitioner was retired on 30.04.2018 thereafter disciplinary proceeding was initiated vide order dated 07.07.2021 and charge sheet was served upon him on 07.04.2022 i.e. undisputedly disciplinary proceeding was initiated after retirement of the petitioner whereas Regulations 1984 does not provide any disciplinary proceeding against a retired employee. Even in case of adoption of rules applicable to the State Government employees under Regulation 43 of Regulations 1984, once the service is not pensionable under Regulation 47 of Regulations 1984, no action can be taken against him under Article 351-A of CSR or any other rule adopted by respondents under Regulation 43 of Regulations 1984. Therefore, impugned order dated 07.07.2021 and subsequent charge sheet dated 07.07.2022 are bad in law and liable to be set aside.

14. Accordingly, the writ petition is **allowed.** The impugned order dated 07.07.2021 passed by respondent no. 3 and charge sheet dated 07.04.2022 are hereby quashed.

15. No order as to costs.

(2022) 9 ILRA 881
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. JYOTSNA SHARMA, J.

Writ A No.7994 of 2022

Mahesh Kumar Singh & Anr. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Alok Kumar Yadav, Ms. Jigyasa Singh

Counsel for the Respondents:
C.S.C., Sri Ashish Mishra

Civil Law - U.P. Higher Judicial Service Rules, 1975- prescription of minimum passing marks in the interview-upheld-Petitioners participated in interview-had knowledge of prescribed minimum pass marks-cannot turn around and contest the minimum prescribed marks.

W.P. dismissed. (E-9)

List of Cases cited:

1. All India Judges' Assc. & ors. Vs U.O.I. & ors., (2002) 4 SCC 247

2. Ramesh Kumar Vs High Court of Delhi & anr., (2010) 3 SCC 104

3. Hemani Malhotra Vs High Court of Delhi, (2008) 7 SCC 11

4. Salam Samarjeet Singh Vs High Court of Manipur at Imphal & anr., (2016) 10 SCC 484

5. Taniya Malik Vs Registrar General of the High Court of Delhi, (2018) 14 SCC 129

6. K.H. Siraj Vs High Court of Kerala & ors., (2006) 6 SCC 395

7. St. of U.P. Vs Rafiquddin & ors., 1987 (Supp) SCC 401

8. Dr. Krushna Chandra Sahu & ors. Vs St. of Orissa & ors., (1995) 6 SCC 1

9. Manjeet Singh, UDC & ors. Vs Employees St. Insurance Corp. & anr., (1990) 2 SCC 367

10. Lila Dhar Vs St. of Raj. & ors., (1981) 4 SCC 159

11. Ashok Kumar Yadav & ors. Vs St. of Har. & ors., (1985) 4 SCC 417

12. Madan Lal Vs St. of J& K (1995) 3 SCC 486

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

1. Heard Sri Alok Kumar Yadav learned counsel for the petitioners and Sri Ashish Mishra learned counsel for the respondent-High Court.

2. The present writ petition has been filed seeking declaration of Note (ii) Paper No. 6 (Interview) to Appendix-G framed under Rule 18 of the U.P. Higher Judicial Service Rules, 1975 (In short as "the U.P.H.J.S. Rules, 1975) as ultra vires to Articles 14 and 16 of the Constitution of India, in view of the decision of the Apex Court in the cases of **All India Judges' Association and others vs. Union of India and others1** and **Ramesh Kumar vs. High Court of Delhi and another2.**

3. The petitioners herein being practicing Advocates at the District Judgeship at Meerut and Delhi had participated for appointment in the Higher Judicial Services of the State of U.P. in the Direct Recruitment Examination-2018 (Part-III), against the advertisement dated 9.8.2019.

4. It is stated that the petitioners being eligible for appointment to the Higher Judicial Services, had qualified the preliminary as well as main written examinations held on 15th September, 2019 and 18th-20th October, 2019; respectively. They were called for the interview held on 14.12.2019. The final result of the selection was declared on 20.12.2019.

5. The brief facts of the case as stated in the writ petition are that both the petitioners herein belonging to Scheduled Caste category remained unsuccessful in the final result. Being aggrieved by their non-selection in U.P. Higher Judicial Services Recruitment-2018 (Part-III), they filed a Writ-A No. 12441 of 2020 (Kameshwar Pratap Singh and another vs. Hon'ble High Court of Judicature of Allahabad and another) which was dismissed vide judgment and order dated 15.12.2020. Aggrieved by the said decision, the petitioners herein filed the Special Leave to Appeal (C) No. 2836 of 2021 (Kameshwar Pratap Singh and another vs. Hon'ble High Court of Judicature at Allahabad and another) which was dismissed as withdrawn by the judgment and order dated 5.4.2021.

It may be noted that the said decision has not been brought on record of the present writ petition.

It is further stated in the writ petition that when the aforesaid writ petition was filed by the petitioners herein, their marks were not disclosed and they were praying persistently for release of their marks. Final marks, which included marks of the main examination and interview were ultimately declared/released at the official website of the High Court on 15.12.2020. The petitioners again filed a Writ-A No. 11763 of 2021 which was disposed of vide judgment and order dated 9.9.2021.

This is the third round of litigation by the petitioners herein after having remained unsuccessful in the Recruitment Examination-2018 (Part-III) held in the year 2019, final result of which was declared on 20.12.2019.

6. Before proceeding to deal with the submission of the learned counsel for the

petitioners, on the merits of the prayer made herein, we may record that the first Writ Petition No. 12441 of 2020 was filed by the petitioners after declaration of the final result on the plea that the petitioners did well in the interview but due to requirement of minimum passing marks in the interview, their names did not figure in the select list. It was noted by this Court while dismissing the writ petition vide judgment and order dated 15.12.2020 that minimum qualifying marks in the interview have been prescribed for selection in U.P.H.J.S. Rules, 1975 and the petitioners having failed to obtain minimum passing marks, their names did not appear in the select list. The challenge to the selection cannot be sustained based on the assumption of the petitioners therein about their performance as it was judged by the interview Board and no allegations of malafide against the interview Board had been made. It was further noted that the petitioners cannot be granted relief only because they belonged to Scheduled Caste as the rule does not permit lower marks for any particular caste to qualify the interview. It was lastly noted that in absence of challenge to the U.P.H.J.S. Rules, 1975, the prayer made in the writ petition cannot be granted.

7. In the second round of litigation, it was noted by this Court that the writ petition was highly belated but on the prayer made by the learned counsel for the petitioners that the petitioners made a representation before the State Government, which is the Selection and Appointing Authority and the High Court which is the recommending Authority, the writ petition was disposed of with the direction to the petitioners to file a copy of the writ petition as representation before the Authority concerned who shall consider and decide the same. The petitioners then submitted a representation dated 17.2.2022 before the High Court, which was rejected in the meeting of the Selection and Appointment Committee of the High Court dated 22.2.2022 on the ground that the petitioners have failed to secure 40% qualifying marks in the interview of the direct recruitment of the U.P.H.J.S.-2018 (Part-III).

Though it is stated in the present writ petition that at the time of filing of the first writ petition, the petitioners were not aware of their marks of the main examination and the interview but it has not been explained as to why the petitioners did not challenge the validity of the rules, as prayed in the present writ petition when the main ground of challenge therein was to the requirement of minimum passing marks in the interview under the U.P.H.J.S. Rules, 1975 for a candidate to qualify for selection.

8. In our considered opinion, the present writ petition is the third writ petition virtually for the same relief and as such cannot be entertained. We may further note that the reliefs sought in the Second Writ-A No. 11763 of 2021 filed by the petitioners herein have not been disclosed in the present petition.

9. Be that as it may, the petitioners being practicing Advocates should desist from filing repeated writ petitions for the same cause of action thereby wasting precious judicial time of this Court as the Court was required to deliberate on the same issue again and again from different angles. In our considered opinion, the present writ petition is liable to be dismissed for this reason alone.

10. However, in order to put the controversy to its logical end, the prayer made in the writ petition about the validity

of the Rule 18 Appendix-G as contained in U.P.H.J.S. Rules, 1975 prescribing for minimum qualifying marks in the interview is being considered by us in light of the arguments made by the learned counsel for the petitioners.

11. We may first note the language of Appendix-G framed under Rule 18 of the U.P.H.J.S. Rules, 1975 which prescribes the syllabus for the recruitment of the officers in U.P. Higher Judicial Service. The examination for U.P. Higher Judicial Services as per Appendix-G includes six papers. Paper no. 6-Interview is relevant for our purpose and is noted as under:-

*"**The interview will be of 200 marks** - The suitability of the candidate for employment in the U.P. Higher Judicial Service will be tested with reference to his merit giving due regard to his ability, character, personality, and physique.*

Notes -

(i) The candidates securing minimum aggregate 45% marks in the written examination shall be called to appear in the interview subject to maximum thrice the number of vacancies category-wise.

The interview shall be in a thorough and scientific manner and shall take any thing between 25 and 30 minutes for each candidates.

(ii) The candidate securing minimum 40% marks in the interview shall only be eligible to be included in the select list. The marks obtained in the interview will be added to the marks obtained in the written papers and the candidate's place in the select list will depend on the aggregate of both."

A perusal thereof indicates that the candidates securing minimum aggregate 45% marks in the written examination are called in the interview subject to maximum thrice the number of vacancies category-wise. The time period of interview has been prescribed as 25 to 30 minutes for each candidate to be taken in a thorough and scientific manner. The candidate securing minimum 40% marks in the interview are eligible to be included in the select list which is to be prepared by adding the marks obtained in the written papers and the interview. The candidate's place in the select list depends upon the aggregate of both.

12. It is argued by the learned counsel for the petitioners that in view of the above provision, the preparation of the final result was actually not based on the cumulative award of marks to the petitioners herein in the written examination as well as interview, rather the petitioners were excluded from the select list because of the fact that they could not obtain minimum 40% marks in the interview. The exclusion of meritorious candidates like the petitioners by prescribing minimum qualifying marks in the interview is in teeth of the decision of the Apex Court in **All India Judges' Association** (supra) and **Ramesh Kumar** (supra). The resolution of the Selection and Appointment Committee dated 22.2.2022 rejecting the representation of the petitioners dated 17.2.2022 based on the aforesaid rule is, thus, liable to be set aside.

It is argued that the Shetty Commission's Report was accepted by the Apex Court in **All India Judges' Association** (supra) and it was categorically noted in **Ramesh Kumar** (supra) that the Shetty Commission did not

prescribe for having minimum marks for interview. It was further noted therein that in **Hemani Malhotra vs. High Court of Delhi3**, it was held by the Apex Court that it was not permissible for the High Court to prescribe the requirement of securing minimum marks in the interview as against the recommendation of the Shetty Commission.

The extract of the Shetty Commission's report, Appendix-1 titled as "Model Rules for Recruitment to District Court Service", appended as Annexure '21' to the writ petition, has been placed before us to argue that Rules 10 and 11 of the Model Rules prescribing for eligibility for candidates for the interview and the criteria of interview; respectively, do not prescribe minimum marks for interview. It was pointed out that Rule 12 of the Model Rules prescribing procedure to prepare the list of selected candidates, i.e. final select list provides that the select list shall be drawn on the basis of the aggregate of the percentage of the total marks secured in the qualifying examination as determined under Rule 10 and of the marks secured at the interview under Rule 11. The Rules framed by the High Court prescribing minimum qualifying marks of 40% for the interview for inclusion of a candidate in the final select list prepared on the aggregate of marks obtained in the written examination and the interview is, thus, contrary to the recommendations of the Shetty Commission accepted by the Apex Court in **All India Judges' Association's case** (supra).

The contention, thus, is that the Note (ii) to Paper No. 6 of Appendix-G framed under Rule 18 of the U.P.H.J.S. Rules, 1975 is liable to be declared ultra vires and the rejection of the candidature of the petitioners pursuant to the said rule is to be held illegal.

13. Apart from the above, no other contention has been made by the learned counsel for the petitioners to challenge the vires of the aforesaid rule. No argument has been made as to how the said rule can be said to be ultra vires to Articles 14 and 16 of the Constitution of India, being antithesis to the doctrine of equality.

14. We may record that the contentions made by the learned counsel for the petitioners can be met with the aid of the observations of the Apex Court in **Salam Samarjeet Singh vs. High Court of Manipur at Imphal and another4** wherein the candidates who remained unsuccessful in the viva-voce conducted by the High Court of Manipur for appointment to the post of District Judge (entry level) in Manipur Judicial Service Grade-I, had challenged the Schedule-B of Manipur Judicial Services Rules which stipulated minimum qualifying marks, both for the written examination and viva-voce. It may be noted that in the said case Schedule-B of Manipur Judicial Services Rules stipulated minimum qualifying marks cumulatively for both written examination and viva-voce. The Full Court later passed a resolution fixing cut-off marks-minimum 40% marks in the interview which was challenged as being erroneous interpretation of "evaluation of performance" given in Schedule-B of the said Rules. Amongst various arguments to challenge the correctness of the decision of the Full Court prescribing minimum qualifying marks for viva-voce, one of the challenge was that the decision of the High Court to prescribe minimum qualifying marks was against the recommendation of the Shetty Commission and was violative

of the judgment of the Apex Court in **All India Judges' Association** (supra). While dealing with the said argument, it was observed by the Apex Court in paragraphs '26', '27' and '28' as under:-

"26. The petitioner contends that the decision of the High Court to prescribe minimum qualification marks is against the recommendations of the Shetty Commission and is violative of the judgment of this Court in All India Judges' Association and Ors. v. Union of India and Ors. (2002) 4 SCC 247. It is further argued that in the said case, the Court accepted Shetty Commission's Report which has recommended not having cut-off marks in interview for the recruitment of the judicial officers.

27. No doubt, Shetty Commission has recommended in its Report that there should be no cut-off marks in the viva-voce test. Relevant recommendation of Shetty Commission reads as under:-

"The viva-voce test should be in a thorough and scientific manner and it should take anything between 25 to 30 minutes for each candidate. What is recommended by the Commission is that the viva-voce test shall carry 50 marks and there shall be no cut-off marks in viva-voce test."

28. Admittedly, the Shetty Commission has recommended that the viva-voce test shall carry fifty marks and there shall be no cut-off marks in the viva-voce test. In All India Judges' Association case para (37), this Court subject to various modifications in the judgment, accepted all other recommendations of the Shetty Commission. While there was a detailed discussion on the perks, mode of recruitment to the Higher Judicial Service and the proportionate percentage for promotion as District Judges for judicial officers, limited competitive examination for Civil Judges (Junior Division) and percentage of direct recruitment, there was no detailed discussion regarding the other recommendations of Shetty Commission. As rightly contended by the learned Senior Counsel for the respondent, All India Judges' Association case is sub silentio on the recommendation of Shetty Commission as to "no cut-off marks for the viva-voce". Contention of the petitioner that fixing cut-off marks for the viva-voce is in violation of the decision of this Court is not tenable."

It may further be noted that the decision of the Apex Court in **Hemani Malhotra** (supra) and **Ramesh Kumar** (supra) as relied by the learned counsel for the petitioners have been considered by the Apex court therein and it was noted that the said decisions proceeded on the issue that prescription of minimum marks in the interview was not permissible after the written test was held.

Further on the view taken by the Hon'ble Justice R. Banumathi, (as she then was) about correctness of the decision of the Full Court in prescribing minimum qualifying marks for the viva-voce, a contrary opinion was noted by the Hon'ble Mr. Justice Shiva Kirti Singh, (as he then was) and the matter was referred for final adjudication before the appropriate Bench in view of difference of opinion. The dissenting view of the Hon'ble Mr. Justice Shiva Kirti Singh, however, was on the ground that change in the selection procedure by providing minimum marks for interview or viva-voce test in the midst of the selection process which has already been initiated amounted to changing the

Rules of the game and hence impermissible. It is noted in the dissenting judgment that the rules and the instructions clearly demonstrate that there was no cut-off mark or pass mark for the viva-voce examination in the past and the Full Court by resolution provided for minimum 40% marks in the interview after the advertisement notification was issued and written examinations were held but before holding the interview. It was, thus, observed that the minimum marks for interview was introduced in the midst of the selection process.

In another decision in **Taniya Malik vs. Registrar General of the High Court of Delhi5,** the petitioners therein who remained unsuccessful in the Delhi Judicial Service recruitment examination 2015 had challenged the prescription of minimum pass marks in the viva-voce examination under the recruitment rules and sought for a direction to relax the marks for interview for the Scheduled Caste category candidates for selection. The petitioner therein had been declared failed in the viva-voce examination (interview) and urged that fixation of minimum passing marks of 45% in viva-voce examination (interview) was unreasonable. It was observed by the Apex Court relying upon its earlier judgment in **K.H. Siraj vs. High Court of Kerala and others6** that the interview is the best mode to assess the suitability of a candidate and to judge the capacity of the candidate to perform well in the service, minimum marks is necessary to prescribe. It was observed that the interview is the best method of judging the performance, overall personality, the actual working knowledge and capacity to perform. It is desirable to have the interview and it is necessary to prescribe minimum passing marks for the same when the appointment in the higher judiciary to the post of District Judge (entry level) is involved. It was observed that a written examination only tests academic knowledge, which is sometimes, gained without possessing overall qualities, practical experience of practice and law. The observations in **Taniya Malik** (supra) in paragraphs '18' and '19' are relevant to be extracted hereunder:-

"18. Coming to the question of prescribing the minimum pass marks in the viva voce examination, in our opinion it is rightly observed by this Court in K.H. Siraj v. High Court of Kerala & rs. (2006) 6 SCC 395, that interview is the best method to assess the ability of the candidate and to judge the capacity and minimum marks can also be prescribed. In case a candidate fails in an interview it cannot be said that he is suitable for the job of a Munsif Magistrate. This Court observed:

"54. In our opinion, the interview is the best mode of assessing the suitability of a candidate for a particular position. While the written examination will testify the candidates' academic knowledge, the oral test alone can bring out or disclose his overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of leadership etc. which are also essential for a judicial officer.

55. We may usefully refer to a decision of this Court in Lila Dhar v. State of Rajasthan (1981) 4 SCC 159 in which this Court observed as under:

4. The object of any process of selection for entry into a public service is to secure the best and the most suitable

person for the job, avoiding patronage and favouritism. Selection based on merit tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services.

'The ideal in recruitment is to do away with unfairness.'

***

5...."A system of recruitment almost totally dependent on assessment of a person's academic knowledge and skills, as distinct from ability to deal with pressing problems of economic and social development, with people, and with novel situations cannot serve the needs of today, much less of tomorrow...We venture to suggest that out recruitment procedures should be such that we can select candidates who cannot only assimilate knowledge and sift material to understand the ramifications of a situation or a problem but have the potential to develop an original or innovative approach to the solution of problems."

It is now well recognised that while a written examination assesses a candidate's knowledge and intellectual ability, an interview test is valuable to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantage over the interview-test there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity.

9. ... "15. While we do feel that the marks allotted for interview are on the high side and it may be appropriate for the Government to re-examine the question, we are unable to uphold the contention that it was not within the power of the Government to provide such high marks for interview or that there was any arbitrary exercise of power. (SCC p.166, para 9)"

56. In Mohan Kumar Singhania and Ors. v. Union of India and Ors. : AIR 1992 SC 1, S. Ratnavel Pandian, J. speaking for the Bench, observed as under: (SCC p.608, paras 18-21)

'18. Hermar Finer in his textbook under the caption The Theory and Practice of Modern government states:

"The problem of selection for character is still the pons asinorum of recruitment to the public services everywhere. The British Civil Service experiments with the interview.'

19. The purpose of viva voce test for the ICS Examination in 1935 could be best understood from the following extract of the Civil Service Commission's pamphlet:

'Viva Voce - the examination will be in matters of general interest: it is intended to test the candidate's alertness, intelligence, and intellectual outlook. The candidate will be accorded an opportunity of furnishing the record of his life and education.'

20. It is apposite, in this connection, to have reference to an excerpt from the United Nations Handbook on Civil

Service Laws and Practice, which reads thus:

"...the written papers permit an assessment of culture and intellectual competence. This interview permits an assessment of qualities of character which written papers ignore; it attempts to assess the man himself and not his intellectual abilities."

21. This Court in Lila Dhar v. State of Rajasthan (1981) 4 SCC 159 while expressing the view about the importance and significance of the two tests, namely, the written and interview has observed thus: (SCC p.164, para 6) '...the written examination assess the man's intellect and the interview test the man himself and 'the twain shall meet' for a proper selection.' "

57. The qualities which a Judicial Officer would possess are delineated by this Court in Delhi Bar Association v. Union of India (2002) 10 SCC 159. A Judicial Officer must, apart from academic knowledge, have the capacity to communicate his thoughts, he must be tactful, he must be diplomatic, he must have a sense of humour, he must have the ability to defuse situations, to control the examination of witnesses and also lengthy irrelevant arguments and the like. Existence of such capacities can be brought out only in an oral interview. It is imperative that only persons with a minimum of such capacities should be selected for the judiciary as otherwise, the standards would get diluted and substandard stuff may be getting into the judiciary. Acceptance of the contention of the appellants/petitioners can even lead to a postulate that a candidate who scores high in the written examination but is totally inadequate for the job as evident from the oral interview and gets 0 marks may still find it a place in the judiciary. It will spell disaster to the standards to be maintained by the subordinate judiciary. It is, therefore, the High Court has set a benchmark for the oral interview, a benchmark which is actually low as it requires 30% for a pass. The total marks for the interview are only 50 out of a total of 450. The prescription is, therefore, kept to the bare minimum and if a candidate fails to secure even this bare minimum, it cannot be postulated that he is suitable for the job of Munsif Magistrate, as assessed by five experienced Judges of the High Court."

19. In our considered opinion, it is desirable to have the interview and it is necessary to prescribe minimum passing marks for the same when the appointment in the higher judiciary to the post of District Judge is involved. The interview is the best method of judging the performance, overall personality and the actual working knowledge and capacity to perform otherwise the standard of judiciary is likely to be compromised. A written examination only tests academic knowledge, which is some time, gained without possessing overall qualities, practical experience of practice and law. In written exam, even the person with no caliber who takes decision by cramming may obtain better marks. When the Judges of the High Court too are appointed by adjudging the performance and intellect, an interview would be indispensable for judicial post. As ultimately, they also come to adorn the chair of a Judge and Judges of subordinate and higher judiciary to deliver justice to masses, the criteria of experience of practice for direct recruitment of 7 years whether actually gained can be adjudged only by interview, communicating skills

and by elucidation of certain aspects which would not be possible by written exam alone. In Siraj (supra), it was emphasized that interview is the main fulcrum for judging the suitability of the candidate for appointment as District Judge in the higher judiciary. In our opinion that is absolutely necessary. When we consider past practice earlier when the written examination was not prescribed, the High Court used to select the candidates for higher judiciary only by the method of interview. Now additional safeguards of written examination have been added. The importance of interview for the post of the higher judiciary has increased than ever before it is absolutely necessary to weed out unworthy elements/crammers and in our considered opinion it is not only appropriate but also absolutely necessary to prescribe the minimum pass marks soas to weed out unworthy element so as to segregate grain from the chaff. There is a vast difference between having the experience that is required for a Judge that cannot solely be adjudged on the basis of written performance, and for which overall personality, intelligence test is absolutely necessary. Without that it would not be appropriate to make appointments in judiciary. Thus in our opinion the prescription of minimum 45% marks for reserved category candidates could not be said to be uncalled for. Merely by the fact that some more posts were advertised and they are lying vacant, it could not have been a ground to relax the minimum marks for interview after the interview has already been held. It would not have been appropriate to do so and the High Court has objected to relaxation of minimum passing marks in viva voce examination in its reply and as the power to relax is to be exercised by the High Court and since it has opposed such a prayer on reasonable ground and the institutional objective behind such prescription, we are not inclined to direct the High Court to relax the minimum marks."

In a catena of decisions, the Courts have laid much emphasis on the interview/viva-voce. In the recruitment for higher judicial services, the importance of interview/viva-voce cannot be underestimated. Viva-voce is the best mode of assessing the suitability of a candidate as it brings out the overall intellectual qualities of the candidates. [Reference **Salam samarjeet Singh** (supra)]

15. As noted in **Ramesh Kumar** (supra), the decision relied upon by the learned counsel for the petitioners itself, the selecting body has to satisfy itself that a candidate had obtained such aggregate marks in the written test as to qualify for interview and obtained (sufficient marks in viva-voce) which would show his suitability for service. Such a course is permissible for adjudging the qualities/capacities of the candidates. It was observed by the Apex Court that it may be necessary in view of the fact that it is imperative that only persons with the prescribed minimum of said qualities/capacities should be selected as otherwise the standard of judiciary would get diluted and substandard stuff may get selected. Interview may also be the best mode of assessing the suitability of a candidate for a particular position as it brings out the overall intellectual qualities of the candidates. While the written test will testify the candidate's academic knowledge, the oral test can bring out or disclose overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of

leadership etc., which are also essential for a Judicial Officer, [(Reference Para "11'). The decisions in **State of U.P. vs. Rafiquddin and others7; Dr. Krushna Chandra Sahu and others vs. State of Orissa and others8; Manjeet Singh, UDC and others vs. Employees State Insurance Corporation and another9** and **K.H. Siraj** (supra) were relied therein].

16. The decisions of the Apex Court in **Lila Dhar vs. State of Rajasthan and others10** and **Ashok Kumar Yadav and others vs. State of Haryana and others11** were also considered by the Apex Court in Ramesh Kumar (supra), Salam Samarjeet Singh (supra) and Taniya Malik (supra) to notice that the interview can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity with some degree of error.

In **Taniya Malik** (supra), however, prescription of minimum marks for interview in the Delhi Judicial Services Rules-2015 has been upheld with the observation that interview is the main fulcrum for judging the suitability of the candidates for appointment as District Judge (entry level) in the Higher Judiciary.

In **Ramesh Kumar** (supra), it was noted that the selection rules namely the Delhi High Court Judicial Services Rules, 1970 (as it then was) did not provide for minimum marks for interview. The Shetty Commission's report and the decision of the Apex Court in **All India Judges' Association** (supra) was then noted and it was observed that where statutory rules do not deal with the particular subject/issue, so far as appointment of the Judicial Officers is concerned, directions issued by the Apex Court would have binding effect.

17. From the above discussion, it can be discerned that the Courts have upheld the prescription of minimum passing marks in the interview/viva-voce examination in the recruitment for judicial services prescribed in the Recruitment Rules framed by the different High Courts. Much emphasis has been given to the interview as the best method of judging the overall personality, actual working knowledge, intelligence, communicating skills etc., which are essential for a Judicial Officer.

As regards the observations in **Ramesh Kumar** (supra) that the Shetty Commission's report had not prescribed for not having minimum marks for interview, the same was made in the facts of that case as the statutory rules namely Delhi Higher Judicial Services Rules, 1970 (as it then was) did not provide for the requirement of securing minimum marks in interview.

18. Coming to the Shetty Commission's report, the Model Rules framed therein were a recommendation for framing appropriate rules by the High Court for recruitment to the District Court Service. The recommendation of the Shetty Commission as accepted by the Apex Court in **All India Judges' Association** (supra), no where prohibits the High Court from the prescribing minimum qualifying marks by framing its own statutory rules to prescribe

the recruitment criteria for the higher judicial services, nor the said recommendation in any way makes the recruitment rules violative of Articles 14 and 16 of the Constitution of India.

As noted by Hon'ble R. Banumathi, J. in **Salam Samarjeet Singh** (supra), **All India Judges' Association** (supra) is "sub silentio' on the recommendation of Shetty Commission as to "no cut-off marks for the viva voce".

19. The contention of the learned counsel for the petitioners that fixing cut-off marks for the interview in the rules is in violation of the decision of the Apex Court in **All India Judges' Association** (supra) and **Ramesh Kumar** (supra) or against the Shetty Commission recommendation is not tenable.

20. For the above discussion, the challenge to the vires of Note (ii) to Paper No. 6 (Interview) of Appendix-G framed under Rule 18 of the U.P.H.J.S. Rules, 1975, being in teeth of the decisions of the Apex Court in **All India Judges' Association** (supra) and **Ramesh Kumar** (supra) is hereby turned down.

21. Yet another aspect of the matter is that the petitioners herein participated in the interview with the knowledge that for the selection, they have to clear the criteria of prescribed minimum pass marks. On being unsuccessful in the interview, they cannot turn around and contend that the criteria for selection, i.e. the prescription of minimum marks for interview was improper. They are estopped to contend it as observed in **K.H. Siraj** (supra) as under:-

"72. The appellants-petitioners, in any event, are not entitled to any relief under Art. 226 of the Constitution of India for more reasons than one. They had participated in the written test and in the oral test without raising any objection. They knew well from the High Court's Notification that a minimum marks had to be secured both at the written test and in the oral test. .....xxxxxxx....."

In **Madan Lal vs. State of Jammu & Kashmir12**, the Apex Court has observed that:-

"9. ... It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair.....

10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful."

22. Before parting with this judgment, as we have found that this is the third round of litigation at the instance of the petitioners challenging the rejection of their candidature in the Higher Judicial Services Examination-2018 (III) held in the year 2019, we deem it fit and proper to impose cost upon the petitioners, who being Advocates are supposed to be well versed in law that in a challenge before the Court of law, all points/grounds of challenge have to be raised in the first attempt itself. Repeated attempts raising different grounds of challenge at different points of time by the petitioners are nothing but sheer abuse of the process of the Court more so when they are officers of the Court being practicing Advocates.

We quantify the cost to Rs. 20,000/- for each of the petitioners herein, which shall be deposited by them in the Registry of the High Court within a period of one month from today.

The cost so deposited by the petitioners shall be transmitted in the accounts of the High Court Legal Services Committee.

With the above directions, the writ petition is **dismissed** being devoid of merits.

(2022) 9 ILRA 893
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.05.2022

BEFORE

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

Writ A No.13670 of 2021

Rohit Sharma & Anr. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Rishi Kant Singh Chauhan, Sri Ashok Khare (Sr. Adv.)

Counsel for the Respondents:
C.S.C.

Civil Law - U.P. Police Computer Operator (Non- Gazetted) Staff Service Rules 2011-Rule 15 (4)-Petitioners applied for Computer Operator-secured a little lower than the cut off marks-out of advertised posts-130 seats were still vacant-claim to fill the remaining vacant post-no provision for preparation of waiting list in Rules, 2011.

Held, *It is settled position of law that in absence of any specific provision for waiting list and on the contrary, there being specific provision that there shall not be any waiting list and that the posts remaining unfilled on any ground shall have to be carried forward for the next recruitment. The candidates lower in merit than that last selected candidate have no right to claim for appointment on vacancies left unfilled due to non joining of the selected candidates.* ***(para 33)***

W.P. dismissed. (E-9)

List of Cases cited:

1. Munja Praveen Vs St. of Telangana, passed in Civil Appeal No. 10583 of 2017

2. Vatsyayan Shukla & anr. Vs St. of U.P. & ors., passed in Writ A No.7494 of 2019, vide order dated 30.07.2019

3. Vallampati Sathish Babu Vs St. of Andhra Pradesh & ors., reported in 2022 SCC Online SC 470

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

1. Heard Mr. Ashok Khare, learned Senior Counsel assisted by Mr. Rishi Kant Singh Chauhan, learned counsel for the petitioners and Mr. Pranav Ojha, learned Additional Chief Standing Counsel for the State-respondents.

2. Initially the writ petition has been filed with the following prayer:-

"(i) Issue a writ, order or direction in the nature of mandamus directing respondents to fill up all the 81 posts of Computer Operator available due to non joining of the selected candidates of general category in pursuant to the advertisement dated 23.02.2016.

(ii) Issue a writ, order or direction in the nature of mandamus

directing respondents to consider the vested, legitimate right of the petitioners against posts fallen vacant due to non joining of candidates."

3. The amendment application was moved which was allowed by order dated 07.12.2021 and the amended prayer is as follows:-

"(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 05.08.2021 passed by Respondent no.3 (Annexure No.8) to the writ petition to the extent of not considering petitioners for appointment against the available left out 60 posts."

4. Brief of the facts are that, the U.P. Police Recruitment and Promotion Board, Lucknow issued an advertisement dated 23.02.2016 notifying the recruitment of 1865 posts of U.P. Police Computer Operator. The petitioners belonging to general category, being fully qualified and eligible, applied for consideration, pursuant to the aforesaid advertisement. The petitioners were issued admits cards and after appearing in the written examination, they have declared successful and thereafter, they have also appeared in computer typing test. The final result/select list of the selection was published and after declaration of result the cut-off merit with regard to the individual categories of finally selected candidates were also notified on 21.12.2016.

5. From the perusal of the aforesaid cut-off merit, it is apparent that the last selected candidate in General category has secured an aggregate of 113.75 marks, the candidate selected under the O.B.C. category has secured 90 marks and the candidate belonging to Schedule Caste category has secured 80 marks whereas the candidate under dependent of Freedom Fighter category has secured 95 marks and for females the cut-off marks is 81.25.

6. It is very much clear from the aforesaid cut-off marks that the petitioners have secured marks a little bit lower than the last selected candidate in the General category.

7. The selection in question is being done as per provisions of U.P. Police Computer Operator (Non-Gazetted) Staff Service Rules 2011 which was amended by first amendment of Rule 2015 (in short 2011). The petitioners being a little lower than in marks could not be selected as the respondents have taken stand that there is no provision for preparation of waiting list in U.P. Police Computer Operator (Non-Gazetted) Staff Service Rules 2011.

8. Learned counsel for the petitioners submits that out of total 1592 advertised posts only 1462 candidates have turned up for document verification meaning thereby 130 seats were still vacant which is also apparent from the letter dated 31.01.2019 as 130 vacant seats were available due to non turning up of candidates for documents verification. The aforesaid seats should have been filled by the number of petitioners being next in merit.

9. Due to non consideration of claim of the petitioners, Writ Petition No.23016 of 2017 was filed and the Hon'ble Court, vide order dated 03.12.2019 was pleased to allow the writ petition and direct the respondents to consider the claim of the petitioners against unfilled vacancies.

10. The operative portion of the order dated 03.12.2019 is as follows:-

"Accordingly, with the consent of parties of present writ petition as well as other connected, all the writ petitions are disposed of asking the Competent Authority to look into the grievance of the petitioner and in case vacancies are still available and the petitioners fall in the zone of consideration, their claim be decided in the light of the observations so made in Vatsyayan Shukla (supra), expeditiously, preferably within a period of two months from the date of production of certified copy of this order."

11. The aforesaid order dated 03.12.2019 was challenged by the State by means of filing Special Appeal No.1181 of 2021 and the Hon'ble Court has been pleased not to interfere in the order passed by the learned Single Judge.

12. The operative portion of the order dated 08.02.2021 passed in Special Appeal is as follows:-

"It is in view of the fact that on the cut off marks of open category, there were 73 candidates out of which 21 were given appointments based on the age as none of them were having preferential qualification. It is a fact that out of the total candidates offered appointment, 81 open category candidates did not join the post. The list of the candidates scored same marks could have been used for giving appointment as the list of those candidates was available thus list of candidates next in the merit was not required to be called. There would be no purpose to keep post vacant in a case where there are number of candidates scored same marks. It is not a case where the department was not having the list of the candidates who can be offered appointment which otherwise remain in the shape of waiting list and to be called.

The case has peculiarity and thereby we find no reason to cause interference in the judgment passed by learned Single Judge but it need to clarify that the judgment of learned Single Judge would not be treated as precedent. It is not only for the reason that the case has peculiarity as more than 73 candidates scored same marks in the selection and list of those was available. The direction in this case cannot be made applicable in general and therefore while not causing interference in the judgment and order of learned Single Judge, it is made clear that this judgment would not be treated as precedent."

13. Against the order dated 08.02.2021, passed in Special Appeal, State Government filed S.L.P. before the Hon'ble Apex Court, which has been dismissed by order dated 19.07.2021.

14. In compliance of the aforesaid orders of this Court, the respondents published the names of only 21 candidates against the 81 vacant posts of General category on 05.08.2021, leaving 60 candidates of General category during training period. The petitioners approached the respondents by means of filing the representation which has been rejected by the impugned order dated 05.08.2021, hence, the present petition has been filed.

15. Learned counsel for the petitioners submits that the respondents have rejected the claim of the petitioners, ignoring the relevant fact that posts are still lying vacant due to non joining of some candidates. While passing the order impugned, the respondents have ignored the settled legal position that posts covered by particular advertisement are required to be filled up on the basis of remaining merit

list so prepared and any such vacant posts are covered by same advertisement.

16. Learned counsel for the petitioners submits that it is settled principle of law that selections starts with the advertisement and ends with issuance of appointment letters, hence, any posts which has following vacancy prior to issuance of appointment letter shall not be notified for next recruitment so far. In support of his submission, learned counsel for the petitioners relied upon the judgement of **Munja Praveen Vs. State of Telangana,** passed in **Civil Appeal No. 10583 of 2017.**

17. There is no prohibition in Rules for preparation of the waiting list, hence, the petitioners who are next in merit list were to be considered for being appointed.

18. Learned counsel for the petitioners further submits that the posts as advertised cannot be left vacant without any rhyme or reason and there should be plausible reason for not filling up such posts. It is also settled legal position that posts covered by particular advertisement are required to be filled up on the basis of remaining merit list prepared in pursuance thereto.

19. Learned counsel for the petitioners submits that in the present case 60 candidates did not turn up against 81 posts having the same cut-off marks, hence, the petitioners being next in merit of legal right to be appointed in all such vacant posts. The case of the petitioners was to be decided in the light of **Vatsyayan Shukla And Another Vs State of U.P. And 5 Others, passed in Writ A No.7494 of 2019**, vide order dated 30.07.2019, wherein it has been held that in case vacancies remain available due to non joining of selected candidates, the authorities are expected to fill up the posts from the candidates next in the order of merit and their claim cannot be rejected only on the ground that the waiting list has not been prepared. He further submits that petitioners have acquired knowledge to be appointed against the advertised posts which remains unfilled due to non joining of the candidates who were more meritorious than him. The concept of waiting list cannot brought in picture for defeating the legitimate right of such candidates against unfilled posts.

20. He further submits that while passing the impugned order the authorities concerned have not considered the observations as made in the case of Vatsyayan Shukla and another wherein the respondents were directed to consider the claim of the appointment of the petitioners without taking a plea that waiting list was not prepared.

21. There is no justifiable reason for not considering the candidature of the candidates figuring in the comparative merit list who was just below the selected candidates who had not joined the posts. Therefore, the impugned order is arbitrary, discriminating and cannot be sustained in the eyes of law, hence, the same may be set aside.

22. Learned Standing Counsel on the other hand submits that petitioner have secured 112.50 marks in the said examination and the cut-off marks of selected candidates was 113.75, therefore, there is no question of considering the claim of the petitioners who are less than the cut-off marks as secured by the selected candidates. He further submits that learned Single Judge had directed the respondents

to consider the claim of the petitioners in the light of observations made in Vatsyayan Shukla (supra) case wherein it was held that in case vacancies remain available due to non joining of selected candidates the authorities were expected to fill up the posts from the candidates next in order of merit, whereas in the special appeal filed against the aforesaid order, it was clarified that on the cut-of marks of open category there were 73 candidates out of which 21 were given appointment based on age as none of them were having preferential qualification. It was also mentioned that in case 81 open category candidates did not join the posts, the list of candidates who had secured same marks was already prepared, therefore, the candidates scoring the same marks would have been used for giving appointment as such a list of those candidates were available, hence, the list of next in merit was not required to be called.

23. Learned Standing counsel submits that the appointment was to be offered to those candidates who had secured same marks, as secured by the selected candidates who had not joined and such a list was already prepared, therefore, there is no illegality in the order impugned wherein claim of the petitioners has been rejected on the ground that they had not secured same marks as the selected candidates who had not joined on the said post and there was no need to prepare merit list or depend on any waiting list for the same.

24. Learned Standing Counsel has further clarified that as per the provisions contained in the relevant Government Service Rules, the selection process comes to an end after issuance of the select list and the appointments have to be made from the said list only, there being no provisions of preparation of any other list for the purpose of considering the claim of appointment of persons on unfilled posts due to non joining of selected candidates.

25. Learned Standing Counsel further submits that in the present case, the marks obtained by the last selected candidate was 113.75 whereas the petitioners have secured only 112.50 which is less than the tie break marks, hence, they cannot be selected, considering the directions as issued by Hon'ble Court in the writ petition as well as in the Special Appeal relating to the petitioners .

26. As per the directions of the writ Court, the claim of the petitioners was to be decided in the light of Vatsyayan Shukla (supra) case wherein it has been held that in case, vacancies remain unfilled due to non joining of selected candidates, the authorities are expected to fill up the posts from the candidates next in order and their claim cannot be rejected only on the ground that waiting list has not been prepared whereas in the Special Appeal, the court has clarified the position that the select list of the candidates scoring same marks which was already available, could have been used for giving appointment in order to fill the vacancies, arisen due to non joining of the selected candidates. It is clear that the petitioners had obtained less marks than that of the last selected candidate and as per direction, only those candidates were to be considered who had obtained 113.75 marks, hence, the petitioners cannot claim parity of 113.75 tie break marks. The petitioners have also not been discriminated as the claim of similarly situated candidates has already been rejected by the respondents-authorities, therefore, there is no illegality in the order

impugned and no interference is required by this Court.

27. Learned Standing Counsel submits that, as per the procedure for direct recruitment to the post of Computer Operator in Rule 15 of U.P. Police Computer (Non-Gazetted) Staff Service Rules 2011 as applicable, in the case of the petitioners, the successful candidates shall be placed higher and such candidates who obtained equal marks the candidates having preferential qualification shall be placed higher, and such candidates as have obtained equal marks having no preferential qualification the candidates senior in age shall be placed higher in the list. Accordingly, as list was prepared and appointments were given, based on age as none of the candidates were having preferential qualification, therefore, those having equal marks were to be considered for appointment on the vacancies left unfilled due to non joining of the selected candidates, as per the direction of the writ court as well as special appeal court. Since, the petitioners did not have equal marks as obtained by the last selected candidates, therefore, their claim has been rightly rejected.

28. Heard learned counsel for the parties and perused the material available on record.

29. Before discussing the merit of the case, it would be appropriate to quote the procedure for direct recruitment as provided in Rule 15 of U.P. Police Computer (Non-Gazetted) Staff Service Rules 2011. Rule 15 is as follows:-

15. Procedure for Direct Recruitment-- Procedure for recruitment of Computer Operator Grade-A-

"(1) Direct recruitment to the post of Computer Operator Grade-A in the service shall be made through Uttar Pradesh Police Recruitment and Promotion Board, Lucknow.

The Board shall scrutinize the applications and require the eligible candidates to appear in a written examination and a Computer Typing examination. Written examination will be as under:

(2) Written Examination (200 marks) : written examination shall be of objective type. Examination shall be of total 200 marks. The written examination paper shall consist of questions related to General Knowledge, Mental Ability, Reasoning and Computer Science. The level of question paper shall be according to the level of minimum required educations qualification for the post.

Minimum 40 per cent marks are must in the written examination. The Selection Committee shall call successful candidates for the Computer Typing Examination on the basis of merit in the written examination, in such numbers as required.

(3) Computer Typing Examination (Qualifying)-- The Computer Typing Examination shall be qualifying examination. Candidates who type minimum 25 words per minute in Hindi and 40 words per minute in English, shall be declared successful in the Computer Typing Examination.

(4) The Board after due consideration of proper representation of candidates according to the norms specified for reservation, shall prepare a list from the

list of successful candidates in Computer Typing Examination, in order of their marks obtained in written examination by considering preferential qualification, and recommend such number of candidates as it considers necessary for appointment. Such candidates who obtained equal marks the candidates having preferential qualification shall be placed higher and such candidates as have obtained equal marks having no preferential qulification, the candidate senior in age shall be placed higher in the list. The Board shall forward the list of successful candidates to the Appointing Authority."

30. Accordingly, the select list was to be prepared from successful candidates in Computer Typing Examination, in order of their marks obtained in the written examination by considering the preferential qualification and in case of candidates who obtained equal marks, the candidates having preferential qualification were to be placed higher whereas those candidates who obtained equal marks having no preferential qualification, the candidates senior in age was to be placed higher in the list.

31. Considering the aforesaid provision in the present case, the list was prepared based on age as none of the candidates were having preferential qualification from such a list, those candidates having marks 113.75 were declared successful and names were recommended. When the selected candidates from the said list did not join, the posts left vacant due to the aforesaid, was to be filled from the list as prepared according to Rule 15(4) of the aforesaid Act, which was already available with the respondents authorities, considering which, the petitioners having less than 113.75 marks as per the tie break marks were not eligible for being considered.

32. There is no provision for preparation of any waiting list as per the aforesaid rules, therefore, such a list of those candidates who was not figuring in the comparative merit list as already available, could not be considered for appointment on the posts by preparing another list of the persons next in the merit.

33. It is settled position of law that in absence of any specific provision for waiting list and on the contrary, there being specific provision that there shall not be any waiting list and that the posts remaining unfilled on any ground shall have to be carried forward for the next recruitment. The candidates lower in merit than that last selected candidate have no right to claim for appointment on vacancies left unfilled due to non joining of the selected candidates. The issue with respect to claim of candidates for consideration of their appointment on unfilled posts due to non joining of the selected candidates came to be considered in the case of **Vallampati Sathish Babu Vs. State of Andhra Pradesh and Others,** reported in **2022 SCC Online SC 470,** wherein the Apex Court observed that even in case selected candidates have not joined in the absence of statutory rules, to the contrary, the employer is not bound to offer the unfilled vacancy to the candidates next below the said candidates in the merit list. It has been held that in absence of any provision the employer is not bound to prepare waiting list in addition to the panel of candidates to appoint candidates from the waiting list, in case the candidates from the panel could not join.

34. Erstwhile rightly interpreting the directions as given by the writ Court and special appeal court in case of the petitioner, the claim of the petitioners has been rejected on the ground that they did not have the tie break marks as obtained by

the last selected candidates as the posts which were vacant due to non joining of the selected candidates was to be filled from the list already available with the respondents, wherein the petitioners have obtained less than the tie break marks of 113.75.

35. In view of the aforesaid discussion, this Court finds no good ground to interfere in this matter.

36. Accordingly, the writ petition is dismissed.

(2022) 9 ILRA 900
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.09.2022

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Writ A No.18864 of 2016

Vanshraj Sharma ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Amar Nath Dubey, Sri Anurag Srivastava

Counsel for the Respondents:
C.S.C.

Petitioner seeks seniority from date of getting salary-appointed on regular basis in 1995-interim order for salary in 1994-the said Writ dismissed for non prosecution-Petitioner not entitled for any benefit except the salary as directed.

W.P. dismissed. (E-9)

List of Cases cited:

1. Kunhayammed & ors. Vs St. of Kerala & anr.; (2000) 6 SCC 359

2. Civil Appeal No. 2417 of 2022; St. of U.P. & ors. Vs Prem Chopra

3. Sanjay K. Sinha-II & ors. Vs St. of Bihar & ors.; (2004) 10 SCC 734,

4. Rashi Mani Mishra & ors. Vs St. of U.P. & ors.; 2021 SCC Online SC 509

5. Malook Singh & ors. Vs St. of Punj. & ors.; Civil Appeal No.6026-6028 of 2021

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

1. Heard Sri Anurag Singh, learned counsel for the petitioner and Sri Pratyush Tripathi, learned Additional Chief Standing Counsel.

2. By means of the present writ petition, the petitioner has assailed the order dated 13.07.2016 passed by the Chief Conservator of Forest, Southern Region, U.P., Allahabad, by which the representation of the petitioner dated 23.04.2016 has been rejected. The petitioner has further prayed for a direction to the opposite party nos. 1 to 5 to provide seniority to the petitioner from February 1994.

3. It would be apt to refer the brief facts of the case for adjudication of the case in hand. Initially, the petitioner was engaged on daily wage basis on the post of Driver in the Forest Department. He approached this Court by means of Writ Petition No.307(S/S) of 1994 claiming his regularization. The interim order was passed in the writ petition on 21.01.1994, by means of which it was provided that the opposite parties shall consider the matter of regularization of the petitioner and the petitioner shall be paid salary in the regular scale of pay as admissible to the driver until further orders. In pursuance thereof, a Selection Committee was constituted and in

pursuance of the report of the Selection Committee, the petitioner was appointed on the post of driver by means of the order dated 25.01.1995 in the pay scale of 950-1500 and he was paid the regular salary by the Divisional Director, Social Forestry Division Pratapgarh. The said order was passed subject to final outcome of the pending writ petition. The services of the petitioner were confirmed vide order dated 06.02.2009. The aforesaid writ petition was dismissed for want of prosecution on 18.01.2013.

4. The petitioner again approached this Court by means of Writ Petition No.7632(S/S) of 2009 for payment of regular salary w.e.f February 1994 to 25.01.1995 in compliance of the interim order dated 29.01.1994 passed in Writ Petition No.307(S/S) of 1994. In the said writ petition, learned counsel for the petitioner after arguing at some length restricted his prayer for a direction to the extent that for redressal of his grievance, the petitioner may be permitted to make a fresh representation to the opposite party no.5 therein and he may be directed to consider and decide the same within some stipulated period. Accordingly, the writ petition was disposed of by means of the order dated 19.11.2019, without entering into the merits of the case, with liberty to the petitioner to make a fresh representation to the opposite party no.5 and the opposite party no.5 was directed to consider and decide the representation, in case the petitioner moves representation within 10 days, by a reasoned and speaking order as per law. In pursuance thereof, representation was decided and the petitioner was paid remaining salary w.e.f. 01.02.1994 to 25.01.1995.

5. The petitioner preferred a representation on 10.01.2014 for correction of his seniority and claiming seniority from 01.02.1994 on the ground that the petitioner has been given regular pay scale since February 1994 in compliance of order passed by this Court on 29.01.1994 in Writ Petition No.307(S/S) of 1994 and the regular appointment has been given to the petitioner on 25.01.1995, therefore he is entitled for seniority w.e.f. 01.02.1994. The petitioner again preferred a representation on 17.11.2015. However, though some recommendations were made but the petitioner was not given the seniority and the tentative seniority list was issued on 22.03.2016, in which the petitioner was placed at serial No.19 on the basis of the date of appointment i.e. 25.01.1995. The objections were called from the employees. The petitioner also filed objection. Thereafter he again approached this Court by means of Writ Petition No.7976(S/S) of 2016, which was disposed of by means of order dated 13.04.2016. The order dated 13.04.2016 is extracted here-in-below:

"Heard learned counsel for the parties.

Let the petitioner implead the Chief Conservation Officers, Forest Division, U.P. Allahabad as opposite party in the writ petition during the course of the day.

Let the newly impleaded opposite party no. 6 consider and take a decision on the recommendation of the opposite party no. 5 in accordance with rules, if there is no other legal impediment. If in the process of considering the same it is found that the seniority of other persons would be affected then the benefit of seniority placement as claimed shall not be given to the petitioner unless an opportunity to submit objection is provided to the affected persons and then objections are considered as per law. The

officer shall also verify the relevant facts as regards the validity of the petitioner's appointment/ regularization and the result of Writ Petition No. 307(SS) of 1994. All pleas are open for being considered by him. This exercise shall be completed within a period of three months from the date a certified copy of this order is submitted.

With the aforesaid observations, the writ petition is disposed of. There shall be no orders as costs."

6. In pursuance of the aforesaid order passed by this Court on 13.04.2016, the case of the petitioner has been considered and the representation, filed in pursuance to the aforesaid order, on 23.04.2016 has been rejected by means of the impugned order dated 13.07.2016, contained in Annexure No. 1 to the writ petition, providing therein that the petitioner shall remain at serial No.19 of the Zonal Seniority List. Being aggrieved by the said order, the petitioner has approached this Court by means of the present writ petition assailing the said order.

7. Submission of learned counsel for the petitioner is that the petitioner was treated as a regular employee in compliance of the order dated 21.09.1994 passed in Writ Petition No.307 (S/S) of 1994 and paid salary in regular Pay-Scale w.e.f. 01.02.1994 but the petitioner has not been given seniority from that date, whereas the petitioner was appointed on regular basis on the basis of said interim order on 25.01.1995, therefore he is entitled for seniority from February 1994. Thus the impugned order is not sustainable and liable to be quashed.

8. Learned Additional Chief Standing Counsel, while opposing the submission of learned counsel for the petitioner, submitted that the salary in regular pay-scale was paid to the petitioner only in compliance of the interim order passed by this Court as he was working on daily wage basis, however he was appointed on regular basis on 25.01.1995, therefore he is entitled for seniority only from that date. He further submitted that the said writ petition was dismissed for non-prosecution, therefore the claim made in the said writ petition was not adjudicated, therefore the petitioner is not entitled for any benefit of the interim order except the salary which has already been paid. He further submitted that the petitioner was appointed on 25.01.1995 and he is entitled for all service benefits including seniority and has been given from the said date. The impugned order has rightly been passed in accordance with law. The writ petition is mis-conceived and liable to be dismissed.

9. I have considered the submissions of learned counsel for the parties and perused the records.

10. The issue involved in this case is as to whether the petitioner is entitled for seniority w.e.f. 25.01.1995, the date of appointment of the petitioner or from February 1994, from when the petitioner has been paid salary in regular pay scale in compliance of interim order passed by this Court in Writ Petition No.307 (S/S) of 1994, while the petitioner was working on daily wage basis.

11. The petitioner was initially appointed, on the post of driver in the Forest Department, on daily wage basis. It appears that the petitioner was not being regularized, therefore he approached this Court by means of Writ Petition No.307(S/S) of 1994. An interim order was passed in the said writ petition on

29.01.1994 and the opposite parties were directed to consider the matter of regularization of the petitioner. Further direction was issued that the petitioner shall be paid salary in the regular scale of pay as admissible to the driver until further orders. In pursuance thereof, a Selection Committee was constituted and the petitioner was considered by the Selection Committee for appointment and on the basis of the report of the Selection Committee, the petitioner was appointed on the post of driver under the Drivers Service Rules by means of the order dated 25.01.1995 and paid salary in the regular scale of pay. The writ Petition No.307 (S/S) of 1994 was dismissed for non-prosecution on 18.01.2013. Therefore the issue as to whether the petitioner was regularly appointed or not and he is entitled for regularization from a date prior to 25.01.1995 or not, has not been adjudicated by this Court, whereas the petitioner has been appointed after due selection by means of the order dated 25.01.1995.

12. The petitioner approached this Court by means of Writ Petition No.7632 (S/S) of 2009 for a direction to the opposite parties to pay regular pay scale w.e.f. February 1994 to 25.01.1995, in compliance of the interim order dated 21.01.1994 passed in Writ Petition No.307 (S/S) of 1994. The said writ petition was disposed of vide order dated 19.11.2009 on a request made by learned counsel for the petitioner, without entering into the merits of the case, with liberty to the petitioner to move fresh representation and direction was issued to consider and dispose of the representation of the petitioner. Therefore the order passed by this Court in the said writ petition was only to the extent of payment of salary w.e.f. February 1994 to 25.01.1995 in the regular pay scale of driver in compliance of interim order dated 21.01.1994. The respondents, in compliance of the aforesaid order dated 19.11.2009, passed the order dated 27.05.2010 and paid the difference of salary in the regular pay scale paid between February 1994 to 25.01.1995 in compliance of the order dated 21.01.1994, which was received by the petitioner.

13. The seniority of the petitioner was fixed at serial No.19 in the seniority list of Southern Zone, U.P., Allahabad. Though some recommendations were made for giving seniority to the petitioner w.e.f. February 1994 but no decision was taken, therefore the petitioner approached this Court by means of Writ petition No.7976(S/S) of 2016 (Vanshraj Sharma versus State of U.P. and others). The said writ petition was disposed of by means of order dated 13.04.2016, which has been reproduced above in paragraph 5 with direction to the newly impleaded opposite party no.6 i.e. Chief Conservation Officer, Forest Division, U.P. Allahabad to consider and take decision on the recommendation of the opposite party no.5 therein, in accordance with the Rules, if there is no other legal impediment. It was also provided that if in the process of considering the same, it is found that the seniority of other persons would be affected, then the benefit of seniority and placement as claimed shall not be given to the petitioner unless an opportunity to submit objection is provided to the affected persons and then objections are considered as per law. It was also specifically provided in the order dated 13.04.2016 passed by this Court in the aforesaid writ petition that the officer shall also verify the relevant facts as regards the validity of the petitioner's appointment/ reguarlization and the result of writ petition No.307 (S/S) of

1994. Therefore it is apparent that the case of the petitioner for seniority w.e.f. February 1994 was to be considered in the light of the result of the writ petition No.307 (S/S) of 1994, which was dismissed for non-prosecution on 18.01.2013. In pursuance of the aforesaid order, the petitioner preferred a representation on 23.04.2016.

14. The representation of the petitioner has been considered by the respondent No.4 and rejected by means of the order dated 13.07.2016, impugned in this writ petition. The respondent no.4 has recorded that the Writ Petition No.307(S/S) of 1994 was dismissed for non-prosecution on 18.01.2013.

15. Admittedly, the petitioner has been appointed on regular basis by means of the order dated 25.01.1995, therefore merely on the ground that an interim order was passed by this Court on 01.02.1994 in the writ petition filed by the petitioner for payment of salary in the regular pay scale does not entitle him seniority from the date, the same was paid by the respondents under the interim order passed by this Court. The writ petition was dismissed for non-prosecution, therefore as to whether the petitioner has been appointed regularly or not or as to whether he is entitled for regularization prior to 25.01.1995 has not been adjudicated upon by this Court, therefore once the writ petition was dismissed, any interim order passed therein would have no effect except for the direction issued by the order because there cannot be two orders governing the field at a time and the interim order merges into final order.

16. The Hon'ble Supreme Court in the case of ***Kunhayammed and others versus State of Kerala and another; (2000) 6 SCC 359***, while considering the doctrine of merger has held that there cannot be more than one operative orders governing the same subject matter at a given point of time.

17. The Hon'ble Supreme Court, in a recent judgment and order dated 25.03.2022 passed in ***Civil Appeal No. 2417 of 2022; State of U.P. and others versus Prem Chopra,*** has held that once the proceedings, wherein a stay was granted, are dismissed, any interim order granted earlier in the said proceedings merges with the final order, therefore the interim order comes to an end with the dismissal of the proceedings. The relevant paragraph 24 is extracted here-in-below:-

"24. From the above discussion, it is clear that imposition of a stay on the operation of an order means that the order which has been stayed would not be operative from the date of passing of the stay order. However, it does not mean that the stayed order is wiped out from the existence, unless it is quashed. Once the proceedings, wherein a stay was 7 granted, are dismissed, any interim order granted earlier merges with the final order. In other words, the interim order comes to an end with the dismissal of the proceedings. In such a situation, it is the duty of the Court to put the parties in the same position they would have been but for the interim order of the court, unless the order granting interim stay or final order dismissing the proceedings specifies otherwise. On the dismissal of the proceedings or vacation of the interim order, the beneficiary of the interim order shall have to pay interest on the amount withheld or not paid by virtue of the interim order."

18. Thus the petitioner is not entitled for any benefit on account of the interim order except the salary as directed, which has been paid to the petitioner.

19. The definition of substantive appointment given under the Rules of 1991 is, "substantive appointment" means an appointment, not being an ad hoc appointment, on a post in the cadre of the service, made after selection in accordance with the service rules relating to that service. Therefore the seniority can be reckoned only from the date of substantive appointment and the period of service, on the basis of appointment made dehors the Rules, cannot be counted for the purpose of seniority. In the present case, initially the petitioner was appointed on daily wage basis, which is made only in exigencies of service.

20. It is also noticed by this Court that while considering the case of the petitioner in compliance of order passed by this Court, an explanation was also called from Sri Inder Prasad, who is at serial No.18 of the seniority list. He, in his objection, has stated that he was appointed on regular basis on 28.02.1994 and the petitioner is junior to him. Therefore the petitioner, who was appointed on regular basis on 25.01.1995 cannot be given seniority over and above him.

21. The Hon'ble Supreme Court, in the case of ***Sanjay K. Sinha-II and others versus State of Bihar and others; (2004) 10 SCC 734***, has held that it is settled law that appointments made contrary to the rules are merely fortuitous and do not confer benefit of seniority on the appointees over and above the regular/substantive appointees to the service.

22. The Hon'ble Supreme Court, in the case o***f Rashi Mani Mishra and others versus State of U.P. and others; 2021 SCC Online SC 509,*** considering the Rules of 1991 has held that as per Seniority Rules 1991, applicable in the present case, seniority is to be counted from the date of "substantive appointment" and "substantive appointment" means, an appointment, not being an ad hoc appointment.

23. Relying on the aforesaid judgment, recently the Hon'ble Supreme Court in the case of ***Malook Singh and others versus State of Punjab and others; Civil Appeal No.6026-6028 of 2021,*** by means of the judgment and order dated 28.09.2021, has held that seniority which has to be counted from "substantive appointment" would not include ad hoc service. Relevant paragraph 20 of the judgment is extracted here-in-below:-

"20. The law on the issue of whether the period of ad hoc service can be counted for the purpose of determining seniority has been settled by this Court in multiple cases. In Direct Recruits (supra), a Constitution Bench of this Court has observed:

"13. When the cases were taken up for hearing before us, it was faintly suggested that the principle laid down in Patwardhan case [(1977) 3 SCC 399: 1977 SCC (L&S) 391: (1977) 3 SCR 775] was unsound and fit to be overruled, but no attempt was made to substantiate the plea. We were taken through the judgment by the learned counsel for the parties more than once and we are in complete agreement with the ratio decidendi, that the period of continuous officiation by a government servant, after his appointment by following the rules applicable for substantive

appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole test of confirmation, for, as was pointed out, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter se seniority has to conform to the principles of equality spelt out by Articles 14 and 16. If an CA 6026-28/2021 appointment is made by way of stop-gap arrangement, without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequals as equal which would violate the equality clause. But if the appointment is made after considering the claims of all eligible candidates and the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for purpose of seniority. Same will be the position if the initial appointment itself is made in accordance with the rules applicable to substantive appointments as in the present case. To hold otherwise will be discriminatory and arbitrary.....

47. To sum up, we hold that

(A) Once an incumbent is appointed to a post according to a rule, his seniority has to counted from the date of appointment and not according to date of his confirmation. The corollary to the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account considering the seniority." (emphasis supplied)

The decision in Direct Recruits (supra) stands for the principle that ad hoc service cannot be counted for determining the seniority if the initial appointment has been made as a stop gap arrangement and not according to rules. The reliance placed by the Single Judge in the judgement dated 6 December 1991 on Direct Recruits (supra) to hold that the ad hoc service should be counted for conferring the benefit of seniority in the present case is clearly misplaced. This principle laid down in Direct Recruits (supra) was subsequently followed by this Court in Keshav Chandra Joshi v. Union of India15. Recently a two judge Bench of this Court inRashi Mani Mishra v. State of Uttar Pradesh16, of which one of us (Justice DY Chandrachud) was a part, observed that the services rendered by ad hoc employees prior to their regularization cannot be counted for the purpose of seniority while interpreting the Uttar Pradesh Regularization of Ad Hoc Appointment Rules. This Court noted that under the applicable Rules, "substantive appointment" does not include ad hoc appointment and thus seniority which has to be counted from "substantive appointment" would not include ad hoc service. This Court also clarified that the judgement in Direct Recruits (supra) cannot be relied upon to confer the benefit of seniority based on ad hoc service since it clearly states that ad hoc appointments made as stop gap arrangements do not render the ad hoc service eligible for determining seniority. This Court speaking through Justice MR Shah made the following observations:

"36. The sum and substance of the above discussion would be that on a fair reading of the 1979 Rules, extended from time to time; initial appointment orders in the year 1985 and the subsequent order of regularization in the year 1989 of the ad hoc appointees and on a fair reading of the relevant Service Rules, namely Service Rules, 1993 and the Seniority Rules, 1991, our conclusion would be that the services rendered by the ad hoc appointees prior to their regularization as per the 1979 Rules shall not be counted for the purpose of seniority, vis-à-vis, the direct recruits who were appointed prior to 1989 and they are not entitled to seniority from the date of their initial appointment in the year 1985. The resultant effect would be that the subsequent re- determination of the seniority in the year 2016 cannot be sustained which was considering the services rendered by ad hoc appointees prior to 1989, i.e., from the date of their initial appointment in 1985. This cannot be sustained and the same deserves to be quashed and set aside and the seniority list of 2001 counting the services rendered by ad hoc appointees from the date of their regularization in the year 1989 is to be restored.

37. Now so far as the reliance placed upon the decision of this Court in the case of Direct Recruit Class II Engg.Officers' Assn. (supra), relied upon by the learned Senior Advocate appearing on behalf of the ad hoc appointees is concerned, it is required to be noted that even in the said decision also, it is observed and held that where initial appointment was made only ad hoc as a stop gap arrangement and not according to the rules, the officiation in such post cannot be taken into account for considering the seniority. In the case before this Court, the appointments were made to a post according to rule but as ad hoc and subsequently they were confirmed and to that this Court observed and held that where appointments made in accordance with the rules, seniority is to be counted from the date of such appointment and not from the date of confirmation. In the present case, it is not the case of confirmation of the service of ad hoc appointees in the year 1989. In the year 1989, their services are regularized after following due procedure as required under the 1979 Rules and after their names were recommended by the Selection Committee constituted under the 1979 Rules. As observed hereinabove, the appointments in the year 1989 after their names were recommended by the Selection Committee constituted as per the 1979 Rules can be said to be the "substantive appointments". Therefore, even on CA 6026-28/2021 facts also, the decision in the case of Direct Recruit Class II Engg. Officers' Assn. (supra) shall not be applicable to the facts of the case on hand. At the cost of repetition, it is observed that the decision of this Court in the case of Direct Recruit Class II Engg. Officers' Assn. (supra) was considered by this Court in the case of Santosh Kumar (supra) when this Court interpreted the very 1979 Rules."

The notification dated 3 May 1977 stated that the ad hoc appointments were made in administrative interest in anticipation of regular appointments and on account of delay that takes place in making regular appointment through the concerned agencies. In this regard, the vacancies were notified to the Employment Exchange or advertisements were issued, as the case maybe, by appointing authorities. The appointments were not made on the recommendation of the Punjab Subordinate

Service Selection Board. However, subsequently a policy decision was made to regularize the ad hoc appointees since their ouster after a considerable period of service would have entailed hardship. Thus, the initial appointment was supposed to be a stop gap arrangement, besides being not in accordance with the rules, and the ad hoc service cannot be counted for the purpose of seniority."

24. In view of above, this Court is of the view that the petitioner is entitled for seniority only from the date of his substantive appointment on 25.01.1995, which has been made after considering his case by the Selection Committee in accordance with law. Therefore this Court is of the view that there is no illegality or error in the impugned order challenged in the present writ petition. The writ petition has been filed on mis-conceived grounds and it lacks merit.

25. The writ petition is, accordingly,**dismissed.** No order as to costs.

(2022) 9 ILRA 908
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ A No.9842 of 2022

Seema Gupta ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Awadh Behari Singh

Counsel for the Respondents:
C.S.C.

Civil Law - Intermediate Act, 1921-Regulation no. 103-Compassionate Appointment-Petitioner's claim for Compassionate Appointment rejected-on the ground that she is divorced daughter of the deceased employee-does not come within definition of 'Family' under rule no.103 of Act,1921-exclusion of a daughter on the basis of her marital status is against the specific provision of the Constitution-Regulation no. 103 against Article 14 and 15.

W.P. allowed. (E-9)

List of Cases cited:

Smt. Vimla Srivastava Vs St. of U.P. & anr. reported in 2015(4) UPLBEC 3388

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

1. Heard learned counsel for petitioner and learned State Counsel appearing on behalf of respondents no. 1 and 2.

2. In view of order being proposed to be passed, notices to respondents no.3 and 4 stand dispensed with.

3. Petition has been filed assailing the order dated 06.06.2022 passed by the District Inspector of Schools concerned whereby petitioner's representation for compassionate appointment has been rejected on the ground that she is divorced daughter of the deceased employee and therefore does not come within the definition of 'Family' as envisaged under Regulation No.103 of the Regulations framed under the Intermediate Education Act, 1921.

4. Learned counsel for petitioner submits that the petitioner's father Late Shiv Tahal Gupta was appointed Assistant

Teacher in the Intermediate College concerned on 08.09.1980, which was duly approved. While in service, he passed away on 26.09.2016 leaving behind his widow and the petitioner along with another daughter and son. It is submitted that at the time of passing away of her father, the petitioner was married but was subsequently divorced on 22.05.2019. It is submitted that the petitioner filed the application for compassionate appointment on 07.01.2021.

5. It is further submitted that the grounds for rejection of petitioner's representation is clearly against the Division Bench judgment of this Court rendered in the case of ***Smt. Vimla Srivastava versus State of U.P. and another*** reported in ***2015(4) UPLBEC 3388*** wherein it has been held that a daughter cannot be excluded from consideration only on the ground of her marital status. It is submitted that subsequently vide notification dated 12.11.2021, the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 which are pari materia were also amended by the State Government to include daughters (including adopted daughters) and widow daughters-in-law in the definition of the term 'family'. It is submitted that although there is no such corresponding amendment in Regulation 103 which is applicable in the present case but the proposition of law striking down the exclusion of married daughters would have the same applicability.

6. Learned State counsel refuting submissions advance by learned counsel for petitioner as submitted that under Regulation 103 of the aforesaid Regulations, there is no inclusion of a divorced daughter under the definition of term 'family'. It is submitted that the judgment rendered in the case of ***Smt. Vimla Srivastava*** (supra) as well as the amendment incorporated in the dying in harness Rules of 1974 are inapplicable in the present facts and circumstances since they apply only to Government Servants and not to teachers of Private Intermediate Colleges even though under grant-in-aid.

7. Upon consideration of submissions advanced by learned counsel for parties and perusal of material available on record, it is apparent that Regulation 103 of the Regulations aforesaid does not contemplate inclusion of a divorced daughter within the definition of the terms 'family'. It is however relevant notice that judgment rendered by Division Bench of this Court in the case of Smt. Vimla Srivastava (supra) had considered a similar rule under the Rules of 1974. The aforesaid judgment in paragraph 11 has considered the aspect and has held that the test in matter of compassionate appointment is a test of dependency within defined relation-ship. It has been held that the assumption that after marriage a daughter cannot be said to be a member of family of her father or that she ceases to be dependent on her father irrespective of social circumstances cannot be countenanced. Excluding daughters purely on the ground of marriage has been held to constitute an impermissible discrimination which would be violative of Articles 14 and 15 of the Constitution of India. The relevant paragraphs of the aforesaid judgment are as follows:-

"11. The stand which has been taken by the state in the counter-affidavit proceeds on a paternalistic notion of the position of a woman in our society and particularly of the position of a daughter

after marriage. The affidavit postulates that after marriage, a daughter becomes a member of the family of her husband and the responsibility for her maintenance solely lies upon her husband. The second basis which has been indicated in the affidavit is that in Hindu Law, a married daughter cannot be considered as dependant of her father or a dependent of a joint Hindu family. The assumption that after marriage, a daughter cannot be said to be a member of the family of her father or that she ceases to be dependent on her father irrespective of social circumstances cannot be countenanced. Our society is governed by constitutional principles. Marriage cannot be regarded as a justifiable ground to define and exclude from who constitutes a member of the family when the state has adopted a social welfare policy which is grounded on dependency. The test in matters of compassionate appointment is a test of dependency within defined relationships. There are situations where a son of the deceased Government servant may not be in need of compassionate appointment because the economic and financial position of the family of the deceased are not such as to require the grant of compassionate appointment on a preferential basis. But the dependency or a lack of dependency is a matter which is not determined a priori on the basis of whether or not the son is married. Similarly, whether or not a daughter of a deceased should be granted compassionate appointment has to be defined with reference to whether, on a consideration of all relevant facts and circumstances, she was dependent on the deceased Government servant. Excluding daughters purely on the ground of marriage would constitute an impermissible discrimination and be violative of Articles 14 and 15 of the Constitution."

8. It is also relevant to notice that a similar provision under the Rules of 1974 excluding a married daughter has been amended by the State Government vide notification dated 12.11.2021 to the effect that daughters (including adopted daughter) have now been included under the definition of 'family' of a deceased Government Servant. It is evident that the inclusion of the term daughters which includes adopted daughters has a very-wide import and is in the nature of an inclusive provision instead of an exclusive one. As such all the daughters of deceased Government Employee irrespective of her marital status is now included under the definition of term 'family' under the aforesaid Rules of 1974.

9. In the present facts, although the Rules of 1974 would not be applicable but it is seen that Regulation 103 of the Regulations under the Intermediate Education 1921 is pari materia to Rule 2(c) of the Rules of 1974, which are as follows:-

"[103. इस विनियमावली में दी गई किसी बात के होते हुए भी जहाँ किसी मान्यता प्राप्त सहायता प्राप्त संस्था का अध्यापक या शिक्षणेत्तर कर्मचारी वर्ग के किसी कर्मचारी की जो विहित प्रक्रिया के अनुसार नियुक्त किया गया हो, सेवा काल में मृत्यु हो जाये, तो उसके कुटुम्ब के एक सदस्य को, जो 18 वर्ष से कम आयु का ना हो, प्रशिक्षित स्नातक की श्रेणी में अध्यापक के पद रूप में या किसी शिक्षणेत्तर पद पर, यदि वह पद के लिये विहित अपेक्षित शैक्षिक प्रशिक्षण अर्हताये, यदि कोई हो, रखता हो और नियुक्ति के लिये अन्यथा उपयुक्त हो, नियुक्त किया जा सकता है:

स्पष्टीकरण- इस विनियम के प्रयोजनार्थ 'कुटुम्ब का सदस्य' का तात्पर्य मृत कर्मचारी:

विधया/विधुर, पुत्र, अविवाहित या विधवा पुत्री से होगा।

टिप्पणी- यह विनियम और विनियम 104 से 107 तक उन मृत कर्मचारियों के संबंध में लागू होंगे जिनकी मृत्यु 1 जनवरी, 1981 को या उसके पश्चात् हुई हो।]"

Rules of 1974:

2."(c) "family" shall include the following relations of the deceased Government servant:-

(i) wife or husband;

(ii) sons/adopted sons;

(iii) unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law;

(iv) unmarried brother, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent court:

Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him."

10. The concept for exclusion of a married daughter as indicated in the judgement rendered in the case of ***Smt. Vimla Srivastava*** (supra) thus would have complete applicability particularly since the exclusion of a daughter of a deceased Government Employee only on the basis of her marital status has been held to be against the specific provisions of the Constitution of India. The Constitution of India being the fountain head of all laws within the State thus would have primacy over all legislation or subordinate legislation including Regulations framed under the Intermediate Education Act, 1921. As such, the proposition of law enunciated in the case of ***Smt. Vimla Srivastava*** (supra) would have complete applicability on the regulations framed under the Intermediate Education Act, 1921 also.

11. In view of aforesaid, the exclusion of a daughter from the definition of 'family' under Regulation 103 of the Regulations framed under the Intermediate Education Act, 1921 is clearly against the provisions of Articles 14 and 15 of the Constitution of India as envisaged in ***Smt.Vimla Srivastava (supra)***

12. Considering the fact that the impugned order has rejected petitioner's representation only on the ground of marital status of petitioner although admitting her to be the daughter of a deceased teacher, clearly the said impugned order is violative of Articles 14 and 15 of the Constitution of India as also against the dictum of this Court in the case of ***Smt. Vimla Srivastava*** (supra) is therefore quashed by issuance of a writ in the nature of certiorari at the admission stage itself.

13. A further writ in the nature of mandamus is issued directing Respondent No.2 i.e. District Inspector of Schools,

Gorakhpur to revisit the petitioner's application irrespective of her marital status. The order pertaining to same shall be passed within a period of six weeks from the date a copy of this order is produced before the concerned authority.

14. Consequently, the writ petition succeed and is **allowed**. Parties shall bear their own costs.

(2022) 9 ILRA 912
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Criminal Appeal No. 212 of 2014

Satendra Kumar & Anr. ...Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioners:
Sri Mangala Prasad Rai, Sri Indra Kumar Chaturvedi, Sri S.K. Rao, Sri Saurabh Chaturvedi, Sri O.P. Singh (Sr. Advocate)

Counsel for the Respondent:
Govt. Advocate, Sri Ashok Kumar Pandey

Criminal Law - Indian Penal Code, 1860 - Section 302- Arms Act, 1959 - Section 25 -Land dispute-accused fired upon the deceased-defective, biased and prejudiced investigation-violation of all norms-implanted two persons as eye witness-planted cartridges and country-made revolver-and showed it as recovered on the pointing of accused-person cannot be judge in his own cause being informant/plaintiff of the Arms Act case-without interrogating the probable persons-not taking blood stained clothes-submitted chargesheet testimony of eye-witnesses - place of occurrence-doubtful-no dying declaration- deceased had inimical relations with several persons.

Appeal allowed. (E-9)

List of Cases cited:

1. Padam Singh Vs St. of U. P. (2000) 1 SCC 621

2. Rama Vs St. of Raj., reported in (2002) 4 SCC 571

3. Majjal Vs St. of Har. (2013) 6 SCC 798

4. Varkey Joseph Vs St. of Kerala, 1993 Supp (3) SCC 745

5. Munsi Prasad Vs St. of Bihar, AIR 2001 SC 3031, 3033

6. Raj Kishor Vs St. of Bihar, 2003 (47) ACC 1068 SC

7. Bhagwan Singh Vs St. of M.P., 2002 (44) ACC 1112 SC

8. Satnam Singh Vs St. of Raj., (2000) 1 SCC 662.

9. Bhagwan Jagannath Marked Vs St. of Mah., (2016) 10 SCC 537

10. Shyamal Ghosh Vs St. of W. B.l, AIR 2012 SC 3539

11. Sone Lal Vs St. of M.P., AIR 2009 SC 760

12. Sucha Singh Vs St. of Punj., (2003) 7 SCC 639

13. Dilawar Singh Vs St. of Hary., (2015) 1 SCC 737

14. Dhari Vs St. of U.P., AIR 2013 SC 308

15. Anil Rai Vs St. of Bihar, (2001) 7 SCC 318

16. St. of Bihar Vs Ram Padarath Singh, AIR 1998 SC 2606

17. Mehraj Singh Vs St. of U.P., (1994) 5 SCC 188

18. St. of M.P. Vs Dharkole, AIR 2005 SC 44

19. Paramjeet Singh Vs St. of Uttrakhand, AIR 2011 SC 200

20. Nagraj Vs St., (2015) 4 SCC 739

21. Wakkar Vs St. of U.P., 2011 (2) ALJ 452 SC, Nathuni Yadav Vs St. of Bihar, (1998) 9 SCC 238

22. Arun Bhanudas Pawar Vs St. of Mah., MANU/SC/7056/2008, (2008) 11 SCC 232

23. Sumer Singh Umed Shinh Rajput @ Sumer Shinh Vs St. of Guj., AIR 2008 SC 904

24. Maqbool Vs St. of Andhra Pradesh, AIR 2011 SC 184

25. Khem Ram Vs St. of H. P. , (2018) 1 SCC 202

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

27. Navinchndra N. Majithia Vs St. of Megh. & ors., (2000) 8 SCC 323

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

1. Heard Shri I.K. Chaturvedi, learned Senior Advocate assisted by Shri Saurabh Chaturvedi, learned counsel for the appellants, Shri Ashok Kumar Pandey, learned counsel for the informant and Shri Vikas Goswami, learned A.G.A. for the the State and perused the record.

2. This appeal has been preferred against the judgment and order dated 2.1.2014, passed by Additional Sessions Judge/Special Judge S.C./S.T. (Prevention of Atrocities) Act, Meerut, whereby the learned Trial Court convicted the appellants/accused persons under Section 302/34 I.P.C. and Section 3 (2) (5) of The S.C. and S.T. (Prevention of Atrocities) Act, 1989, and awarded life imprisonment and fine of Rs. 5,000/- each under Section 302/34 I.P.C., 10 years rigorous imprisonment and fine of Rs. 30,000/- each under Section 3 (2) (5) of The S.C. and S.T. (Prevention of Atrocities) Act, 1989, and in default of payment of fine they have to undergo three months simple imprisonment each under Section 302/34 I.P.C. & Section 3 (2) (5) of The S.C. and S.T. (Prevention of Atrocities) Act, 1989, out of Rs. 30,000/- Rs. 25,000/- had to go to Smt. Sushma, widow of the deceased. Accused Subhash was acquitted under Section 25 of the Arms Act in S.T. No. 614 of 2007 (State Vs. Subhash), Police Station- Lalkurti, District- Meerut, against which no appeal has been preferred by the State.

3. In brief the facts of the case are that on 8.3.2007, informant Narendra Bhan, moved a Tehrir before S.H.O. Lalkurti, Meerut at 11:30 A.M., that due to land dispute, Satendra Kumar and Subhash, sons of Babu Ram Sharma, with an intention to kill his brother fired upon him when he was coming to office at about 10.00 A.M. Both the miscreants were riding a motorcycle and his brother was on a scooter bearing No. UP 15 K-0927. He was admitted in Jaswant Rai Hospital; it was requested to take appropriate action.

4. On the basis of the Tehrir, a case under Section 307 I.P.C, & Section 3 (2) (5) of The S.C. and S.T. (Prevention of Atrocities) Act, 1989, bearing Case Crime No. 64 of 2007, was registered. Thereafter, the scooter of the deceased and a bullet was taken into possession from the spot. A map/site plan of the occurrence was prepared and medical report was obtained from Jaswant Rai Hospital. After death of the injured inquest report was prepared and Senior Sub Inspector (S.S.I) Umesh Chandra Yadav sent the dead body of the deceased for post-mortem and letters to Chief Medical Officer (C.M.O.) and Reserve Inspector (R.I.) Police Line, Meerut, were also sent. Photo Nash and Challan Lash were also prepared and accused were

arrested and sent to Jail. After taking them on police custody remand they were taken for recovery of the crime weapon. An illegal revolver of 38 bore, an empty cartridge form its barrel and two live cartridges of the said bore were recovered on the pointing out of accused Subhash from near the broken boundary of R.V.C. Farm, kept in white polythene. Accused Subhash admitted before the police that this was the revolver from which he fired at Bijendra Bhan and thereafter hid it there. An attempt was also made to recover weapon from the accused Satendra but in vain.

5. As per the prosecution version the recovery memo was prepared and copy thereof was provided to the accused Subhash and a map of the place of recovery was also prepared and after obtaining prosecution sanction charge-sheet was prepared and filed under Section 25 of the Arms Act, along with, charge-sheet under Section 307, 302 I.P.C. and Section 3 (2) (5) of The S.C. and S.T. (Prevention of Atrocities) Act, 1989, and a report from Forensic Science Laboratory, Agra, U.P. was also obtained and the same was kept on record.

6. Cognizance was taken by the concerned Magistrate on both the charge-sheets and both the cases were committed to the Court of Sessions on 19.6.2007. On 28.9.2007 charge was framed in both the sessions trials. The file of S.T. No. 613 of 2007 (Satendra Kumar and Another Vs. State of U.P.) was made leading file. Both the sessions trial was decided together by a common judgment.

7. Following witnesses were produced to prove the prosecution version:-

P.W.-1	Dr. Joseph Jamal Jaidi, Dr. Jaswant Rai Hospital, Meerut.
P.W.-2	Narendra Bhan, brother of the deceased and informant.
P.W.-3	Ajay Bhan, alleged eye-witness, son of the informant and nephew of the deceased.
P.W.-4	Dr. Sompal Singh, Dr. who conducted post-mortem.
P.W.-5	Shradhhanand Sharma, Constable Clerk.
P.W.-6	Achhendra Kumar Bhanu, alleged eye-witness, nephew of the deceased and the informant.
P.W.-7	S.I. Umesh Chandra Singh, first I.O.
P.W.-8	S.I. Harpal Singh, I.O. of case under Section 25 of Arms Act.
P.W.-9	Mukesh Kumar Meshram, the then D.M. Meerut.
P.W.-10	Dr. Brijesh Kumar Singh, C.O., second I.O.

Documentary evidence relied upon by the prosecution:-

Ex. Ka-1	Medical Report of the deceased
Ex. Ka-2	Tehrir
Ex. Ka-3	Post-Mortem
Ex. Ka-4	F.I.R. of Case Crime No. 64 of 2007
Ex. Ka-5	Kayami Case G.D. dated 8.3.2007
Ex. Ka-6	Entry of Tehrir in G.D.
Ex. Ka-7	Chick F.I.R. of Case Crime No. 73 of 2007
Ex. Ka-8	G.D. Entry dated 15.3.2007
Ex. Ka-9	Recovery Memo of Scooter
Ex. Ka-10	Recovery Memo of Bullet
Ex. Ka-11	Site-plan of Case Crime N. 64 of 2007
Ex. Ka-12	Inquest
Ex. Ka-13	Letter to C.M.O.
Ex. Ka-14	Letter to R.I.
Ex. Ka-15	Photolash
Ex. Ka-16	Challan Lash
Ex. Ka-17	Specimen Seal
Ex. Ka-18	Arrest Memo of the accused Satendra Kumar and Subhash Chand
Ex. Ka-19	Recovery Memo of illegal revolver of .38 bore and empty and live cartridges

	regarding case crime no. 64 of 2007
Ex. Ka-19A	Search Memo of weapon regarding Case Crime No.64 of 2007
Ex. Ka-20	Site plan regarding Case Crime No. 73 of 2007 under Section 25 of Arms Act
Ex. Ka-20A	Recovery Memo of illegal revolver alongwith empty and live cartridges of .38 bore regarding Case Crime No. 64 of 2007
Ex. Ka-21	Charge-sheet under Section 25 of Arms Act against accused Subhash
Ex. Ka-21A	Site plan regarding search of weapon as alleged by the accused Satendra regarding Case Crime No. 64 of 2007
Ex. Ka-22	Prosecution Sanction
Ex. Ka-22A	Charge-sheet against accused regarding Case Crime No. 64 of 2007
Ex. Ka-23A	Report of Forensic Science Laboratory Agra, U.P.

Material Exhibits produced and proved by the prosecution:-

Material Ex. 1	Alleged recovered country made revolver
Material Ex. 2	Empty cartridge
Material Ex. 3 & 4	Live cartridges
Material Ex. 5	Clothes
Material Ex. 6	Bullet recovered from the place of occurrence

It may be noted that the bullet recovered from the dead body was neither produced, nor, proved in the Court.

8. After closure of prosecution evidence statements of accused persons were recorded under Section 313 Cr.P.C. wherein, both the accused persons denied the allegations, documentary and oral evidences produced by the prosecution. They stated that false recovery was made by the I.O. According to them, witnesses have given false evidence on account of enmity and both the alleged eye witnesses, P.W.3 and P.W. 6, are real nephew of the deceased and son and nephew of informant P.W.2 Narendra Bhan. Accused Subhash stated that there is property dispute between his uncle, deceased- Bijendra Bhan, Satendra Som and Yogendra Som, who were tenants of his uncle. His uncle had sold their property to them and when they came to take possession then dispute arose, therefore, his uncle in connivance of the tenants falsely implicated both the brothers in the murder of Bijendra Bhan. When they were sent to jail, Satendra and Yogendra, again reoccupied their plot. There was no enmity between the deceased and the accused persons. All the witnesses of fact are the family members of the deceased who have falsely deposed against them due to enmity. Accused Satendra in addition to that has clarified that being brother of Subhash his uncle has falsely implicated him in connivance with Satendra and Yougendra.

9. Oral evidence from the side of accused persons:-

D.W.-1	Vinod, owner of close tea stall.
D.W.-2	Pankaj Kumar Sharma, Yoga Teacher.
D.W.-3	Mohd. Ayub, a prisoner in lockup of P.S. Nauchandi.
D.W.-4	Chandra Shekhar, property dealer.
D.W.-5	Vineet Kumar, employee of Sushila Jaswant Rai Hospital.
D.W.-6	Sanjay Khare, Scientist/Arms specialist, F.S.L. Agra.

Documentary evidence from the side of defence:-

Ex. Kha-1	Certified copy of the admission register of the deceased in Sushila Jaswant Rai Hospital.

10. Submissions:

In brief, the learned counsel for the appellants has made the following submissions :-

(a) That the conviction and sentence passed by the trial Court is against the weight of evidence. The trial Court has not considered the material facts available on record and on the basis of conjectures and surmises passed the impugned order which is against the law and facts and is liable to be set-aside.

(b) That P.W.-1, the doctor who examined the injured has categorically stated that condition of the deceased was too critical and was immediately kept on ventilator and while on the ventilator he succumbed to the injuries. Thus, there was no occasion for the deceased to communicate anything to any of the witnesses.

(c) That it is admitted by the prosecution that informant of the case Narendra Bhan (P.W.2) was not present at the time of the incident and he has admitted in his testimony that he came to know about the incident and the deceased being admitted to the hospital in an injured condition later. P.W. 2 was on duty in the court and after getting the information from another employee regarding the incident and the admission of his brother in the hospital, firstly, he moved an application before the Presiding Officer for granting leave, thereafter, he proceeded to the hospital where the injured was kept on the ventilator, thus, he is not the eye witness of the incident and no pre- death statement had been given by the deceased to the informant.

(d) That other alleged eye witnesses of the incident are Ajay Bhan (P.W.3) and Akshendra Kumar Bhan (P.W.6) who are the son and nephew of the informant, but their names were also not mentioned in the F.I.R. Further, no other evidence corroborates the fact that they were present at the time of the incident. They being the close relatives of the deceased and after lodging of the F.I.R. they were setup as eye witnesses.

(e) That it is admitted by the prosecution and established from the evidence of defence that there was property dispute (sale deed paper no. 114 Kha) and a copy of F.I.R. being case crime no. 124 of 2003, wherein charge-sheet, has been submitted against the informant and the deceased which indicates admitted enmity with appellants.

(f) That, further, it appears that deceased dealing in property was shot by some other persons in order to take revenge, the appellants have been falsely implicated in the present case due to admitted enmity. It is also evident from the prosecution case that the place of occurrence is not the actual place of occurrence as no blood was found on the spot, though deceased had received six gun shot injuries, three entry wounds and three exit wounds, meaning thereby, there should have been a pool of blood on the spot, but nothing was recovered by the I.O. in this regard no recovery memo was prepared.

(g) That it appears that the deceased was shot somewhere else and his body was thrown at the place which the prosecution claims to be the place of incident. The appellants have been convicted on the oral testimony of the alleged eye witnesses P.W.-3 and P.W.-6 who are close relatives of the deceased and the confessional statement of the accused. The testimony of the eye witnesses is false and untruthful. It is a case of no evidence. .

11. Scope of Appeal under Section 378 Cr.P.C.:

This is an appeal against the judgment and order of conviction. The duty of Appellate Court has been highlighted by the Supreme Court in several cases, some are noted herein below :

In ***Padam Singh vs. State of U. P. (2000) 1 SCC 621,*** while dealing with the duty of the Appellate Court, Supreme Court expressed as follows :

"2.... It is the duty of an appellant court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. It must be remembered that the appellate court, like the trial court, has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final Court of Appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court."

Similarly, in ***Rama Vs. State of Rajasthan, reported in (2002) 4 SCC 571,*** the Hon'ble Apex Court has also cast duty upon the appellate court in the following terms:-

"4.....It is well settled that in a criminal appeal, a duty is enjoined upon the appellate court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law."

Furthermore, in **Majjal Vs. State of Haryana (2013) 6 SCC 798,** a three Judge Bench of the Apex Court has ruled thus: -

"7. It was necessary for the High Court to consider whether the trial court's assessment of the evidence and its opinion that the appellant must be convicted deserve to be confirmed. This exercise is necessary because the personal liberty of an accused is curtailed because of the conviction. The High Court must state its reasons why it is accepting the evidence on record. The High Court's concurrence with the trial court's view would be acceptable only if it is supported by reasons. In such appeals it is a court of first appeal. Reasons cannot be cryptic. By this, we do not mean that the High Court is expected to write an unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which go to the root of the matter."

Accordingly, this Court proceeds to consider and decide the Appeal in accordance with the principles laid down by the Supreme Court.

12. Statements of prosecution witnesses and its analysis/scrutiny :

(a) **P.W.-1 Dr. Joseph Jamal Zaidi,** attended the deceased in injured state at 10:40 A.M. on 8.3.2007, in Sushila Jaswant Rai Hospital, Meerut, has proved the injury report Ex. Ka-1 and stated that when he saw the injured, the injured had not fallen unconscious, but was in a drowsy state. Diastolic B.P. was not showing while systolic B.P. was 60. Pulse was very feeble and hardly palpable. This witness has found

that patient sustained multiple fire-arm entry and exit wounds over lower chest and upper abdomen. Blood was arranged but the patient could not be revived. Pupils became fixed and not responding to light.

Normally name of the person/hospitalizer of the injured is written in the beginning, but in this case first four lines and last few lines of the report appear to have been written later after preparation of the injury report. The sentences are in different handwriting and ink, it is noted, further, that the deceased was brought by P.W.-2 Narendra Bhan, brother of the deceased. It also establishes that the patient was not brought by P.W.3 and P.W.6, who claim to be eye-witnesses, otherwise their names would have found place in the injury report. Even the name of the patient Bijendra Bhan has been written, above the drawn lines, in another handwriting. This witness admits that he has not written the particulars of the patient and below the injury report Left Thumb Impression (LTI) of Narendra Bhan, son of Harikishan, was also not in his handwriting.

(b) P.W.-2, Narendra Bhan- informant, Reader of the then Additonal Sessions Judge (A.D.J.) Court No. 16, in Civil Court, Meerut, has deposed that there was property dispute between him and accused persons. He proved the Tehrir (Ex. Ka-2) wherein, he has written that on 8.3.2007, at about 10:00 A.M. when his brother was coming to the Court, near Hanuman Temple, Sophipur, accused Satendra and Subhash, shot his brother Bijendra Bhan, who was on a scooter, with an intention to kill him. Accused persons were on motorcycle. After receiving information at the Court he reached Sushila Jaswant Rai Hospital, thereafter, lodged the F.I.R. Bijendra Bhan died on the same day in the hospital. He, further, deposed that the incident was seen by witnesses Ajay Bhan(P.W.3), Satendra and Achhendra Bhan (P.W.6). His brother Bijenndra Bhan had also informed him during treatment that due to property dispute accused persons caused fire-arm injuries.

(i) It is noteworthy that only Ajay Bhan (P.W.3) and Achhendra Bhan (P.W.6), who are real nephew of the deceased and son of the informant have come forward in support of prosecution, but independent witness Satendra has not been examined. According to this witness, P.W.6 does his own business, whereas, Achhendra Bhan, (P.W.6), in contradiction has stated that he was working with Marshal Security, Abu Lane, Meerut. P.W.2 does not claim to be eye-witness, but stated that deceased before death had informed him about the incident and the accused persons. This fact shall be dealt later in the light of statements of other witnesses. This witness admittedly received information of the incident at 10:40 A.M. from one Arvind Kumar Gupta, Munsarim Munsif Hawali. Thereafter, he prepared casual leave application and got it sanctioned from the presiding officer, thereafter, proceeded to the hospital. As per F.I.R, deceased was admitted in hospital at 10:40 A.M. Thus, this witness would have reached the hospital after 11:00 A.M. During cross-examination this witness has admitted and expressed ignorance about several facts, including, enmity of the deceased within the family, and other persons, other than the named accused persons.

(ii) P.W.2 has further deposed that after inquest, body of the deceased was carried by the police for post-mortem. He expressed ignorance about the vehicle on which the dead body was brought to post mortem house and also admits that no family member had accompanied the dead body to the post-mortem house. He also expressed ignorance as to who donated

blood; he admits that at the time of the incident, deceased was having Mobile Phone bearing No. 9412707982, but its C.D.R. has not been obtained by the I.O. to fix the place of occurrence. It is also noteworthy that no blood stained and plain earth/soil/part of tar-coal road was taken from the spot which is essential to establish the place of occurrence. In this regard no laboratory report was obtained by the I.O. In this backdrop it is argued, from the appellants' side, that place of occurrence is somewhere else and the body was thrown at the alleged place of occurrence.

(c) P.W.-3, Ajay Bhan, claims to be eye-witness, in brief, he claims himself to be L.I.C. agent in L.I.C. branch Saket Meerut and eye-witness of the incident, deposed that at about 9:35 A.M., he on scooter and his cousin Achhendra Bhan on motorcycle were going to Meerut. When they reached on Roorki Road, his uncle, Bijenrdra Bhan, overtook them by scooter. On his uncle reaching near Sophipur Temple, Satyendra and Subhash, both real brothers, shot at Bijendra Bhan, who fell down and thereafter both the assailants fired at him with intention to kill him. This incident was seen by his cousin Achhendra Bhan and Satendra Som. He deposed that Subhash had fired 3-4 bullets at waist and side of the deceased, thereafter, the deceased parked the scooter and fell down. They parked their vehicles and transported Bijendra Bhan at Sushila Jaswant Rai Hospital. Relevant part of his statement has been recorded at paragraph no. 16 to 21.

(d) **P.W.-4, Dr. Sompal Singh,** conducted autopsy/post-mortem and found the following injuries on the body of the deceased:-

He found that rigor-mortis was head downwards. There was dried blood smeared over the body. There was fracture of L3 vertebrae. 11th rib of right side was under injury. Right side pleura was lacerated, right lung was lacerated, vessels were lacerated, there were clotted blood and fluid in the right side pleural cavity. Peritoneum was lacerated and in its cavity 2.5 kg clotted blood and fluid was present. In stomach only 50 ml. watery fluid was present. Small and big intestine were lacerated. Liver was also lacerated. Spleen was pale. Both kidneys and gall bladder was lacerated .

(i) Following ante mortem injuries were found on the person of the deceased:-

i. Gun shot wound (GSW) entry 1 - 1x1 c. m. X bone deep on back mid line lumber vertebral column at the level of L3. Margins inverted blackening present. Bone fracture under injury.

ii. GSW exit 2 --1 x 1 c.m. correspond injury no. 1, wound of entry on abdomen 5 c.m. below from umbilicus at 6 'O' Clock position. Margin everted.

iii. GSW 3 Entry- 1x 1 c.m. right lateral side of abdomen involving lower part of chest. 11 c.m. above. ASIS margin irregular, blackening present, 11th rib fracture under injury, no penetration wound found.

iv. GSW Entry - 1 x 1 c.m. x chest cavity deep - right lateral side chest 16 cm. above injury no. 3. 6th and 7th ribs fractured under injury. Margins inverted with blackening.

v. GSW exit- 1 x 1.5 c.m. correspond to injury no. 4 wound of entry on left lateral side of abdomen 8 cm. above left ASIS. Margin everted.

vi. GSW entry - 1 x 1 c.m. X abdominal cavity deep on right lateral side of abdomen 13 c.m. above (right ASIS).

(ii) One metallic bullet was recovered from soft tissue of left side abdomen near costal margin. Body was sent for X-ray for any foreign body. X-ray

film number 1675 to 1680 dated 8.3.2007, copy of X-ray slip was also attached with post-mortem report.

(iii) In cross-examination this witness has admitted that considering the nature of the injuries there was possibility of immediate death of the deceased, though, as per the death certificate issued by Jastwant Rai Hospital, the deceased died at 1:00 P.M. He admits that he has not written the time of death. He further admits that having regard to the injuries there is possibility of death of the deceased on the spot. On being inflicted serious injuries deceased would not be in a position to speak.

(iv) In the backdrop of the evidence of P.W.-4, the deposition of P.W.2 that the deceased had informed the name of accused persons while in ICU is improbable or falsified. P.W.4 further opined that deceased must have taken meal 6 to 8 hours before receiving the fire arm injuries, as 50 ml. watery fluid was found in stomach of the deceased. Therefore, deposition of P.W.2 that deceased left the house, for the Court, after taking meal in the morning is falsified. P.W. 4 further deposed that most of the organs of the deceased had been torn/lacerated. Having regard to the nature of the injuries, moving-walking or the possibility of the deceased driving scooter is not possible. The testimony of this witness also casts doubt in the manner of attack explained by the prosecution. According to this witness the I.O. had not recorded his statement.

(e) **P.W.-5, Shradhha Nand Sharma,** constable/clerk, who on the basis of Tehrir prepared chick FIR and after death of the deceased added Section 302 I.P.C. and entered it in GD No. 21 at 11:30 A.M. This witness further states that GD No. 25 regarding addition of Section 302 I.P.C. was prepared by him at 2:10 PM. After alleged recovery of fire arm and bullet on the pointing out of accused Subhash a case under Section 25 of Arms Act bearing Case Crime No. 73 of 2007 was lodged at 11:45 AM on 15.3.2007. This witness has prepared chick F.I.R. Ex. Ka-7. In this regard G.D. was prepared by him at 1:30 P.M. and has proved it as Ex. Ka-8.

According to this witness he did not receive the clothes of the deceased, nor, pathological or scientific report was obtained with regard to presence of blood on the clothes of the deceased. He stated that after recovery, accused were brought to the lockup. He admits that clothes received from post-mortem house was neither sealed by the I.O., nor, sent for examination.

According to the learned counsel for the appellants forged and fictitious recovery memo was prepared on the pointing out of accused Subhash. As per the F.S.L. Report, bullets and cartridges recovered from the place of occurrence and from the body of the deceased do not match with the so called recovered country made pistol.

(f) **P.W.-6- Achhendra Kumar Bhan,** is the real nephew of the deceased. According to him on the date of incident he was serving in Abu Lane Marshal Security, Meerut. On 8.3.2007 he started his journey from his house at 9:45 A.M. for Meerut. According to him when he and P.W.3 Ajay Bhan, reached near Roorkee Road, his uncle overtook them by scooter. When he reached in front of Sophipur then a motorcycle driven by accused Satendra overtook them on which accused Subhash was a pillion rider. When they (accused) reached near the deceased, first Subhash shot the deceased and accused fell down. Thereafter, Satendra and Subhash both fired with an intention to kill the deceased, thereafter, ran away towards Modipuram. According to P.W.5 this incident was

witnessed by him, Ajay Bhan and Satyendra Som of his village. The incident took place at 10:00 A.M. on 8.3.2007. Thereafter, it is stated that they carried their uncle in injured state to the hospital and handed him to the officials of the hospital, who carried the injured to I.C.U. After sometime his uncle (P.W.2) reached and completed the admission formalities. On the same day injured Bijendra Bhan died during treatment. P.W.5 and Ajay Bhan narrated the story of the incident to his uncle Narendra Bhan(informant).

According to P.W.5 the informant Narendra Bhan reached the hospital after admission of the injured in I.C.U. It has come in evidence that the deceased immediately was intubated and put on ventilator. The doctor did not find the injured in position to give dying declaration, therefore, no information was sent to police/Magistrate. In case of intubation and patient being put on ventilator, there was no possibility that the injured could speak or had told anything to anyone. This witness does not say that prior to death of the deceased there was any talk between the informant and the deceased.

(g) **P.W.-7, Umesh Chandra Singh Yadav:-** This witness has proved the alleged recovered revolver (M Ex. 1), empty cartridge (M Ex. -2), live cartridges (M Exs. 3 and 4), clothes (M Ex. 5). Bullet alleged to be recovered from the place of occurrence was produced unsealed in the Court. It is proved (M Ex. 6). He admits that C.O. Brijesh Kumar Singh is the informant/plaintiff of the case under Section 25 Arms Act, but it was investigated by S.I. Mithun Dixit (it is against the procedure and principle of natural justice, though the accused has been acquitted on the basis of F.S.L. report for the charge of Section 25 Arms Act, finding him to have been falsely implicated and no appeal has been preferred by the State). This witness admits that since beginning. Section 3 (2) (5) of The S.C and S.T (Prevention of Atrocities) Act, 1989, was mentioned in the Chick F.I.R. But Circle Officer (C.O.) was out of station therefore on the oral direction of the Inspector he started the investigation but he did not mention this fact in G.D. Further, he deposed that after one hour when he received death memo of the injured, he added Section 302 IPC. (i) He reached the hospital and completed inquest proceeding there. He admits that he started inquest at 14:30 hours and finished at 14:45 hours but by mistake he has written A.M. He also admits that he faulted in writing 15:45 instead of 14:45 (time of closure of inquest proceeding). He admitted that he did not receive the signature of the constables by whom the dead body was sent for post-mortem. He admits that being I.O. he had not taken clothes of the deceased. He further stated that he had visited the place of occurrence with the informant, no one else accompanied them.

(ii) It is material to note that if informant is not the eye-witness, whereas, P.W.3 and P.W. 6 have seen the occurrence, but the I.O. prepared site plan in absence of both or anyone of them. Meaning thereby, till then prosecution had not decided that Ajay Bhan P.W.3 and Achhendra Bhan P.W.6 were to be produced as eye-witnesses. Further, he admits that where the incident took place is in midst of military area. There is Gol Bhatta, Military Check Post and Military Farm, where armed military guards always remain present. According to P.W.7 at the time of his visit, no guards were there so he did not record the statement of anyone. According to him priest of the temple was also not present. He admits that he visited the spot only once. He admits that he did not enquire

about the scooter because according to him there was no abnormality in it as it was in running condition, so he did not send the scooter for technical examination. He found no damage to the scooter but he was unable to say whether there was blood on the scooter or not.

(iii) Further P.W.7 deposed that he found 315 bore empty cartridge on the spot but the recovered revolver relates to 32 bore from which recovered cartridge can not be operated (as per FSL report the .38 revolver and the 315 cartridge was not sent for examination to FSL and in this regard no investigation has been done by any of the I.O.). According to him they had not operated the revolver recovered from Subhash. Further, he deposed that soiled bullet was found on the spot. He admits his mistake that he had not sent the soil for examination. He admits that no empty cartridges or bullet of 9 m.m. was recovered from the spot. But in view of Ex. Ka- 23 FSL report bullet recovered from the dead body EB1 and bullet EB2 found from the place of occurrence are 9 mm bullets.

(iv) According to P.W.7 revolver relates to 32 bore while it is a country made pistol of .38 bore. The witness admits that the bullet can not be operated from the recovered revolver. P.W.7 arrested the accused persons next day at 7:00 A.M. and produced them at 12 hours in Court. He admits that accused persons had not resisted, nor, received any injury during the course of their arrest and they had not escaped after the incident, (this proves that they had no apprehension of being named for the murder of deceased and that they would be arrested for the crime, otherwise, they would have in normal circumstances left the house and absconded). No cash was recovered from their possession. P.W.7 admits that he had not sent the revolver to the finger print expert. He further states surprisingly that the case diary dated 8.3.2007 and 9.3.2007 was not written by him but might have been written by the driver. He admits that he had not taken clothes of the deceased in his possession.

(j) **P.W.-8 - S.I. Harpal Singh** is the second I.O. of the case under Section 25 Arms Act, he received the investigation from S.I. Mithun Dixit. According to this witness first of all he read over the CD recorded by the first I.O., thereafter, recorded the statement of informant C.O., B.K. Singh and witnesses of recovery HCP Keshav Dutt Sharma, constable Ratan Singh and driver Ashok Singh. On the pointing of HCP K.D. Sharma, visited the place of recovery and prepared site plan and proved it (Ex. Ka-20). He also recorded the statement of S.S.I. Umesh Chandra Yadav, HC Devendra Singh, constable Shyoraj Singh and constable Bijendra Singh. On 7.5.2007 he received sanction order from the then D.M. (while as per sanction order Ex. Ka-22 and statement of P.W.9, Mukesh Kumar Meshram, the then D.M., sanction was given on 9.4.2007) and finding accused Subahsh guilty under Section 25 Arms Act submitted the charge-sheet and has proved it (Ex. Ka-21). In cross-examination he admits that he had not moved any application to receive the case property from Malkhana. It proves that from the Malkhana of P.S. Lalkurti Meerut, any case property could be easily taken out any time and could be deposited any time in any manner. According to him the sealed arm and ammunition was opened before the City Magistrate (not before District Magistrate). According to him clerk of City Magistrate has taken the case property. He admits that he has not disclosed in CD that the case property was produced before the D.M. He admits that CD paper was seen by DM and in this case the same C.O. was the

informant (of the case under Section 25 Arms Act). He admits that any person is accessible to the farm where from case property was recovered. He could not say which crop was sown there. He could not remember that marks of police visit were present on spot or not. *(These shortcomings show that this witness did investigation in casual manner and under the undue influence of the informant CO who approved the charge-sheet in violation of natural law as impliedly he was capable of making unwarranted interference and controlling the investigation).* He could not remember the kind of truss on the case property. He admits that City Magistrate had seen the revolver by operating it. (City Magistrate can not do so, it was to be sent to the FSL only in the condition that it was found). He admits that he went to D.M. with the case property but he was not there *(meaning thereby it is not established that he produced the case property before D.M. and after satisfying himself the DM had given prosecution sanction under Section 39 of the Arms Act).*

(j) **P.W.-9 Shri Mukesh Meshram,** District Magistrate, Meerut, deposed that on 9.4.2007 he, after reading the whole case diary and after opening the truss of the case property observed the case property and after that he had granted the prosecution sanction. After sealing the case property it was returned with the case diary. He has proved the prosecution sanction as Ex. Ka-22. He has denied the suggestions given by the defence counsel that the sanction was granted without looking the case diary and the case property or it was not again sealed before him.

(k) **P.W. 10- Circle Officer (C.O.)- Brijesh Kumar Singh,** I.O. of the case deposed that on 10.3.2007, he was posted as C.O. Sadar Meerut. He recorded the additional statement of informant Narendra Bhan, Ajay Bhan and Achhendra Bhan the eye witnesses (meaning thereby till 10.3.2007 they were not found, nor, considered by the previous I.O. as eye witnesses, and this I.O. finding no evidence case has shown them as eye witnesses to make up for the shortfall).

(i) On 12.3.2007 he recorded the statements of Vinod and Sukhpal. He moved application on 14.3.2007 for getting police custody remand of the accused persons which was allowed and on 15.3.2007, the alleged arm and ammunition was recovered from inside the RVC Farm. No arm could be recovered from accused Satyendra. According to this witness the recovered revolver was sealed on the spot. Recovery memo was written by S.S.I. Umesh Yadav on his dictation. He with police personnel and accused had signed the recovery memo (Ex, Ka 19 A). According to him site map was prepared by him on 16.3.2007 (Ex. Ka 20A). On 16.3.2007, he prepared another map regarding failed attempt to make recovery from accused Satynedra (Ex. Ka 21A).

(ii) It is to be noted that the informant is reaching on the spot of recovery next day and the map is prepared by the S.I., whereas, it is the duty of the I.O. Harpal Singh (I.O.) visited the place of occurrence on 29.3.2007 and prepared the map regarding recovery from accused Subhash. He has copied the map prepared by his boss, C.O., B. K. Singh. This witness has earlier not deposed that two live cartridges and one empty cartridges was recovered from the place of recovery, but after opening the truss, the articles that appeared before him, he proved it. Revolver was exhibited as material Ex. 1, empty cartridge as material Ex. 2, two live cartridges as material Ex. 3 & 4 and clothes as material Ex. 5. On 12.4.2007, he copied the inquest report and post mortem in C.D.

On 16.4.2007 he recorded the statement of Smt. Sushma, widow of the deceased. On 2.5.2007 he recorded the statement of the witnesses Satendra Kumar, Dev Pal Singh and Shri Kishan. On 26.5.2007 he recorded the statement of Sunil Kumar, Priya Bhan, Gajendra Bhan and Narendra Bhan. On 27.5.2007 he recorded the statements of witnesses Rajiv and Mahkar Singh. On 28.5.2007 he recorded the statement of Dr. S.P. Singh *(it is denied by doctor P.W.4)* and submitted the charge-sheet (Ex. Ka 22A).

(iii) The relevant points that come across from cross-examination of P.W.10 is that he does not know which officer had visited the spot. He admits that he neither visited Jaswant Rai Hospital, nor, recorded the statement of any doctor or workman of the hospital. He also did not verify the papers received from the hospital. According to him he did not pay attention on the report of Dr. Zaidi who first attended the injured and noted the injuries. According to him he acted, in accordance with the post mortem report. On 11.3.2007 he visited the place of occurrence with the informant and the witnesses but not the eye witnesses. He admits that he inspected the spot on the pointing of the informant *(not on the pointing of the alleged eye witnesses)* and the map was in conformity with the map prepared by S.S.I. Umesh Chandra Yadav. He did not find any evidence that day on the spot. According to him there are Army Farms on both sides of the place of occurrence; there is a temple and 18 to 19 shops, wooden shops and bus stop. He admits that military personnel always remain at the military post, but he did not record the statement of any one of them, but considered the spot and the scene of the incident on the statement of the ex I.O. and the informant. According to him, Ajay Bhan (P.W.3) had stated to him that Subhash had fired at the back of the deceased and deceased had fallen down on the spot. Satendra of his village was there. Similar statement was given by Achhendra Bhan (P.W.6) to him. He admits that C.D. was not written by him but was written by Head Constable. He further states that neither first I.O., nor, did he find blood on the spot. He recorded additional statements of both the eye witnesses on 26.5.2007. He did not search for the three wheeler whereon the deceased was taken to hospital. He did not verify that whether the witnesses actually do the job which they claim are doing or not.

(iv) Whereas, according to Achhendra Bhan he works in Marhsal Security Abu Lane Meerut and Ajay Bhan does L.I.C. work in Saket. As per P.W.2, informant, Narendra Bhan, P.W.6 Achchendra Bhan does bottle related work in Kankar Khera. Therefore, there was no occasion for Achhendra Bhan to come to Meerut and remain present on the spot at the time of occurrence. In these circumstances it was necessary for the I.O. to verify the place of work and job of the witness Achhendra Bhan. It appears that only for the purpose of being eye witness, this witness stated to be working with Marshal Security Abu Lane, Meerut, which has not been verified by the I.O. In this situation even P.W.6 can not be said to be chance witness, far from being eye witness. P.W.10 admits that there are different routes to reach Abu Lane and Kankar Khera from village Dorli Roshanpur. This evidence also undermines the presence of P.W.6 at the scene.

(v) P.W.10 admits that the case property was sent very late for FSL report on 27.5.2007. He also admits that case property was returned by FSL Agra, for proper stamping by City Magistrate and Doctor. (It shows casual approach on the

part of the I.O.) He admits that the place of first fire arm shot has not been shown in the map. He did not enquire about the enmity between the witness Satendra Som (not examined) and the accused persons. He could not explain the reason of delayed recording of statement of Satendra Som on 2.5.2007.

(vi) According to this witness accused persons had confessed the commission of crime on the day of their arrest but was unable to explain as to why recovery was not made by the first I.O. He admits that no motorcycle alleged to have been employed in commission of the crime was ever traced. According to this witness, witnesses had not informed that in Panchayat, deceased and witnesses Ajay Bhan and Acchendra Bhan had fired at Vinod Kumar a villager. He states that he can not say anything about dying declaration, thus, the alleged dying declaration by the deceased to P.W.2 is not being supported by the I.O. Further, he deposed that only previous I.O. can say in this regard. First I.O. has also not deposed that any dying declaration was made by the deceased. This witness could not tell about the way/path of visiting the place of recovery. He admits that he can not tell how the interior of the Farm looks from the street. He does not remember the length of the wall. He could not tell the extent of the wall and whether the level of road and place of recovery was even or not. He could not say about the crop sown in the Farm. He could not say about the enmity between the deceased and the other persons, though, he admits that the deceased had enmity regarding land with other persons also. He admits that he has not seen the clothes of the deceased. According to him witnesses had not informed him that the son-in-law had attacked the deceased twice earlier. *(It shows that this officer has done the investigation in very casual manner, the clothes of the deceased were not sent for examination by the first I.O., it was his bounden duty to send the same for FSL report, wherein, the holes could establish characteristic of fire arm injury or the clothes would have been found scorched. This could also have established the distance wherefrom the deceased was shot.)*

13. Truthfulness of the contents of the F.I.R. :

(a) P.W.-2 Narendra Bhan, brother of the deceased, a Civil Court employee, lodged F.I.R. at 11:30 A.M. on 8.3.2007, alleging that due to property dispute his younger brother Bijendra Bhan was shot by the accused persons, residents of the same village Roshanpur Daurali Meerut, near Sofipur Mandir, at about 10:00 A.M. while his brother was coming to the office on his scooter. The accused persons were riding a motorcycle. His brother was admitted in Jaswant Rai Hospital.

(b) The chick F.I.R. (Ex. Ka-1) was prepared at about 11:30 A.M. and it was entered into G.D. at serial no. 21. In the F.I.R. informant has not mentioned the name(s) of the witnesses, nor, he has claimed himself to be an eye witness. The alleged eye witnesses P.W.3, Ajay Bhan, son of the informant and P.W.-6, Achhendra Kumar Bhan, nephew of the informant and the deceased are also not mentioned as eye witnesses of the incident. Though as per the informant P.W.3 and P.W.6 informed him of the incident at the hospital. The motive set up was land dispute. As per the F.I.R. there is no eyewitness of the incident.

(c) From the perusal of the deposition of informant, P.W.-2, Narendra Bhan, it is established fact that P.W.-2 was

not present on the spot and was not accompanying the deceased at the time of incident. According to P.W.-2 on 8.3.2007, he proceeded for his office (Civil Court) from his house at 9:30 A.M. and reached the office at 9:45 A.M., he received information of the incident at 10:40 A.M. from one Arvind Kumar Gupta, when he was in the court. From his evidence it is evident that the alleged eyewitness P.W.-3 and P.W.6 who are his son and nephew had not informed him of the incident until then, nor, were they present in the hospital. As per the medical papers injured was not brought by them. After receiving information of the incident P.W.2 moved an application for casual leave before the presiding officer and informed him about the incident. The application was accepted, thereafter, he reached Jaswant Rai Hospital. He admits that he alone went to the hospital which is about 700 to 800 meters from the Civil Court. According to him at the time of incident deceased Bijendra Bhan was posted as suit clerk in the vacant court of Sixth Additional Civil Judge. P.W.2 informed the Senior Administrative Officer of the Civil Court. He has also admitted that deceased was ex-secretary of Civil Court Employees Association, Meerut Branch. According to him in Jaswant Rai Hospital several persons, viz. Girish Chandra Tyagi, Omveer Sharma, Jitendra etc. had reached. Some advocates had also reached but he could not tell their names. He admits that he did not ask Arvind Kumar as to who had given the information to him.

(d) From the aforesaid evidence of the informant it is obvious that even alleged eyewitnesses P.W.3 and P.W.6 had not reached the hospital, neither, with the informant, nor, later on with other persons who reached the hospital after hearing about the incident. This witness has said that when he reached the hospital he found his brother intubated and was on ventilator in I.C.U., he further states, he asked the injured about the assailants and the deceased replied. He further deposed that when he saw the dead body and at the time the dead body was sealed it was in an underwear.

14. On the basis of the evidence of the informant, it is established that the informant had not met the deceased after the incident, but he could reach the hospital when the injured had been intubated and was on ventilator. It is also noteworthy that no dying declaration was recorded, either by any private person, by the police, doctor or by the Magistrate. Doctor does not depose that the injured was in a position to speak or to say something, if it had been so, doctor himself would have asked the police to call the Magistrate to write the dying declaration. Considering the serious condition of the deceased it is probable that deceased did not tell anything to the informant about the assailants and the incident, or was in a position to speak. It is not the case of prosecution that deceased pointed out about the assailants by gesture or he was in position to do so.

15. This witness also admits that when he reached the hospital he found that his brother's wounds were bandaged. He further admits that when he reached I.C.U. Dr. Zaidi was attending his brother; at the moment his brother told the names of accused persons the doctor was not there. He could not say that whether the doctor heard their conversation or not. The evidence of P.W.2 appears to be unreliable and doubtful for the reason that generally relatives of the patient are not allowed to enter the I.C.U. more so, when the patient has been intubated and is on ventilator. He

admits that he had not told to the doctor that he had heard the name of the assailants from the deceased. He admits that he has not mentioned the names of the eyewitnesses in the F.I.R. or, that his brother had disclosed the names of the assailants. He admits that timing is strictly followed in the Court where his brother was posted. Every employee has to report by 10:00 A.M. and leave the Court by 5:00 P.M. He further stated that his brother used to come to office after taking meals and also with tiffin/lunch. On the day of the incident the deceased had come after taking meals. But this fact is not corroborated by the evidence of P.W.4, Dr. Som Pal Singh, doctor of post-mortem who found that the deceased had taken meals six to eight hours before the death. It means in the morning he had not taken meal. As per the post mortem report there was only 50 Ml. watery fluid in his stomach.

16. P.W.3, Ajay Bhan, L.I.C. Agent, is the nephew of the deceased. According to him at about 9:45 P.M. he was going to L.I.C. Branch Saket, Meerut, by motorcycle, his cousin Achhendra Bhanu was going by scooter ahead of him. When he reached Roorkee Road, his uncle-deceased Bijendra Bhan who was driving scooter overtook them. They also started following the scooter, when he reached Sofipur Temple, one motorcycle driven by Satendra overtook them. Subhash, younger brother of Satendra was pillion rider on the motorcycle. They shot at the deceased who fell down after being hit by the bullet. Thereafter, both the assailants fired at the deceased with an intention to kill him. This incident was also seen by his cousin Achhendra Bhanu and Satendra Som.

17. It is noteworthy that Satendra Som, an independent witness, has not been examined by the prosecution. In cross-examination this witness has deposed that the deceased overtook him at sewage drain. He further deposed that deceased crossed him, as soon as, he reached Roorkee Road. According to P.W.3, the moment deceased crossed them pleasantries were exchanged amongst them. However, in examination in chief, pleasantry taking place amongst them is not stated. He has deposed that Subhash had fired 3 - 4 bullets on the waist of the deceased even then the deceased kept plying the scooter. Thereafter, Satendra stopped the motorcycle and fired 4-5 bullets at the deceased which hit at the waist and side of the body of the deceased. Thereafter, deceased parked the scooter and fell down. It is noteworthy that neither P.W.-3 Ajay Bhan, nor, P.W.6 Achhendra Bhan have lodged the F.I.R. and they are not mentioned as eyewitness in the F.I.R., and even in medical papers of Jaswant Rai Hospital, their names are not mentioned of having brought the deceased. In this backdrop learned counsel for the appellant argued that their presence on the spot is doubtful, otherwise, they would have informed the informant or they would have transported the deceased to Jaswant Rai Hospital and their names would certainly have been mentioned in hospital record, (Ex. Ka-1) being brought by them. But later in the admission register of Jaswant Rai Hospital, it is written that the deceased was brought and admitted by P.W.2 Narendra Bhan in different ink and in different handwriting which has been stated by D.W.5 Vineet Kumar. It reflects that the entry has been made at different point of time and by different persons.

18. As per post mortem report only 2.5 litre blood was found in abdomen cavity, taking that half litre blood present in other parts of the body of the deceased. It

follows that about two litres of blood had been thrown out of the body, which should either have been found on scooter, place of occurrence, tempo, on the clothes of P.W. 3 & P.W. 6, if actually they had carried the injured from the place of occurrence to the hospital. No blood stained clothes of P.W.3 & P.W.6 were found, nor, taken in possession by the I.O. Further, I.O. did not find blood on the scooter and no technical examination of the scooter was done. I.O. did not find blood on spot of the incident. Alleged bullet claimed to be recovered from the place of occurrence (Ex. Ka-10) did not match with the recovered weapon, as per FSL report. In the map of the place of occurrence (Ex. Ka-11), motorcycles of P.W.3 and P.W.6 are not shown or parked. These facts and circumstances go against the prosecution and it is doubtful whether at the alleged time of occurrence P.W.3 & P.W. 6 were present on the spot and they had seen the incident.

19. From the defence side witnesses D.W.1 to D.W. 6 have been examined who have proved that the deceased was lying on the road as unknown person and Dr. Pankaj Kumar Sharma, D.W.-1- Vinod, Chandra Shekhar, put him in a tempo and transported the injured to Jaswant Rai Hospital; P.W.3 and P.W.6 were not seen there. From the evidence of defence witnesses it is not proved that eye witnesses P.W.-3 and P.W.-6 were present on the spot and they assisted the injured in putting him on the tempo and in transporting him to the hospital. P.W.3 and P.W. 6 are close relatives of the deceased. It is probably for this reason that in medical papers of the hospital their names are not indicated of having brought the injured. P.W.2 was not informed of the incident by P.W.3 and P.W.6.; P.W.2 came to be informed of the incident by Arvind Gupta, a stranger.

20. It is admitted that P.W.2- Narendra Bhan, was not present on the spot and he is not the eyewitness. Generally spot map are prepared on the pointing out of the person who has seen the occurrence and was present on the spot. In the absence of eye witness, on the pointing out of informant, spot map is prepared. In this case, P.W.-3 and P.W.6 claim to be present on the spot, then in that event the site map would have been prepared on the pointing out of these witnesses. Had they seen the incident they would have been capable to communicate the relevant facts to the I.O. of actually what happened, the manner of the occurrence and also about the position, situation and condition of the deceased and accused. But the I.O. prepared the spot map on the pointing of the informant, who, admittedly is not the eye witness. This is not a shortcoming of the prosecution, but proves that the eye witness setup by the prosecution were not present on the spot of the incident.

21. According to P.W.3- Ajay Bhan, he and Achhendra Bhan parked their motorcycle and scooter, but it was neither noted by the I.O., nor, there is evidence that they had parked their vehicles there and later on they fetched their motorcycle and scooter from there. It is also strange that this witness had accepted that he had not informed the informant that his uncle/deceased Bijendra Bhan had been attacked by the accused persons. He admits that someone else had informed his father/informant about the incident. It is also noteworthy that according to this witness he, his cousin Achhendra Bhan and Satendra Som transported the deceased in three wheeler, but there was no blood on their body. From the injury report and post-mortem report it transpires that ribs, arteries, stomach, lungs and kidney were

torn. P.W.-4, doctor, found that the cause of death was shock and hemorrhage due to sustained anti-mortem injuries. In such a condition it can't be said that blood would not have fallen on the actual place of occurrence, scooter, clothes of the persons carrying the injured and on the three wheeler. In absence of prosecution evidence it creates doubt whether P.W. 3 and P.W. 6, who claim their presence on the spot at the time of occurrence and of transporting the deceased were present. This witness admits that he went to arrange blood after half an hour. This aspect also establishes that he was not in the hospital when the deceased was brought there. Considering the critical condition and loss of blood the doctor would have directed the attendants at once to arrange blood. As per doctor (P.W.1) and injury report (Ex. Ka-1) blood was arranged and transfused to the injured then and there. Upon scrutiny of the evidence it can be fairly concluded that this witness could have reached only after half an hour from the time of admission of the deceased in the hospital after hearing the news of the incident from someone. Therefore, he has deposed in such a manner.

22. According to this witness his uncle was moaning in pain but again he says that no conversation took place between them. Meaning thereby, the deceased was in critical condition and in such a condition he was unable to communicate with the witness. If it was so and this witness was along with the injured then the injured would have informed about the incident and assailants and he would not wait for the informant, who admittedly came after 45 minutes from the time of the incident. Since then the injured had been intubated and was shifted on ventilator, in such a condition the injured would not be able to speak.

23. P.W.-6, Achhendra Kumar Bhanu, nephew of the deceased, has also claimed himself to be eyewitness. According to him at the time of occurrence he was working with Marshal Security, Abu Lane, Meerut. Further, he deposed that he left the house for his office at 9:45 A.M. by scooter. Similar story has been repeated by this witness in examination in chief that firstly his uncle/deceased, thereafter, the accused persons crossed; accused Subhash fired at the deceased who fell down, thereafter, both the accused persons fired at the deceased causing fire arm injuries. According to him occurrence was seen by him, his cousin Ajay Bhan, and Satendra Som, resident of his village. He claims that they admitted the injured in Jaswant Rai Hospital, where injured was kept in I.C.U. and later his uncle/informant Narendra Bhan reached and completed the procedure of admission. According to P.W.3, Ajay Bhan, accused Subhash shot 3-4 times at the deceased which hit the waist of the deceased even then he was plying his scooter. Thereafter, accused Satendra stopping his motorcycle fired 4 times which hit waist and side of the body of the deceased. Thereafter, his uncle parked the scooter and fell down. But this witness P.W.6 deposed that accused Subhash fired at the back of the deceased due to which he fell down and thereafter both the accused persons fired at him with an intention to kill the deceased. Therefore, there is vast difference in the statements of both the alleged eyewitness so far as the manner of attack is concerned. According to this witness P.W.2 informant reached hospital after admission of the deceased in I.C.U., meaning thereby, informant P.W.2 reached hospital, after intubation and deceased was on ventilator. In view of the statement of P.W.1 & P.W.4 deceased was not in position to convey anything to the informant P.W.2.

This witness further stated that he narrated the whole incident to the informant. P.W.3 does not say so but if this witness had informed about the incident to the informant claiming himself and P.W.3 Ajay Bhan to be eyewitness, but they were not shown as eyewitness in F.I.R. This relevant fact was not disclosed in the F.I.R. Therefore, it can be reasonably concluded that till then name of the witnesses was not determined by the prosecution. On afterthought, later two eye witnesses of the family and one Satendra Som, having inimical terms with the accused persons were setup as eyewitnesses to strengthen the prosecution case.

24. Whether P.W.3 and P.W.6 are the eye-witnesses :

The question that follows is as to whether P.W.3 & P.W. 6 are eye-witnesses of the incident or not. They are not named as witnesses in the F.I.R., it is also apparent from the record of the hospital that they had not admitted the deceased to the hospital. It is also apparent that they had not informed about the incident to the informant P.W.2, Narendra Bhan. It is also established that I.O. did not visit the spot and make site plan on their pointing. It is also apparent from the record that their scooter and motorcycle were not shown and found on the spot or nearby. It is also apparent from the record that their clothes was not taken into possession by the I.O., nor, presence of blood on their clothes was recorded in C.D.

25. It is also proved that at the time of incident Achhendra Bhan was working in Kankar Khera and there was no occasion for him to come to Meerut. It is also surprising and noteworthy that no mobile number of these witnesses and the deceased have been taken into possession and no C.D.R. has been obtained by the I.O. to establish, as to whether at the time of incident, they were present on the spot. It is a mere co-incidence that they claim to be eye-witness. They neither resisted, nor, tried to prevent the incident, but remained silent spectator, both being young men of the family. From the evidence of D.W.1 to D.W.5 it is established that P.W.3 and P.W. 6 were not present on the spot and the deceased was taken to hospital by private persons and the deceased was lying injured on the spot as unidentified person. In this regard statements of D.W.1 to D.W. 5 are relevant :

(a) D.W.1 Vinod Kumar, confectioner, at the place of occurrence, deposed that at about 10:00 A.M. a tourist bus stopped at his shop, some persons were taking tea and breakfast and some others were easing themselves, here and there. Dr. Pankaj and some other person ran and saw that injured Bijendra Bhan was hit by bullets. The injured was not in position to speak and was about to die. A tempo came from Modi Puram side, he requested the tempo to stop and Dr. Pankaj and Chandra Shekhar @ Bittan carried the injured to the hospital for treatment in the tempo. No gunshot was fired, the injured was thrown/lying there. Had there been any shot fired, there is Army check post, it would not have been possible that the assailant could escape from the market, church, shop and wooden shops and busy road. At least some person would have heard the noise of the gun shot.

(i) D.W.1 further stated that the scooter of the injured was lying on the spot. There was no blood on it. There was no one who else could identify the injured. Ajay, Achhendra were well known to him, they were not there. He knew the accused

persons, they were not present there. He deposed that his shop is 50 steps away from the place of occurrence. There were 20-25 men already present. It was found and noticed that deceased was shot by some persons, but name of the persons was not known. There was no empty cartridge found on the scene. According to him he knew the injured who used to drink tea at his shop while going to the Court. He was a Court employee and also their leader. He denied that accused persons killed the deceased.

(b) D.W.-2- Pankaj Kumar Sharma, resident of same village, a Yoga doctor, deposed that on 8.3.2007, at about 10:00 A.M. he was going to Meerut from his village, on reaching the Hanuman Temple at Sofipur Gate, he found that some persons were putting injured Bijendra Bhan in a tempo. He also accompanied them on his Motorcycle. He did not depose that P.W.3 and P.W.6 were present on the spot or inside the tempo, nor, any question was asked in that regard by the prosecution. He went till the hospital gate, then left for his work so he had no idea whether the family members of the injured were present in the hospital or not. There is no suggestion by the prosecution that he was telling a lie.

(c) D.W.3- Mohd. Ayyub, deposed on oath that on 8.3.2007, at about 2 to 2:30 P.M., police had confined him with Salim in the lockup of P.S. Nauchandi, in connection of theft. Two boys were already in lockup. At about 4 - 5 P.M. accused Subhash and Satendra were brought and locked up, they said that they were falsely implicated in a murder case. Next day at about 3 - 4 P.M. they were sent to jail. From this evidence, defence wants to establish that the accused persons were not arrested in the manner shown in the arrest memo and C.D. They were taken into police custody without completing the proper formalities.

(d) D.W.4- Chandra Shekhar, deposed that on 8.3.2007, for some property work, he was going to Meerut from his house and on reaching the temple, he saw Bijendra Bhan, of village Dorely, lying on the side of the road. First he thought it was an accident, but on close look, found that he had suffered bullet injuries, but no blood was oozing. Some other persons had also gathered and were saying that some one has thrown the injured here, take him to the hospital. The injured was not able to speak, he was dying. At that moment no member of his family was present. A tempo came from Modipuram side, wherein, he sat with Bijendra Bhan, two passengers were already seated in the tempo, they deboarded on the way. Bijendra Bhan was taken to Sushila Jaswant Rai Hospital. Dr. Pankaj also came to the hospital behind them and left thereafter. At 10:40 A.M. the witness had taken Bijendra Bhan inside for treatment. At about 11:15 A.M. Narendra Bhan (P.W.-3) reached the hospital, thereafter, formalities (regarding admission) was completed. He thereafter, returned to his home.

(i) Relevant questions were not put to this witness. In cross-examination this witness said that he had taken Bijendra Bhan to hospital and his brother Narendra Bhan had later admitted him to the hospital. He deposed that when he had taken the deceased to the hospital, doctor had declared him dead. He had not seen the assailants. No question was asked and no suggestion was made to the witness that P.W.3 Ajay Bhan and P.W.6 Achhendra Kumar Bhan were also present on the spot and had also taken the injured to the hospital. No question was asked and no suggestion given that when did P.W.2, Narendra Bhan, reached the hospital, whether the patient was alive and had

talked to each other. The relevant omissions make the evidence of examination in chief conclusive, absolute and unrebutted. It is also not asked as to whether the witness was not at the place of occurrence, otherwise, he would have probably seen the accused persons. Lack of proper cross-examination of the witness, about the facts narrated in examination in chief creates, doubt of the prosecution case and undermines it.

(e) D.W.-5, Vineet Kumar, is an employee of Sushila Jaswant Rai Hospital, who was present in the hospital on that day from 9:00 A.M. to 6:00 P.M. before whom entry was made in the relevant register at serial no. 1327 /2007, page no. 68, by his colleague Babita. He deposed that the deceased was brought by some unknown persons at about 10:40 A.M. and upon enquiry they stated that they had brought the injured on humanitarian consideration. Seeing the serious condition, doctor started the treatment at once. At about 11:15 - 11:30 A.M. brother of the injured i.e. Narendra Bhan (P.W.2) came and signed the register *(That is why the writing and ink on injury report is not only different but written at an interval by different persons, which has already been discussed).* He further deposed that the patient was on ventilator in I.C.U., Narendra Bhan remained outside, as no one is allowed to enter I.C.U., and the patient is unable to speak while on ventilator. This witness had come to the Court with the patient admission register. He filed and proved the relevant part (Ex. Kha-1). According to this witness, if any serious patient is brought to the hospital without attendant, the treatment is immediately started by making entry of time and after that when their family members reach, their signatures/thumb impressions are taken.

(i) The prosecution did not put relevant questions to the witness in cross-examination. No questions were asked and no suggestions given regarding the alleged conversation between the injured and P.W.2 Narendra Bhan and with regard to bringing of the patient by P.W.3 Ajay Bhan and P.W.6 Achhendra Kumar Bhan, and also about their presence in the hospital. No questions were asked or suggestions given as to whether injured was brought by P.W.3 & P.W. 6 and not by unknown persons. It makes the evidence of the witness in examination in chief absolute and conclusive, rather, diminishes and weakens the prosecution story. Instead a wrong suggestion was put to the witness asserting that P.W.2 Narendra Bhan had admitted the patient at 10:40 A.M. While it is not the case of the prosecution that Narendra Bhan had admitted the patient. He already admitted that at 10:40 A.M. he came to know about the incident from Munsarim Gupta. After sanction of a day's casual leave he proceeded to the hospital. He probably reached the hospital after 11:00 A.M. Thus, this suggestion is of no avail being irrelevant and contrary to the prosecution story which does not diminish or impeach the worthiness and truth of the witness.

26. On cumulative scrutiny of the evidences it is established that P.W.3 and P.W. 6 were not present on the spot, deceased was not admitted by them in hospital in the injured condition. The deceased had not informed anything about the assailants and the cause of injury.

In ***Varkey Joseph Vs. State of Kerala, 1993 Supp (3) SCC 745;*** Supreme Court has held that *"witnesses were inimical and had motive to prejure the evidence and a chance witness at best and their presence on the spot was not spoken by P.W.4, a coffee house owner."*

Similarly, in this case D.W.1, a tea stall owner, D.W.2, Dr. Pankaj and D.W.4, Chandra Shekhar, who transported the injured/deceased to the hospital had not seen these witnesses (P.W.3 and P.W.6) on the alleged place of occurrence. In such circumstances, the *"testimony of chance witness who also had motive to prejure is unreliable."*

27. In ***Munsi Prasad Vs. State of Bihar, AIR 2001 SC 3031, 3033***, Supreme Court has held that principles relating to credibility and trustworthiness of a defence witness have to be the same as are applicable to prosecution witness.

28. Thus the admissibility, credibility, reliability, relevancy and acceptability of the defence witnesses is not lower to the prosecution witnesses for the reason that they were examined from the side of the defence. Proper opportunity of cross-examination was provided to the prosecution but prosecution failed to impeach in any manner the merit of the evidence of these witnesses.

29. From the discussions herein above, it is established beyond doubt that at the place of occurrence P.W.3 Ajay Bhan and P.W. 6 Achhendra Kumar Bhan were not present at the time of commission of crime. They had not seen the occurrence and they are not the eye-witness. They had not taken the deceased to the hospital and they had not even admitted the injured to the hospital. They had not reached the hospital before P.W.2 Narendra Bhan reached there. After three days, C.O. Brijesh Kumar Singh took charge of the case as I.O. he then wrongly proceeded to establish the theory of F.I.R. version, by making a false recovery, planting a country made revolver and two live and one empty cartridges of .38 bore without going through the post mortem report that the deceased was hit by 9 m.m. bullet and pistol. A 9 mm bullet was recovered from the spot X marked in the site map. Thus, it is concluded that P.W.3 Ajay Bhan and P.W. 6, Achhendra Kumar Bhan, are neither chance witnesses, nor eye-witnesses, nor are they the persons who brought and admitted Bijendra Bhan to the hospital. It is for this reason they were not shown to be eye-witnesses in the F.I.R. and in the records of the hospital. Later on when second I.O. found no evidence in the case, then after three days the I.O. set up eye-witnesses and after planting revolver and cartridges tried his best to strengthen the prosecution case which is solely based on mere suspicion. The Court is aware that not naming the witnesses in F.I.R. or even not recording their statements under Section 161 Cr.P.C. does not bar a person to be witness in Court and in absence thereof the evidence of such witnesses can not be rejected if otherwise found credible, as held in ***Raj Kishor Vs. State of Bihar, 2003 (47) ACC 1068 SC, Bhagwan Singh Vs. State of M.P., 2002 (44) ACC 1112 SC*** *and in* ***Satnam Singh Vs. State of Rajsthan, (2000) 1 SCC 662.***

30. In ***Bhagwan Jagannath Marked Vs. State of Maharastra, (2016) 10 SCC 537, Shyamal Ghosh Vs. State of West Bengal, AIR 2012 SC 3539 Sone Lal Vs. State of M.P., AIR 2009 SC 760, Sucha Singh Vs. State of Punjab, (2003) 7 SCC 639,*** Supreme Court held that "though the testimony of related witnesses cannot be discarded merely because they are relative or family members of the victim but in such a case Court has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related

witness is otherwise found credible accused can be convicted."

31. Similarly, enmity of the witnesses with the accused is not a ground to reject their testimony and if on proper scrutiny the testimony of such witness is found reliable, the accused can be convicted. However, the possibility of falsely involving some persons in the crime or exaggerating the role of some of the accused by such witnesses should be kept in mind and ascertained on the facts of each case. The above principles have been laid down by the Supreme Court in ***Dilawar Singh Vs. State of Haryana, (2015) 1 SCC 737; Dhari Vs. State of U.P., AIR 2013 SC 308; Anil Rai Vs. State of Bihar, (2001) 7 SCC 318.***

In ***State of Bihar Vs. Ram Padarath Singh, AIR 1998 SC 2606,*** the Supreme Court held that no implicit faith can be put upon the evidence of witnesses whose relations with the accused persons are inimical. But their evidence can not be rejected on the ground that their names did not figure in the F.I.R. Nor on the ground that no independent witness from the nearby place were examined by the prosecution, but their testimony is to be considered with caution.

In the facts of the present case though independent witnesses were available but they were neither contacted, nor, examined by the prosecution. Satendra Som who according to the prosecution was present on the spot has not been examined by the prosecution without assigning any reason, on the plea that it is prerogative of the prosecution either to examine any witness or not. Section 114 (g) of the Indian Evidence Act 1872, provides that the evidence which could be and is not produced would, if produced, be unfavorable to person who withholds it. In ***Mehraj Singh Vs. State of U.P., (1994) 5 SCC 188,*** it is held that failure by prosecution to produce eye-witnesses creates a presumption that the witnesses were not prepared to support a false case, such presumption casts no reflection.

32. Certainly the witnesses of fact are close family members of the deceased and the informant. They are also interested and inimical to the accused persons. There is no law that related and inimical persons can not be witness, but it has been proved beyond doubt that P.W.3 and P.W.6 though shown to be chance witnesses, but there is no evidence to show that they generally went together to their workplace, and/or, they generally pass or bypass each other on their way to Meerut. It has also been proved that they are not the eye-witnesses, they have not transported the deceased to the hospital; they had not informed the informant; they had not lodged the F.I.R. and their names are not mentioned in the F.I.R. and/or, in hospital records. P.W.6 Achhendra Kumar Bhan is also not the witness of inquest.

33. The I.O. failing to solve the riddle of the crime setup a case that all the three i.e. the deceased, P.W.3 and P.W.6, coincidentally came together on their way to Meerut. They were at inimical terms with the accused persons, therefore, the I.O. introduced two eye-witnesses of the family i.e. P.W.3 and P.W.6. Thus, the Court is of the considered opinion that P.W.3 and P.W.6 are not the actual eye-witnesses and it is not a case of direct evidence, but the accused persons have been falsely implicated on account of remote rivalry.

Learned counsel for the appellant has relied on ***Mehraj Singh Vs. State of U.P., 1994 SCC (5) 188,*** wherein the Supreme Court found that the so called eye-witnesses were not actually present at

the scene. It appears that it was a blind case and none of the witnesses had actually seen the occurrence. Alleged eye-witnesses were undoubtedly deeply interested in the prosecution so they were introduced as eye-witnesses after thoughtful deliberations and consultations. It was found that since it was a blind murder, the appellants were roped in on account of misguided suspicion due to the previous enmity. On careful scrutiny and analysis of the evidence on the record, coupled with the infirmities, has created an impression with the Court that prosecution has not been able to bring home the guilt of the appellants beyond reasonable doubt. In the cited case learned trial Court had acquitted the accused persons but the High Court had convicted them. The reasons given by the High Court were set aside and the appeal was allowed and it was held that the case against both the appellants has not been proved beyond a reasonable doubt. The principles laid down in Mehraj (Supra) supports the finding reached by the Court.

34. **Burden of proof always lies on the prosecution:**

The concept of proof beyond the shadow of doubt is to be applied in criminal trials. Doubts would be called reasonable if they are free from zest for abstract speculation or free from an over-emotional response. Doubts must be actual and substantial as to the guilt of the accused persons arsing from the evidence from the lack of it as opposed to mere vague apprehension. A reasonable doubt is not an imaginary, trivial or a mere possible doubt, but a fair doubt based on reason and common sense. It must grow out of the evidence (vide ***State of M.P. Vs. Dharkole, AIR 2005 SC 44.)***

In criminal cases burden of proof lies on the prosecution to prove that the accused is guilty of the crime with which he is charged. The prosecution asserts the affirmative of the issue and, therefore, has to prove its case. The Court starts with the presumption that the accused is innocent. The innocence of the accused means nothing more than this that burden lies on the prosecution to prove the case beyond reasonable doubt, it is not the accused who has to satisfy the Court that he is innocent. If there is reasonable doubt as to whether the accused killed the deceased the prosecution has not made out the case, the accused is entitled to an acquittal. More serious the crime more strict proof is required. (Refer: ***Paramjeet Singh Vs. State of Uttrakhand, AIR 2011 SC 200.)***

35. Motive:

In the F.I.R. the informant has setup land dispute as motive behind the commission of the crime. As per prosecution it is a case based on direct evidence of eye witnesses P.W.3 & P.W. 6, close relatives of the deceased, and the informant (P.W.2). In cases based on direct evidence motive does not have much significance, but in the cases based on circumstantial evidence motive becomes significant and of much consequence. The legal propositions was stated in ***Nagraj vs. State, (2015) 4 SCC 739, Wakkar Vs. State of U.P., 2011 (2) ALJ 452 SC, Nathuni Yadav Vs. State of Bihar, (1998) 9 SCC 238 etc.***

36. With regard to motive informant P.W. 2 deposed in examination in chief that there was land dispute between him and the accused persons (not with the deceased). From the evidence of P.W. 2, P.W. 3 & P.W. 6 it is established that the deceased was having inimical terms with several other persons and they might have had motive to kill the deceased which are as under :

Evidence of P.W.2, Narendra Bhan:

(i) According to him his grandfather had transferred 20 Bigha land being Khasra Plot No. 547, 548 and 561 to Sant Neki Ram but they had not handed over its possession. He admits that there is stay order in favour of the defendant/appellant Ram Niwas.

(ii) Another being case no. 141/66 (Harikishan Vs. Ram Niwas etc.) instituted by his father, wherein, according to defence counsel only informant and deceased were arrayed party, therefore, rest of the brothers and their family members were annoyed. He admits that during pendency of the first appeal no. 173/1976, some other person had executed sale-deed in favour of one Vikram Singh about which there was tussle. According to him deceased had not prevented anyone from executing the sale-deed. In cross examination, contrary to the statement of examination in chief, he deposed that the land dispute was between the deceased and the accused persons. According to statement under Section 313 Cr.P.C. uncle of accused persons had sold their plots to Satendra Som, the proposed eye witness and Yogendra, but re-occupied the plot after their arrest. Thus, there was no direct enmity between the accused persons and the deceased.

(iii) He has also expressed ignorance that wife of the deceased had sold 151 square yard of Khasara No. 410/02 to Malkhan who later on sold the purchased land to Smt. Geeta Som, wife of Yogendra Som, brother of the proposed witness Satendra Som. According to the defence this transaction was done, so that Satendra Som testifies in favour of the prosecution. P.W.2 expressed ignorance that accused persons filed suit in respect of land against their uncle Rajaram and also expressed ignorance that accused Satendra had moved an application under Section 156(3) Cr.P.C. for lodging F.I.R. under Section 420, 467 I.P.C. against Raja Ram, Bijendra Bhan (deceased) and Smt. Sushma widow of the deceased.

(iv) P.W. 2 also expressed ignorance that the deceased got the deed of Ratan Pal's land executed in the name of his wife Sushma.

(v) He also expressed ignorance that the deceased had executed sale-deed on 17.3.2002, in favour of Sundar Lal etc. being power of attorney holder of Budhha Prakash Sharma.

(vi) The witness expressed ignorance that by becoming general power of attorney holder of Smt. Phullee, deceased on 3.7.2002 sold, the land in favour of his wife Sushma, wherein, Ajay Bhan, son of this witness was the marginal witness.

(vii) The witness again expressed ignorance, that deceased becoming general power of attorney holder of Nain Singh and Shanti Devi etc. had executed sale-deed in favour of Umesh.

(viii) He also expressed ignorance that deceased becoming general power of attorney holder of Raja Ram, son of Basanta, executed sale-deed on 14.5.2002, in favour of his wife Sushma or not, wherein, his nephew Vishwendra Bhan is marginal witness or not.

(ix) He also expressed ignorance that his deceased brother becoming general power of attorney holder of Budhha Prakash Sharma had executed sale-deed in favour of Deepak Kumar or not.

(x) He also expressed ignorance that deceased becoming general power of attorney holder of Bodal etc. had executed sale-deed on 25.7.2002, in favour of Sarvesh and others or not.

(xi) He also expressed ignorance that the deceased had sold the uneven and rough land *(Beehad)* or not.

(xii) He also expressed ignorance that the deceased and P.W.3 Ajay Bhan (son of this witness) and P.W.6 Achhendra Bhan, (nephew) had shot Vinod Kumar of their village or not. He also expressed ignorance that this matter was settled in the village (at Panchayat level) and deceased had accepted his fault or not.

(xiii) The witness admits that the deceased was sent to jail in 1992 during his service in *Sher Gadhi Kand.* He admits that if any government servant purchases land in his or his family member's name, permission is necessary from the concerned department. According to this witness, if ancestral property is sold and from the consideration money another property is purchased, their is no need of permission. (As per Rule 25 of the U.P. Government Servant Conduct Rule 1956, prior permission is necessary for sale and purchase of the property from any private person except that the dealer is regular and reputed but in that case also giving information after sale or purchase to the department is necessary). The witness admits that the Government servant can not engage himself in any other work during service. He expressed ignorance whether the deceased had given information of these transactions to the department or not. He denies rivalry of the deceased with several persons due to the sale and purchase of the land.

(xiv) According to P.W.2, Jitendra (nephew) was not seen in hospital and he had not talked to Jitendra, he denies that he had not beaten Jitendra and had not forced him to leave the hospital doubting him to be the culprit of murder of the deceased. But he admits that in the same night his nephew Jitendra had left the house and he did not know where he had gone. According to the witness the ashes of the deceased was submerged at Haridwar, but in the ceremony, neither Jitendra, nor, his father had participated. According to the learned counsel for the appellant that the offence was committed by some other person and was falsely imposed upon the accused persons. The witness also expressed ignorance that Jitendra had not moved an application against the deceased before the commissioner regarding land dispute. He denied that deceased ever threatened Jitendra with his pistol.

(xv) The witness (P.W.2) admits that his brother (deceased) had a fight with Raja Ram, son in law of his sister, but further deposed that it is wrong to say that on the day of the incident Rajendra was caught, and stated in front of the villager, that do whatever you want with me today, but will certainly kill Bijendra Bhan by shooting him.

(xvi) P.W.2 is not admitting that on 9.2.2005, Smt. Har Pyari, wife of Jagbhan, had moved a complaint against P.W.2 and the deceased to the Senior Superintendent of Police (S.S.P.) for threatening her with revolver, but he expressed ignorance that in the application Smt. Har Pyari had alleged that P.W.2 and the deceased were threatening her to leave the village along with the family at gun point.

37. That apart other than the accused persons, several other persons were also having motive to commit the murder of the deceased as is reflected from the statement of P.W.2. The evidence of P.W.3 is also relevant :

(i) P.W.3 is the real nephew of the deceased, he deposed that he did not render help in the work of his uncle. He expressed

ignorance of being witness in the sale deed executed by Smt. Phulli on 3.7.2002, in favour of wife of the deceased Smt. Suhsma. Further, he deposed that he was not aware whether there was any dispute over the transaction of money in the said matter or not. It is wrong to say that he, along with Achhendra Bhan and the deceased had beaten Vinod Kumar, resident of the village or not, in the incident deceased fired a bullet shot and later on 26.3.2005, they had apologized in panchayat.

(ii) The witness also expressed ignorance regarding dispute between the deceased and Narendra at the dias on the occasion of Ambedakar Jayanti. This witness denied that Haripyari had moved an application to S.S.P. on 5.2.2005 charging him, his brother Priyabhan, and his father for attacking her house with an intention of beating, threatening and intimidating her with a revolver, whereas, P.W.2 had expressed ignorance. This witness expressed ignorance that Harpyari and Jitendra Kumar had also complained about the deceased alleging that he was a land mafia and he along with goons came to their house and threatened to kill them pointing revolver on their head. Jitendra had complained to Sub Divisional Magistrate (S.D.M.). He also expressed ignorance that Jitendra had complained to the Chief Justice describing the deceased as land mafia and being a criminal vide letter posted on 29.11.2005. He does not know whether Jitendra had left the village in the evening of the fateful day.

(iii) He denies that his father and the deceased had grabbed property of his uncle Gajendra Singh (an ex CISF personnel). He also denies that the deceased and his father made false complaint to the department and extended threats to Gajendra Singh and his children to leave the village, and were not handing over possession of their land for which he had filed complaint with the Commandant CISF, Aligarh.

(iv) The witness also expressed ignorance that on 31.3.2003, Rajendra, son in law of the deceased's sister, had come to his village to settle scores with the deceased, and whether any person was injured or not. He also expressed ignorance that on the complaint of the deceased, Rajendra (ex. Navy personnal) woking in BHEL Haridwar, was expelled from service or not.

(v) He admits that when the deceased was hospitalized, Rajendra had not come to see him. The witness expressed ignorance regarding enmity between the accused persons and the deceased. The witness also expressed ignorance as to whether there was any dispute between the accused persons and Yogendra Som and Satyendra Som (both real brothers) or not.

38. Evidence of P.W.6- Achhendra Kumar Bhan, also establishes that deceased was having several other enemies in the family, with relatives and outside the family. Deceased was one of the six brothers, all were living separately with their small coparcenary. In this regard statement of the witness is relevant :

(i) The witness expressed ignorance whether Jitendra had come to the hospital or not. He also expressed ignorance that any Mar-peet took place there or not. According to him, he was present in the hospital, therefore, should have known as to what happened with Jitendra there. He admits that family of Jitendra had left the village same day *(it is surprising that his uncle was murdered on the same day, post-mortem and funeral was pending and when he visits hospital then*

rest of the family members knowing him to be responsible for murder beat him and oust him and he along with the family leaves the village same day). P.W.6 did not try to enquire the reasons of their abscondance. Similarly, the witness also expressed ignorance that Rajendra, son-in-law of deceased's sister, tried to kill the deceased or not.

(ii) The witness also expressed ignorance that his aunt Harpyari had made complaint against the deceased or not. The witness admits that on the fateful day his uncle Gajendra Bhan had not visited the hospital untill he remained there. He also expressed ignorance that his uncle Gajendra Bhan had met deceased and P.W.2 Narendra Bhan or not. He admits that Jitendra had not participated in post funeral rituals in Haridwar.

39. In so far as motive is concerned the investigating officer, P.W.10, Brijesh Kumar Singh, did not care to enquire about the enmity between the deceased and other persons and only on the basis of F.I.R. version proceeded with the investigation without ascertaining whether some other persons might have committed the murder or not. The witness (P.W.10) in cross-examination deposed that he can not say with whom the deceased was having land enmity. According to him Rajendra, son-in-law of the deceased's sister, had tried to kill the deceased was not communicated to him by the witnesses.

40. In view of the discussions herein above it is crystal clear and established that deceased was not an ordinary person. Being an employee of Civil Court he also was involved in large scale property dealing. He got executed several power of attorney in his favour from several persons and on the basis thereof sold property of others to his wife and other persons, and he was also politically and socially very active person. He was also having a licensed revolver. He was having serious disputes within the family and with the relatives. He had also employed his revolver on several occasions to threaten his family members and others, as well as, Civil Court employees. He was also active in organizational activities in Civil Court. He had been ex-Secretary of Civil Court Class III employees. His family had serious suspicion on Jitendra about his murder, his nephew and cousin son-in-law, Rajendra. Therefore, it is probable that not only accused persons but several other persons had motive and mens-rea to commit the murder of the deceased.

41. Place of occurrence:

It is argued from the side of appellants that place of occurrence shown in Ex. Ka-11 is not the actual place of occurrence and the deceased was probably thrown there. In this regard following points are relevant which establish that virtually the deceased was not fired at the alleged place of occurrence:-

(i) No blood was found at the place of occurrence while there was only two and half litre blood in cavity, and the body of the deceased had been whitened. There is no proper explanation of the two litres of blood; blood stained clothes were not taken into custody and neither sent for chemical examination. It is not stated by the prosecution that blood was found on the scooter. The I.O. therefore did not take it into custody, nor, send the scooter for technical examination; neither the seat cover was sent for chemical examination.

(ii) Both the I.Os. have not asked questions or interrogated the priest of Hanuman Temple, persons at the Church and nearby shopkeepers. None came

forward to say that firing took place and they heard the noise of firing. Only D.W.-1 Vinod, having tea stall 50 feet away, was examined by the defence who said that he did not see nor hear any firing. According to him the deceased was seen laying as if thrown there. D.W. 2 and D.W. 4 also did not accept that the incident had taken at the place of occurrence.

(iii) The tempo driver was not searched by both the I.Os.

(iv) Army Check Posts was near the place of incident, but killing went unnoticed, firing is not possible and if such an event happens, probably the assailants would not be successful in escaping having regard to the presence of army personnel at the Check Post. Not recording statements of army personnel posted at the Posts also creates doubt upon the I.O. For the sake of argument even if it is accepted that the attack took place on the alleged place of occurrence and the assailants might have escaped after making several gun shot firing, then being an army area, army personnel would have reached the spot and taken notice of the injured and the incident. It is generally seen that when an accident or criminal act happens within Military area or nearby, Military Police comes into action and contacts the Civil Police. It is surprising that if such an incident had taken place at 10:00 A.M.,but the Military Police did not take action.

(v) It has already been discussed that no site map was prepared on the pointing of so called eye witnesses P.W. 3 and P.W. 6 if the occurrence happened before them. It is not the prosecution case that P.W.3 and P.W.6 had narrated the whole story to the informant Narendra Bhan before preparation of the map and distance from where assailants fired and where the injured has fallen down. Even they were not present when the site map was being prepared by the I.O. in presence and pointing out of P.W.2 Narendra Bhan. It transpires that an imaginary drawing was prepared by the I.O. regarding the scene of the incident and a vague and imaginary map was prepared trying to create the real scene.

(vi) Thus, it can in all probability be concluded that where the injured was found, is not the actual place of occurrence. Empty stomach of the deceased also strengthens the inference that deceased had not come from his house after taking meal, but had left home early morning without taking breakfast. It appears that the deceased was shot somewhere else, thereafter, he either reached there or would have been thrown there. No blood was found at the place of occurrence. No blood was oozing from his body when P.W.1 Dr. Zaidi attended him in hospital.

On the basis of above discussion we are of the considered opinion that the place of occurrence shown in the site map (Ex. Ka-11) is not the actual place of occurrence where the deceased was actually fired upon and where he is said to have fallen due to fire arm injury.

42. Who admitted the deceased in hospital :

From the aforesaid discussion it is established that P.W.3 and P.W.6 had neither transported the deceased to the hospital, nor, admitted him there. Their names are not available in the hospital record. Had they remained there and admitted the deceased, in normal circumstances, being close relatives, they would have completed the admission formalities and informed the informant. Their absence is reflected from the fact that employees of the hospital waited for the informant, P.W.2, to complete the

admission process later on, *(as per the evidence P.W. 1 and D.W.5).*

43. **Whether the deceased was capable of making any dying declaration :**

P.W.3 and P.W.6 do not claim that the deceased made any dying declaration to them. Doctor P.W.1 does not say that deceased was able to speak or made any dying declaration. The injured was in a very critical condition, blood was arranged immediately and transfused; he was intubated at once and put on ventilator in I.C.U., but patient could not be revived. By that time P.W.2 reached the hospital, injured had been intubated and was on ventilator in I.C.U. In the circumstance neither P.W.2, P.W. 3 and P.W.6 could enter the I.C.U. According to D.W.5, Vineet Kumar, an employee of the hospital, except staff no other person is permitted to enter the I.C.U. and in that situation patient can neither speak, nor is able to make any gesture *(the prosecution case that patient made the alleged dying declaration to P.W.2 is improbable)*. Even as per the statements of D.W.1 to D.W.5, the patient was not in a position to talk and reply. Therefore, it is probable that deceased had not made any dying declaration to P.W.2 Narendra Bhan or any other person regarding the incident.

In **Arun Bhanudas Pawar Versus State of Maharashtra, MANU/SC/7056/2008, (2008) 11 SCC 232,** Supreme Court declined to accept the testimony of the mother of the deceased that deceased upon regaining consciousness disclosed the name of the accused to her. The mother of the deceased categorically deposed that when she went to civil hospital she found her son in unconsciousness condition, however, later on, deceased regaining consciousness informed her the names of accused who assaulted him with knife. She further stated that doctor was present when the deceased made oral dying declaration to her. The Court declined to accept her testimony being an interested witness and her testimony was not without corroboration from independent witness, including, medical officer. The court observed as follows:

"21....It is well-settled law that the oral dying declaration made by the deceased ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination. In the present case, admittedly, the alleged dying declaration had not been made to any doctor or to any independent witness, but only to the mother...The prosecution has not brought on record any medical certification to prove that after operation the deceased was in a fit condition to make the declaration before his mother."

44. **Recovery of fire arm of .38 bore, live and empty cartridges and bullets from the person of the deceased, from the place of occurrence, F.S.L. report and acquittal in S.T. No. 614 of 2007 (State Vs. Subhash) Under Section 3/25 Arms Act :**

Earlier it has been discussed that on 14.3.2007, second I.O. B.K. Singh, C.O., got the police custody remand and on 15.3.2007, a country-made revolver, two live and one empty cartridges were alleged to have been recovered on the pointing of the accused Subhash. In this regard, recovery memo (Ex. Ka-19), search memo (Ex. Ka-19 A), site plan (Ex.Ka-20, Ex. Ka- 20A), charge-sheet under Section 25 Arms Act (Ex. Ka-21), site plan (Ex. Ka-

21A), prosecution sanction (Ex. Ka-22), F.S.L. report (Ex. Ka-23 A), statement of P.W.-8, S.I. Harpal Singh I.O. and P.W.9, Mukesh Kumar Meshram, the then D. M. Meerut and statement of D.W. 6, the then expert F.S.L. Agra, has been discussed and it was found that the bullet received from the body of the deceased and from the spot are of 9 m.m. bore, whereas, the recovered revolver and live cartridges are of .38 bore and on the back of empty cartridge received from the barrel, .38 bore was not written and both the bullets were not executed from the alleged recovered revolver. According to P.W.7 S.I. Umesh Chandra Singh Yadav, first I.O., an empty hole/cartridges of 315 bore was also recovered from the place of occurrence but that empty hole/cartridge of 315 bore was concealed and neither sent for F.S.L. Examination, nor, produced before the Court. In this regard statement of expert Sanjay Khare who examined the materials at F.S.L. Agra, is relevant, therefore, the same is discussed herein below: -

D.W.-6 Sanjay Khare, fire-arm expert F.S.L. Lucknow, deposed that on 25.5.2007, constable Shyoraj Singh had brought the case property of crime no. 64/2007 and 73/2007 from Meerut to Agra F.S.L. But the same was returned with an objection that there was no stamp of the City Magistrate and no stamp of the doctor/hospital on the envelop of post-mortem. Also there was no clear seal on the bundle. After removing the objections, the case property was again deposited with the F.S.L. on 31.5.2007. Both the bullets sent for examination were of 9 m.m. Empty cartridge recovered from the barrel was country made. Bullet received from the body, in post mortem was not fired from the recovered revolver, .38 etc. was not written on the empty cartridge but it was written on the live cartridges only. Injuries No. 1, 3 & 4 were fire arm entry wound with blackening which occurs in case of firing within 6 inches. If person riding on a motorcycle, fires on a person who is on a moving scooter, such an injury would probably not occur because these injuries have been caused from a close distance. Further, he deposed that after firing the empty cartridges of 9 m.m. fall out of the pistol. No relevant questions and suggestions were put by the prosecution to this witness during the cross-examination.

Learned Trial Court after coming to the conclusion that the bullet received from the body of the deceased and from the alleged spot could not be fired from the alleged recovered revolver and there was no injury of empty cartridge's bullet caused to the deceased, acquitted the accused Subhash under Section 3/25 Arms Act. No appeal has been preferred by the State against the acquittal.

I.O. did not take notice of the hole on 315 bore cartridge. P.W. 1 and P.W.4 both the doctors do not depose that such fire arm entry wound may occur from weapon of 315 bore, in this regard no ballistic expert opinion was obtained, whereas, it is the case of prosecution that both the accused persons fired from two different weapons. The prosecution concealing the hole/cartridge of 315 bore and keeping it away from the investigation and the Court, is either due to negligence or it was done with an ulterior motive. Thus, it is probable that the alleged recovery is totally false in the light of injuries, F.S.L. report and oral evidence of the witnesses. The Trial Court rightly acquitted accused Subhash for the charge under Section 25 Arms Act.

In Sumer Singh Umed Shinh Rajput alias Sumer Shinh Vs. State of Gujrat, AIR 2008 SC 904, the accused was convicted for the offences under Section 307 I.P.C. and also under Section 25 (1) (a)

of the Arms Act, 1959. Supreme Court setting aside his conviction and sentence, found that pant and vest of complainant were having one bullet hole which were incompatible with case of single shot; nature of injury suffered by complainant was also incompatible with gun shot injury. In the cited case witnesses had turned hostile. It was held that prosecution case suffers from discrepancies, therefore, conviction of the accused was set aside.

45. Defective, biased and prejudiced investigation :

It is duty of the I.O. to collect evidence and not to create/introduce evidence in favour of the prosecution and against the accused or vise-versa. But in this case I.O. Brijesh Kumar Singh, the then C.O., has not acted in the right direction and violating all the norms, implanted two persons as eye witness, planted cartridges and country-made revolver and showed it as recovered on the pointing of accused Subhash and employed in commission of crime. Thereafter, he made S.I. Mithun Dixit, followed by, S.I. Harpal Singh, his subordinates as I.Os. of the case under Section 25 Arms Act who forwarded the case-diary to their boss (Brijesh Kumar Singh, C.O.) in violation of principles of natural justice. A person can not be judge in his own cause being informant/plaintiff of the Arms Act case and without contacting or interrogating the probable persons; not taking the blood stained clothes in his possession and without obtaining any report from F.S.L. and without ascertaining the actual place of occurrence and without searching for the tempo employed in transportation of the deceased to the hospital submitted the charge-sheet.

Though in ***Maqbool Vs. State of Andhra Pradesh, AIR 2011 SC 184,*** Supreme Court has held that not sending blood stained soil and clothes for chemical examination, weapon of assault, cartridges, empty and pellets for ballistic examination is not fatal, if ocular evidence is found credible, cogent and trustworthy. Similarly, the Supreme Court has also ruled in several cases that faulty investigation can not be made the sole ground to reject the prosecution case, but it is duty of the I.O. to investigate the case honestly, sincerely, in accordance with police regulation, police manual and with devotion. In ***Khem Ram Vs. State of Himanchal Pradesh, (2018) 1 SCC 202*** and in ***Leela Ram Vs. State of Haryana, (1999) 9 SCC 525;*** the Supreme Court has held that any irregularity or deficiency in investigation by I.O. need not necessarily lead to rejection of prosecution case when it is otherwise proved. The only requirement is use of extra caution in evaluation of evidence. A defective investigation can not be fatal to prosecution where ocular testimony is found credible and trustworthy.

But in the present case alleged eye-witnesses, their testimony and presence has been found doubtful.

In ***Navinchndra N. Majithia Vs. State of Meghalaya and Others, (2000) 8 SCC 323;*** the Supreme Court has pointed out the duties of the investigating officer. After lodging of the F.I.R investigation thereafter would commence and the investigating officer has to go step by step. The Code contemplates the following steps to be carried out during such investigation:

"(1) Proceeding to the spot; (2) ascertainment of the facts and circumstances of the case; (3) discovery and arrest of the suspected offender; (4) collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if

the officer thinks fit, (b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial; and (5) formation of the opinion as to whether on the material collected there is a case to place the accused before a magistrate for trial and, if so, taking the necessary steps for the same by the filing of a charge-sheet under Sec.173.

(vide HN Rishbud vs. State of Delhi [AIR 1955 SC 196} and State of Madhya Pradesh vs. Mubarak Ali [AIR 1959 SC 707]).

All the above duties are conferred by the statute on the police and they shall be carried out as they are statutory duties. The sublime idea behind formulating such steps for conducting investigation is to enable the statutory authority to independently carry out the investigation without being influenced by any of the interested parties. Investigation must not only be fair but impartial and the conclusion reached by them should be unbiased.

A Division Bench of the Madras High Court had pointed to that object of the statutory investigation in re Muddamma Malla Reddy [1954 Crl.L.J.167] through the following observations:

The investigating police are primarily the guardians of the liberty of innocent persons. A heavy responsibility devolves on them of seeing that innocent persons are not charged on irresponsible and false implication. There is a duty cast on the investigating police to scrutinize a first complaint in which number of persons are implicated with rigorous care and to refrain from building up a case on its basis unless satisfied of its truth.

In Sirajjuddin vs. State of Madras [1970 (3) SCR 931] this Court said thus, after referring to various provisions in the Code dealing with investigation:

All the above provisions of the Code are aimed at securing a fair investigation into the facts and circumstances of the criminal case; however serious the crime and howsoever incriminating the circumstances may be against a person supposed to be guilty of a crime the Code of Criminal Procedure aims at securing a conviction if it can be had by the use of utmost fairness on the part of the officers investigating the crime before the lodging of a charge- sheet. Clearly the idea is that no one should be put to the harassment of a criminal trial unless there are good and substantial reasons for holding it.

The said observations were followed by this Court in State of Rajasthan vs. Gurcharandas Chadha [1980 (1) SCC 250]."

The principles laid down by Supreme Court and High Court have not been followed by the I.O. in this case.

46. On scrutiny and evaluation of the evidence and discussions the following points emerge:

a. That the place of occurrence is doubtful as shown in Ex. Ka-11. The absence of human blood on the spot, coupled with the falsity of the eye witness account and not supported by defence witness raises doubt.

b. That P.W.3 Ajay Bhan and P.W.6 Achhendra Kumar Bhan, are neither chance witness, nor, eye witnesses, thus, it is not a case of direct evidence. They are the creation of the IO. P.W.10, Brijesh Kumar Singh, the then C.O. Sadar, Meerut.

c. That P.W.3 and P.W.6 had neither transported, nor, admitted the deceased in Sushila Jaswant Rai Multi Specialty Hospital, Meerut. (per the evidence of D.W.5 Vineet Kumar).

d. That deceased was was not in a position, nor, had made any dying declaration either to P.W.3 or P.W.6 or doctor or any employee to the hospital or P.W.2, informant, Narendra Bhan, or defence witnesses.

e. That the the deceased had inimical relations with several persons within and outside of the family. Thus, several other persons had motive to kill the deceased. The deceased was in property dealing.

f. That I.O. Brijesh Kumar Singh, had planted the countrymade revolver, empty and live cartridges and shown the recovery from accused Subhash only to strengthen the prosecution case, but it could not match with the injuries and bullets recovered from the body of the deceased and the alleged place of occurrence.

g. That deceased was transported to the hospital by P.W.2 Dr. Pankaj and D.W4 Chandra Shekhar and the deceased was not in position to speak.

h. That the accused persons were named in F.I.R. on account of enmity, while the deceased and informant had enmity with several other persons also.

i. That I.O. Brijesh Kumar conducted a sketchy, unlawful, faulty and unfair investigation, falsely implicating the accused persons, especially, accused Subhash in the case under Section 25 Arms Act and did not attempt to extract the grain from the chaff; treating the F.I.R. as gospel truth, submitted the charge-sheet.

j. That P.W.3 and P.W.6 are not the eye witnesses, it is not a case of direct evidence. The chain of events based on circumstantial evidence does not link the accused with commission of the crime. Except alleged motive which, was also available to others. There is neither last seen, nor any recovery, or any extra judicial confession. The necessary elements of a case based on circumstantial evidence is not available in the present case. Recovery of 9 mm Bullet from the spot of the incident and body of the deceased is one of the circumstances, but that does not link or connect the accused of committing the offence.

k. That the learned lower Court has erred in accepting the evidence of P.W.2 P.W.3 and P.W.6 and accepting the contents of the F.I.R. and charge-sheet as gospel truth. Though, the learned lower Court has acquitted the accused Subhash under Section 25 Arms Act.

l. Suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond all reasonable doubt. We have already seen that the prosecution not only has not proved its case but palpably produced false evidence and the prosecution has miserably failed to proved its case against the appellant let alone beyond all reasonable doubt that the appellant and he alone committed the offence. (Vide ***Varkey Joseph Vs. State of Kerala).***

47. On the basis of the discussions herein above, the Court is of the considered opinion that the prosecution miserable failed to prove the charge against the accused beyond reasonable doubt. They were falsely implicated on the pretext of enmity which is double edged weapon due to which a person can cause and commit the offence and a person can also falsely be implicated. In the case at hand we find that the accused are innocent and they have been falsely implicated for the murder of the deceased Bijendra Bhan.

Accordingly, the Court is of the considered opinion that the impugned

judgment and order of conviction and sentence is not sustainable and is liable to be quashed and the appeal is to be allowed.

Order

The appeal is **allowed,** the judgment and order dated 2.1.2014, convicting and sentencing of the appellants Satendra Kumar and Subhash, passed by Additional Sessions Judge/Special Judge S.C. and the S.T. (Prevention of Atrocities) Act, Meerut, is hereby quashed. The appellants are set free if not wanted in any other case.

Copy of this judgment be sent to the concerned Court and Jail Superintendent for necessary compliance.

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

Registry is directed to return the original records to the lower Court along with a copy of this judgment and order.

(2022) 9 ILRA 946
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 4810 of 2012

Sita Ram ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Rakesh Chandra Tiwari, Sri Ashok Kumar Mishra, Sri Satya Prakash Srivastava, Shri Prakash Dwivedi, Sri Suresh Srivastava

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Indian Penal Code,1860 - Section 302 -Dowry death-death due to strangulation-post mortem-homicide death-criminal jurisprudence is reformative and corrective-opportunity of reformation -12 years already spent-enough punishment.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Sanjay Maurya Vs St. of U.P., 2021 0 Supreme(All) 132

2. Tukaram & ors. Vs St. of Mah. (2011) 4 SCC 250

3. B.N. Kavatakar & anr. Vs St. of Karn. 1994 SUPP (1) SCC 304

4. Raj Kumar Prasad Tamarkar Vs St. of Bihar & anr., 10 (2007)10 SCC 433 **(distinguished)**

5. Mohd. Giasuddin Vs St. of A.P., [AIR 1977 SC 1926]

6. Deo Narain Mandal Vs St. of U.P. [(2004) 7 SCC 257]

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

8. Jameel Vs St. of U.P. [(2010) 12 SCC 532]

9. Guru Basavraj vs St. of Karn., [(2012) 8 SCC 734]

10. Sumer Singh Vs Surajbhan Singh, [(2014) 7 SCC 323]

11. St. of Punj. Vs Bawa Singh, [(2015) 3 SCC 441]

12. Raj Bala Vs St. of Har., [(2016) 1 SCC 463]

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

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

1. Heard Sri Suresh Srivastava, learned counsel for the appellant and Sri

Nagendra Kumar Srivastava, learned A.G.A. for the state.

2. This appeal challenges the judgment and order dated 16.10.2012 passed by Additional Sessions Judge, Court No.4, Mirzapur in Sessions Trial No.171 of 2010 (State vs. Sita Ram) arising out of Case Crime No.473 of 2010 convicting accused-appellant under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced the accused-appellant to undergo imprisonment for life with fine of Rs.5,000/- and in case of default of payment of fine, further to undergo imprisonment for a period of one year.

3. The genesis of the litigation are that the deceased was married to the accused appellant Sita Ram in the month of May, 2006. It is alleged in the F.I.R that the accused demanded money and a motor-cycle, when the deceased showed her inability to get the same from her parents the sad news of her death came on 26.05.2010. The F.I.R was lodged on the very same day by the father of the deceased. The police moved to scene of offence and prepared panchnama. The dead body was sent for postmortem and the post-mortem report revealed that the death was due to strangulation.

4. The police after recording the statements of several witnesses filed charge-sheet against the accused. Being summoned the accused was committed to the court of Sessions as the offence for which the accused was charged was exclusively triable by the court of Sessions.

5. On the accused pleading not guilty on 14.10.202010 charges were framed for commission of offence under Section 498A, 304-B I.P.C read with 3/4 of D.P. Act.

6. The witnesses were examined and after two witnesses namely P.W.-1 and P.W.-2 were examined and when they did not support the prosecution, a new charge was framed by the transferred new incumbent Sessions Judge charging the accused for commission of offence under Section 302 of I.P.C.

7. The Trial started and the prosecution examined 4 witnesses who are as follows:

1	Sobhnath	PW1
2	Smt. Brijwanti	PW2
3	Hira Prasad Maurya	PW3
4	Dr. Srikant Pandey	PW4

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

1	F.I.R.	Ex.Ka.2
2	Written Report	Ex.Ka.1
3	Postmortem Report	Ex.Ka.12
4	Charge-sheet	Ex.Ka.13
5	Site Plan	Ex.Ka.4
6	Recovery memo of Broken Bangle	Ex.Ka.6
7	Recovery Memo of Dupatta	Ex.Ka.11

9. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellant as mentioned above.

10. Learned counsel for the appellant has relied on the decision in **Sanjay**

Maurya Vs. State of U.P., 2021 0 Supreme(All) 132 and has contended that it is not proved that the offence under Section 302 is committed nor any offence under Section 304B is proved against the accused, the case cannot be said to be proved under Section 302 of Indian Penal Code as the conviction by Trial Court with the aid of Section 106 of the Indian Evidence Act, 1872 is bad. It is further submitted that the decisions on which the trial court has placed reliance have been misread by the learned trial Judge so as to hold that accused is guilty of commission of offence under Section 302 IPC. It is further submitted that the incident even if it is believed to have occurred and culpability of accused is proved it occurred on the spur of the moment, therefore, the accused if has to be held guilty, the accused be convicted under Section 304(1) of the I.P.C.

11. As against this Sri N.K. Srivastava, learned counsel for the State has contended that

(i) the death occurred in the matrimonial home of the deceased;

(ii) the incident occurred within 7 years of married life. The proof of death being homicidal is proved. Despite the fact that in the statement under Section 313 Cr.P.C the accused has pleaded that he is not guilty but he has not discharged the burden cast on him to rebut the proved facts against accused on facts which are required to be proved are answered so as to cause a dent in prosecution evidence.

12. While considering the facts we have to consider the provisions of Section 304B IPC read with Section 302 of the Indian Penal Code. Trial Court has based the conviction with aid of Section 106 of Indian Evidence Act, 1872. The provisions of Section 106 of Indian Evidence Act, 1872 lay as follows :-

"106. Burden of proving fact especially within knowledge.--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

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

13. We are of the considered opinion that Section 106 of the Indian Evidence Act, 1872 would come into play once the prosecution has discharged its duty of proving facts as per the charge and evidence act. In this case ingredient of Section 300 of I.P.C which read as follows:-

"300. Murder.--Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

(Secondly) --If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

(Thirdly) --If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

(Fourthly) --If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily

injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual. Exception 1.--When culpable homicide is not murder.--Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The above exception is subject to the following provisos:--

(First) --That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

(Secondly) --That the provocation is not given by anything done in obedience to the law,

(Thirdly) --That the provocation is not given by anything done in the lawful exercise of the right of private defence. Explanation.--Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills. Y, Z's child. This is murder, in as much as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, in as much as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as witness before Z, a Magistrate, Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose, Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent

passion in consequence, and kills Z. This is murder, in as much as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder. Exception 2.--Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. Illustration Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide. Exception 3.--Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused. Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault. Exception 5.--Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent. Illustration A, by instigation, voluntarily causes, Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder."

14. Section 304B of IPC reads as under :

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

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

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

15. The evidence on record shows that nobody has seen the accused committing the offence of strangulating the deceased. This is the first dent in the prosecution evidence. The submission of the learned counsel for the State that the

accused was nabbed after 6 days would not make any difference. The facts and circumstances of the case would show that the deceased was subjected to harassment, the words used by the legislation are very clear that it may be the word use as not 'and' but 'or', therefore there is thin line of distinction.

16. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind that it is homicide death.

17. The question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code or under Section 304B of IPC. It would be relevant to refer to Section 299 of the Indian Penal Code, which reads as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

18. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

19. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka, reported in 1994 SUPP (1) SCC 304,** we are of the considered opinion that the offence would not be one punishable under Section 304 of the IPC.

20. It would be relevant for us to discuss the evidence of PW-1, PW-2, PW-3

and PW-4 coupled with the facts that PW-1 and PW-2 did not suport the prosecution and were declared hostile. However, in their examination-in-chief, they have categorically mentioned that they got her married to Sita Ram four years before she died and in the marriage they gave as per their financial condition. However denied the fact that the appellant and his family members were demanding any kind of dowry.

21. In cross examination, witnesses, PW-1 & PW-2 have feigned ignorance as to how the police authority had mentioned the fact of demand of motorcycle and chain in the FIR or their statement under Section 161 of Code of Criminal Procedure. They have even categorically opined that the appellant here in was not present at the time of death. Similar version of PW-3 also. It is only after the witnesses did not support the prosecution that the learned Judge framed new charge on 28.1.2011 to prove that the offence under Section 300 of IPC amounting to murder, there must of clinching evidence that it was the appellant alone who was last seen with the deceased. Just because he has not stated where he was the Court cannot return to a finding against him. There were no anti mortem injuries also as per the occuller version of PW-4 (Doctor). The decision of which the learned Judge has placed reliance for coming to the conclusion that offence under Section 302 IPC is made out, can be made applicable to the facts of this case. However, a rebuttal evidence under Section 106 of the Indian Evidence Act would clear the facts and Section 304B IPC could be presumed to have been made out but not for Section 302 IPC. The death has occurred in the matrimonial home. The accused was not found and was absconding. He was arrested after six days by the police authority. The judgment of **Raj Kumar Prasad Tamarkar Vs. State of Bihar and another, (2007)10 SCC 433** will not apply to the facts of this case.

22. We come to the definite conclusion that the death was homicidal death. The judgments cited by the learned counsel for the appellant namely **Sanjay Maurya (supra)** would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but it is culpable homicide and was dowry death.

23. This takes us to the question of applicability of Section 304B of I.P.C to the facts of this case.

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

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and

regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

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

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

27. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers

that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

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

29. Having discussed the judgment threadbare and have been considered the factual data, we have come to the conclusion that the offence committed by the accused with an aid of Section 106 of Indian Evidence Act, can be said to have been under Section 304B for the finding mentioned herein above.

30. By going through the evidence on record it is very clear that the act of the accused-appellant was not such which cannot be substituted by giving a lessor sentence than life imprisonment. The period of 12 years which he spent is enough punishment in the facts of this case. The minor contradictions will have to be ignored and they cannot for the dent in the prosecution of the husband. Medical evidence is quite clear and corroborates the facts and circumstances. Punishment would be 10 years incarceration, the fine and default sentence are also maintained.

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

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

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

(2022) 9 ILRA 954
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 6666 of 2008
connected with
Criminal Appeal No. 6372 of 2008

Salim @ Pappu ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Pankaj Govil, Sri Siddharth Nandan

Counsel for the Respondent:
Govt. Advocate, Sri V.M. Zaidi

Criminal Law - Indian Penal Code,1860 - Section 302/34 IPC- Accused are two brothers-one accused of stabbing and other accused of grabbing/catching hold the deceased-one victim died another sustained stab injury-manner of offence occurred indicates- at spur of the moment -common intention was formed between three brothers-no premediation-sudden fight-falls under fourth exception to section 300 IPC.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Ramashish Yadav & ors. Vs St. of Bihar, (1998) 8 SCC 555

2. Gulab Vs St. of U.P. & ors. being Criminal Appeal No.81 of 2021

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. These two appeals are by the brothers of Dilshad, namely Saleem and Firoz, challenging the judgment and order of conviction and sentence, dated 28/29.8.2008, passed by the Additional Session Judge, Court No.11, Ghaziabad in Session Trial Nos. 383 of 1998 (State vs. Saleem @ Pappu and Firoz) and 309 of 1999 (State vs. Firoz), whereby the accused appellant Saleem @ Pappu has been convicted and sentenced to life imprisonment under Section 302/34 IPC with fine of Rs.10,000/- and has also been convicted and sentenced to ten years rigorous imprisonment under section 307/34 IPC with fine of Rs.5,000/- and accused appellant Firoz has been convicted and sentenced to life imprisonment under Section 302/34 IPC with fine of Rs.10,000/- and has also been convicted and sentenced to ten years rigorous imprisonment under Section 307 IPC with fine of Rs.5,000/- and he has also been convicted and sentenced to one year rigorous imprisonment under Section 25/4 Arms Act with fine of Rs.1,000/-. In default of fine accused appellants are to undergo two years rigorous imprisonment under section 302/34 IPC and one year rigorous imprisonment under Sections 307/34 IPC and 307 IPC and three months rigorous imprisonment under Section 25/4 Arms Act. All the sentences shall run concurrently.

2. Prosecution case, in brief, is that the first informant Tahzeeb alongwith Suhail had gone to meet Mazid Ali (injured witness, PW-2) and his brother-in-law Fasiuddin (deceased) at their workshop and their helper Moinuddin was also present at 09.30 AM, when their neighbour Saleem @ Pappu, Firoz and Dilshad sons of Imamuddin started sweeping areas in front of their workshop such that dust started coming to the workshop of Mazid. Mazid and Fasiuddin accordingly asked the three accused to sprinkle water before sweeping the area so that dust does not come to their workshop and on this Saleem, Firoz and Dilshad started abusing them. Mazid and Fasiudding asked them not to do so on which the accused persons attacked them with knife. Saleem grabbed Fasiuddin and Dilshad stabbed him and Firoz stabbed Mazid. Seeing the occurrence neighbours and adjoining workshop owners rushed to the spot and tried to apprehend the accused persons but they fled. Mazid and Fasiuddin were taken to government hospital where Fasiuddin was declared dead and his dead body was kept in mortuary. Mazid after first aid was taken to Yashoda Hospital and was admitted there. It is with these contents that written report (Ext. Ka-1) was entered in the General Diary and registered as Case Crime No.594 of 1997 on 27.09.1997 at 12.20 PM, under Sections 302/307 IPC, Police Station Sihanigate, District Ghaziabad. Individual role of accused appellant Saleem @ Pappu is of grabbing/catching hold the deceased Fasiuddin while accused appellant Firoz is accused of causing stab injury to Mazid. Section 34 IPC has also been invoked since the prosecution asserted that with a common intent the three accused persons have committed the offence in which one person, namely Fasiuddin, died and another Mazid sustained stab injury.

3. After registration of FIR the investigation proceeded. The Investigating Officer reached the spot and collected the bloodstained and plain earth. The inquest also followed. The inquest witnesses were of the view that the deceased died due to stabbed injury caused on his chest. The postmortem of the deceased Fasiuddin was conducted on 28.09.1997 and the autopsy

doctor opined the cause of death to be shock and haemorrhage due to following ante-mortem injury:-

"1. Incised wound 2cm x 1(1/2)cm x chest cavity deep on left side chest 7 cm away from left nipple at 10 "o' clock position."

4. A subsequent FIR came to be lodged on 12.10.1997 at 02.00 AM when accused appellant Firoz and Dilshad were arrested on 11.10.1997 at 11.15 PM and two similar knives were recovered from them. The accused persons had no licence to keep such weapons. These two accused persons informed the police that they had killed Fasiuddin and had also injured Mazid with these knives. The recovered knives were sealed separately and recovery memo of two knives and arrest was accordingly prepared.

5. Upon conclusion of investigation charge sheet was submitted against the accused appellants, on which the Magistrate took cognizance and committed the case to the court of sessions, and was registered as Session Trial Nos. 383 of 1998. Charges accordingly were framed against the accused appellants on 26.03.1998 under Sections 302/34 IPC and 307/34 IPC. Accused appellant Firoz was also charged under Section 25/4 Arms Act in respect of which Session Trial No.309 of 1999 was registered. The accused appellants denied the charges and consequently trial commenced. Both the sessions trial have been tried together.

6. The prosecution in order to establish the charges against accused appellants produced oral testimonies of following witnesses:-

1. Tahzeeb Ahmad PW-1
2. Majid Ali PW-2 PW-2
3. V. N. Singh PW-3 PW-3
4. Dr. Chiranji Lal PW-4 PW-4
5. Panna Lal Sharma PW-5 PW-5
6. R.A.S. Yadav PW-6 PW-6
7. Braj Kumar PW-7 PW-7
8. M.C. Gautam PW-8 PW-8
9. Virendra Singh PW-9 PW-9
10. Charan Singh Yadav PW-10 PW-10
11. Dharam Pal Singh PW-11 PW-11
12. Wasif Ali PW-12 PW-12
13. Dr. Sangeeta Garg PW-13 PW-13
14. Dr. Vinesh Kumar PW-14 PW-14

7. Documentary evidences have also been adduced by the prosecution consisting of two FIRs as Ex.Ka. 4 & 14; written report as Ex.Ka.1; recovery memo of bloodstained and plain earth as Ex.Ka. 17; recovery memo of knife and arrest as Ex. Ka.11; postmortem report Ex.Ka. 3; two site plan with index as Ex.Ka.12 & 16.

8. On the basis of oral and documentary evidence, thus adduced, the trial court has found the accused appellants guilty of offence and has consequently convicted them. Aggrieved by the judgement of conviction and sentence the

accused appellants have preferred these appeals before this Court.

9. On behalf of the accused appellants three submissions have been made. First and foremost it is urged that the accused appellants have been falsely implicated in the present case and the weight of evidence on record does not support their conviction and sentence. It is then urged that the incident, as alleged by the prosecution, occurred at spur of the moment and there was neither any pre-meditation nor any common intent to commit the offence. It is, therefore, argued that section 34 IPC cannot be invoked in the facts of the case since common intention on part of the two accused appellants was clearly lacking. It is submitted that the accused appellants can at best be punished for their individual act and not under section 302 read with Section 34 IPC. It is lastly urged stated that only a single stab wound has been inflicted in the heat of the moment and, therefore, intent to murder the deceased was not established. It is submitted that there was no intention on part of the accused appellants to murder the deceased Fasiuddin and the incident occurred over a trivial issue, at the spur of the moment without any pre-meditation and, therefore, even if section 34 IPC is applied, yet, none of the accused appellants are liable to be punished under section 302 IPC and can at best be punished under section 304 part II IPC. It is also submitted that though the accused appellant Saleem has been granted bail vide order dated 22.01.2009 but the accused appellant Firoz is in jail since 28.08.2008.

10. Learned A.G.A. for the State, per contra, states that the weight of evidence clearly supports the conclusion drawn by the trial court inasmuch three accused persons committed the offence with a common intent and, therefore, section 34 IPC rightly invoked. It is urged that the intent on record shows that all three accused went inside the workshop to fetch knife whereafter the incident occurred and, therefore, there is clear evidence that common intention was formed at the spur of the moment and the argument that the accused appellants can be punished for their individual role cannot be accepted. Learned A.G.A. also states that this is a case of broad daylight incident in which one person is killed while other sustained grievous stab wound, as such the conviction and sentence awarded to accused appellants suffers from no infirmity.

11. We have heard Sri Kamlesh Kumar, learned counsel, assisted by Sri Kandarp Srivastava and Sri Pankaj Govil for the accused appellants and Km. Meena, learned A.G.A. for the State and have perused the records brought on record.

12. We may note that accused Dilshad who was assigned the role of stabbing the deceased Fasiuddin was found juvenile at the time of occurrence of crime and was dealt with as per the law applicable.

13. Prosecution case in addition to documentary evidence, referred to above, has adduced oral testimonies of Tahzeeb Ahmad PW-1, Injured Witness Mazid Ali PW-2 and Wasif Ali PW-12 to prove the incident. PW-1 has supported the FIR version that he had come to workshop of Mazid Ali at 09.30 in the morning and in his presence Mazid, Fasiuddin and Moinuddin asked the accused persons to sprinkle water before sweeping the area so that dust does not come to their workshop on which the accused persons started abusing and when they were objected then

the three accused with a common intent came forwarded and Saleem caught hold of deceased Fasiuddin while Dilshad stabbed him. Firoz is stated to have stabbed Mazid. In his cross-examination PW-1 has claimed that his workshop is at a distance of nearly 750 meters from the place of occurrence and he used to get his machine repaired at the workshop of Firoz. He has explained that in FIR he has narrated that he had gone to meet Mazid and that his visit was due to any work was not disclosed. Sohail has a shop about 3-4 kilometres from the place of occurrence. PW-1 has also stated that alongwith him Sohail and Mazid are from the same place and that the incident occurred when they reached the workshop of Mazid. The witness also stated that alongwith him Ahteshyam and one other worker went to police station but Ahteshyam, who happens to be brother-in-law of Mazid, has not been produced. Ahteshyam was called on phone who arrived 35-40 minutes later by his Maruti Car. However, they had gone to police station by rickshaw. It is also stated that when they took Mazid to police station for lodging the report he was conscious and in his senses. PW-1 has stated that the entire incident occurred within 5-7 minutes. He has emphasised that the incident occurred at spur of the moment and they could not apprehend the accused.

14. PW-2 Mazid Ali (injured witness) has stated that alongwith him deceased Fasiuddin and helper Moinuddin were present at the workshop and Tahzeeb and Sohail had come to meet them. He has stated that his workshop adjoins the workshop of accused appellants. He has also supported the FIR version and has stated that with intent to kill him and Fasiuddin the accused persons stabbed him. He was admitted to Yasodha Hospital and that he was operated upon on account of stab wound.

In the cross-examination the injured witness Mazid has admitted that the accused persons used to sweep the area in front of their workshop in the same way everyday but no incident in respect of it had occurred earlier and that it was only on the date of occurrence that such a dispute had arisen. He has specifically stated that Dilshad was not carrying knife when he was sweeping the area in front of their workshop and that these persons must have gone inside the workshop to get the knife and thereafter stabbed him. He has however feigned ignorance whether the accused had gone inside the workshop to fetch the knife after the altercation and it is not known as to how much time they took to come out. He also denied that he sustained injury elsewhere and they have falsely implicated the accused appellants.

15. PW-12 Wasif Ali was not shown to be the person present at the place of occurrence in the FIR. He has disclosed that he was standing near the workshop of Mazid. In his cross-examination he claims to be running a STD Booth at Kavi Nagar and used to cross the workshop of Mazid every morning. He has denied the suggestion that there existed open space between the workshop of Mazid and the accused persons.

16. Upon careful examination of the statement of witnesses PW-1, PW-2 and PW-12, we find that their presence on the spot has been explained. PW-1 was otherwise known to PW-2 as they hail from same area and his presence at the workshop cannot be doubted. Similarly, PW-12 alleged that he crossed the workshop of Mazid everyday in the morning for going to

his STD Booth, therefore, his presence on the spot also cannot be doubted. PW-2 is an injured witness and place of occurrence is his workshop. All three witnesses have supported the FIR version and have clearly stated the manner in which fight erupted. They have been consistent in assigning the role of catching hold to Saleem; stabbing by Dilshad to Fasiuddin; and stabbing by Firoz to Mazid. The statement of PW-1, PW-2 and PW-12 is clearly corroborated by the medical evidence, which refers to stab wound caused to deceased Fasiuddin as also injured PW-2.

17. From the evidence placed before us we have no doubt that the incident had actually occurred in front of workshop of Mazid wherein the accused persons stabbed Fasiuddin and Mazid, resulting in death of Fasiuddin and stab wound caused to Mazid. The finding of the trial court in that regard, accordingly, is confirmed.

18. It is next to be seen in the facts of the case as to whether the offence attributed to accused appellants was committed on account of common intention between three accused persons or they are to be held liable only for their own act.

19. Section 34 IPC is relevant and is reproduced hereinafter:-

"34. Acts done by several persons in furtherance of common intention.--When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

20. It is by now well settled that principles of joint liability in committing an offence is contemplated under section 34 IPC. The factum of joint liability in committing the offence is dependent upon existence of common intention pursuant to which three accused acted in furtherance of their common intention.

21. In Ramashish Yadav and others vs. State of Bihar, (1998) 8 SCC 555 the Court has observed as in following words:-

"Coming to the question of applicability of section 34 for the murder of Tapeshwar, we find from the evidence of the three eye witnesses that while Ram Pravesh Yadav and Ramanand Yadav caught hold of Tapeshwar, accused Samundar Yadav and Sheo Layak Yadav came with gandasa and gave blows on the head of Tapeshwar, as a result of which Tapeshwar died, section 34 lays down a principle of joint liability in the doing of a criminal act. The absence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature of section 34 is the element of participation in action. The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a prearranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of mind may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack."

22. In a recent decision in Gulab vs. State of U.P. and others being Criminal Appeal No.81 of 2021 the ingredients of section 34 IPC has been summed up in para

24 to 27, which are reproduced hereinafter:-

"24. Emphasizing the fundamental principles underlying Section 34, this Court held that:

(i) Section 34 does not create a distinct offence, but is a principle of constructive liability;

(ii) In order to incur a joint liability for an offence there must be a pre-arranged and pre-mediated concert between the accused persons for doing the act actually done;

(iii) There may not be a long interval between the act and the pre-meditation and the plan may be formed suddenly. In order for Section 34 to apply, it is not necessary that the prosecution must prove an act was done by a particular person; and

(iv) The provision is intended to cover cases where a number of persons act together and on the facts of the case, it is not possible for the prosecution to prove who actually committed the crime.

25. These principles have been adopted and applied in another two judge Bench decision of this Court in Chhota Ahirwar v. State of Madhya Pradesh, 2020 (213) AIC 66. Justice Indira Banerjee speaking for the two-judge Bench observed:

"26. To attract Section 34 of the Penal Code, no overt act is needed on the part of the accused if they share common intention with others in respect of the ultimate criminal act, which may be done by any one of the accused sharing such intention [see Asoke Basak [Asoke Basak v. State of Maharashtra, (2010) 10 SCC 660 : (2011) 1 SCC (Cri) 85], SCC p. 669]. To quote from the judgment of the Privy Council in the famous case of Barendra Kumar Ghosh [Barendra Kumar Ghosh v. King Emperor, 1924 SCC OnLine PC 49 : (1924-25) 52 IA 40 : AIR 1925 PC 1], "they also serve who stand and wait".

27. Common intention implies acting in concert. Existence of a prearranged plan has to be proved either from the conduct of the accused, or from circumstances or from any incriminating facts. It is not enough to have the same intention independently of each other."

26. In Dhanpal v. State (NCT of Delhi), 2020 (112) acc 813 (SC) the appellant had exhorted a co-accused to kill the deceased. The exhortation was not repeated by the eyewitnesses in identical terms. Further, it was also alleged that there was no neutral witness since all the eyewitnesses were related to the deceased and there was a delay in lodging the FIR. Justice Aniruddha Bose speaking for the two judge Bench of this Court observed:

"8. There are sufficient materials, however, to establish that the three appellants had returned together to the place of occurrence and attacked the deceased victim with Dhanpal exhorting to kill Ajay. They had grappled the victim and said Kamal inflicted multiple injuries on him with the knife. On the basis of evidence disclosed, the trial court and the High Court found that there was prior meeting of minds of all the four convicts and all the three appellants had intention common with that of Kamal. On this point, the ratio of the judgment of this Court in Asif Khan v. State of Maharashtra [Asif Khan v. State of Maharashtra, (2019) 5 SCC 210 : (2019) 2 SCC (Cri) 484] is relevant. In an earlier case, Rajkishore Purohit v. State of M.P. [Rajkishore Purohit v. State of M.P., (2017) 9 SCC 483 : (2017) 3 SCC (Cri) 749], it has been held that to establish common intention to cause murder, overt act or possession of weapons by all the accused persons is not necessary.

In Richhpal Singh Meena v. Ghasi [Richhpal Singh Meena v. Ghasi, (2014) 8 SCC 918 : (2014) 6 SCC (Cri) 424], the ratio is that in the event the nature of the assault is such that the target person is likely to die from the injuries resulting therefrom, the accused must be deemed to have known the consequences of his act.

.....

11. We find the approach of the trial court and the High Court in appeal was proper in dealing with the discrepancies pointed out on behalf of the appellants. The delay in registering the FIR has been explained properly and judgment of conviction cannot fail for that reason. It is a fact that the eyewitnesses were known to the deceased and there was no neutral witness. But for that factor alone we cannot exonerate the appellants, particularly since the court of first instance and the first appellate court have already examined the evidence and given their findings in favour of prosecution. We do not find any error in the judgment of conviction and order of sentence so far as the appellants are concerned. All the three appeals are dismissed."

Recently in Sandeep v. State of Haryana, 2021 (225) AIC 108 (SC) a two-judge Bench of this Court held that an exhortation given by an accused immediately before a co-accused fired a shot killing the deceased would prove his involvement in the crime beyond reasonable doubt. Accordingly, this Court upheld the conviction of the accused under Sections 302 and 34 of the IPC.

27. The evidence on the record clearly establishes a common intention in pursuance of which the appellant exhorted Idrish to kill the deceased. The prosecution is not required to prove that there was an elaborate plan between the accused to kill the deceased or a plan was in existence for a long time. A common intention to commit the crime is proved if the accused by their words or action indicate their assent to join in the commission of the crime. The appellant reached the spot with a lathi, along with Idrish who had a pistol. The appellant's exhortation was crucial to the commission of the crime since it was only after he made the statement that the enemy has been found, that Idrish fired the fatal shot. The role of the appellant, his presence at the spot and the nature of the exhortation have all emerged from the consistent account of the three eye-witnesses."

23. In light of the settled position in law we are required to examine as to whether there existed common intention on part of the accused appellants in committing the offence.

24. It may be noticed that all the three accused are real brothers. They were present when the incident occurred in which they were objected to by the deceased and injured from sweeping before sprinkling water, so as to avoid dust coming to their workshop. The sudden fight which erupted thereafter was between the three brothers on one side and the deceased as well as injured on the other side. PW-2 in his statement has stated that Dilshad was not carrying knife when he was sweeping the area in front of their workshop. It appears otherwise logical that a person sweeping the floor outside his workshop would not be carrying arms (knife here). This witness appears to be a natural witness who has asserted that he had not seen the accused persons going inside the workshop to fetch knife but it remains undisputed that the injury was caused by the accused persons to Fasiuddin and Mazid. These persons must have got the knife after the fight, though in the heat of moment at that

spur. Specific role has been assigned to all three accused inasmuch as one of the brothers caught hold of the deceased Fasiuddin while Dilshad stabbed him and Firoz stabbed Mazid. The manner in which offence occurred clearly indicates that at spur of the moment common intention was formed between the three brothers which resulted in stab injury caused to deceased Fasiuddin and injured witness Mazid.

25. Law is otherwise settled that in order to incur joint liability for an offence there need not be a long interval between the act or pre-meditation and the plan may be formed suddenly. We, therefore, are in agreement with the conclusion drawn by the trial court that section 34 IPC would be attracted in the facts of the case and each of the accused would be held liable for offence under section 302 IPC.

26. This takes us to the last question urged on behalf of the accused appellant in the present two appeals whether trial court was justified in sentencing the accused appellants under section 302 IPC. According to the accused appellants the maximum punishment which could be imposed upon them is under section 304 part II IPC.

27. The prosecution case clearly is that it was at the spur of moment that a fight erupted when the deceased and injured objected to sweeping the area in front of workshop of accused appellants without sprinkling water. The witnesses present on spot i.e. PW-1, PW-2 and PW-12 have stated that it was at spur of the moment that incident occurred in which one of the persons has died while other sustained stab injury. It is also admitted to the prosecution witnesses that no such incident occurred earlier although accused appellants used to clean the area in similar fashion. In such circumstances, it is apparent that there was no pre-meditation on part of the accused appellants in committing the offence which occurred at the spur of moment.

28. Learned counsel for the accused appellants has urged that the incident in question would be covered under the fourth exception to section 300 IPC, which reads as under:-

"Exception 4. --Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

29. We may at this stage refer to the judgment of the Supreme Court in State of Uttarakhand v. Sachendra Singh Rawat, (2022) 4 SCC 227 wherein the Court examined Exception 4 to Section 300 IPC and observed as under:

"8. In Virsa Singh [Virsa Singh v. State of Punjab, AIR 1958 SC 465 : 1958 Cri LJ 818] , in paras 16 and 17, it was observed and held as under : (AIR p. 468)

"16. ... The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or

intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

17. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact;...."(emphasis supplied)

9. In Dhirajbhai Gorakhbhai Nayak [Dhirajbhai Gorakhbhai Nayak v. State of Gujarat, (2003) 9 SCC 322 : 2003 SCC (Cri) 1809] , on applicability of Exception 4 to Section 300 IPC, it was observed and held in para 11 as under : (SCC pp. 327-28)

"11. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution (sic provocation) not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused : (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To

bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage"."

10. In Pulicherla Nagaraju [Pulicherla Nagaraju v. State of A.P., (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500] , this Court had an occasion to consider the case of culpable homicide not amounting to murder and the intention to cause death. It was observed and held by this Court that the intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances:

(i) nature of the weapon used;

(ii) whether the weapon was carried by the accused or was picked up from the spot;

(iii) whether the blow is aimed at a vital part of the body;

(iv) the amount of force employed in causing injury;

(v) whether the act was in the course of sudden quarrel or sudden fight or free-for-all fight;

(vi) whether the incident occurs by chance or whether there was any premeditation;

(vii) whether there was any prior enmity or whether the deceased was a stranger;

(viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation;

(ix) whether it was in the heat of passion;

(x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;

(xi) whether the accused dealt a single blow or several blows."

30. Necessary ingredients to attract 4th Exception to section 300 IPC are clearly present in the facts of the present case inasmuch as death is caused; there existed no pre-meditation; it was a sudden fight; the offender has not taken undue advantage or acted in a cruel or unusual manner, therefore, the case in hand clearly falls under fourth exception to section 300 IPC. The accused appellants are accordingly sentenced to ten years imprisonment under Section 304 Part I IPC, by substituting the sentence of life imprisonment awarded to them under Section 302 IPC.

31. It is on record that the accused appellant Saleem @ Pappu was arrested and was on bail during trial and has also been granted bail by this Court on 12.10.1997, during pendency of appeal. Accused appellant Firoz was arrested on 12.10.1997 and he is in jail since then and by now he has already undergone incarceration of nearly 25 years.

Since the appellant Saleem @ Pappu is on bail, his sureties and bonds

stand cancelled and he be taken into custody for serving his remaining sentence, and the appellant Firoz shall be released from Jail, forthwith, unless he is wanted in any other case, subject to compliance of Section 437A Cr.P.C. Fine imposed upon the accused appellants is maintained.

32. Both the appeals are thus partly allowed on above terms.

(2022) 9 ILRA 965
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 23 of 2019

State of U.P. ...Appellant
Versus
Balram Singh & Anr. ...Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:

Criminal Law – Criminal Procedure Code, 1973 - Sections 154, 378 & 378(3) - Indian Penal Code,1860 - Sections 302, 323, 504 & 506 - Scheduled Castes and Scheduled Tribes Prevention of Atrocities Act,1989 - Sections 3(2) & 5 - Arms Act, 1959- Section - 25 - Constitution of India, 1950 - Article 136 - Government Appeal – against order of Acquittal - offence of murder with fire arm injuries - FIR - recovery of rifle & cartridges - Post-mortem - site plane all are against accused - trial court acquitted all the accused - appeal - while analysing the case from four concerns it reflect that, not only unexplained delay in lodging FIR but also non presence of signature of first informant (PW1) in Punchnama, coupled with material contradiction in St.ments of PW1 & PW4, with the facts that ballistic report does not supports the story of persecution and why first informant (PW1) leaving the injured deceased from the place of incident at mercy of nature - shows that entire prosecution case is concocted and encompasses with weak evidence - acquittal by trial court is well reasoned which needs no interference - Leave to appeal rejected - consequently, Government.(Para - 39, 40, 43) Appeal stands dismissed.

Appeal dismissed. (E-11)

List of Cases cited:

1. Rajesh Prasad Vs St. of Bihar& anr., 2022 (3) SCC 471,

2. Apren Joseph @ Current Kunjukunju & ors. Vs The St. of Kerala, (1973) 3 SCC 114,

3. Tara Singh & ors. Vs St. of Pun. 1991 Supp (1) SCC 536

4. P. Rajagopal & ors. Vs St. of T. N. , (2019) 5 SCC 403

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Challenge in this appeal u/s 378 of code of Criminal Procedure 1973 (hereinafter referred to as Cr.P.C.) is made to the judgment and order dated 29.08.2018 passed by Second Special Judge/Additional District and Sessions Judge, Hamirpur in Session Trial No. 128/1997 (State of U.P. Vs. Balram Singh and 2 others) u/s 302, 323, 504, 506 IPC read with section 3(2)5 SC/ST Act, P.S. Khanna, District Hamirpur in Case Crime No. 141/1997 as well as Session Trial No. 143/1997 (State of U.P. Vs. Khalbhaliya) in Case Crime No. 148/1997, u/s 25 Arms Act, P.S. Khanna, District Hamirpur acquitting the accused herein.

2. Brief facts of the case so unfolded by the prosecution are to the effect that the informant Dully Chand S/o Kamtu R/o

Village Akbai,Police Station Khanna, District Hamirpur claimed to be of Dhobi caste and according to the prosecution theory he along with his brother Moolchand, Shiv Narain, Chunna has proceeded towards the southern portion of the village near a pond for answering nature's call on fateful day i.e. 27.04.1997 at 5-6 in the evening and when they were crossing towards the outer portion of the pond then the accused who were three in number one of them being village Pradhan Balram Singh jointly obstructed movement of the aforesaid persons and directed the complainant fraction to do fishing work for them and when the complainant fraction exhibited their resistance then the accused fraction hurled abuses and threatened them that the complainant fraction will not be tolerated in the village and they will be ousted. Suddenly, when Mool Chand (since deceased) protested then the accused Balram Singh took out his rifle and the accused Khalbalia also took out single bore rifle and deceased Chuttan took out his double bore rifle and fired upon Mool Chand who fell down. It is further alleged that Shiv Charan tried to safe then with the rifle butt he was given a blow and he sustained injuries and thereafter the complainant fraction being Dully Chand, Shiv Narain and Chunna ran away from the site and went to their respective houses and after taking all necessary precautions regarding their life they stayed in their house in the night and they submitted a written report before the police station in the next morning.

3. Consequent to the submission of the written report, FIR was lodged in Police Station Khanna, Hamirpur on the next day i.e. 28.04.1997 at 08:30 am u/s 302, 323, 504, 506 IPC read with section 3(2)5 SC/ST Act. As per the prosecution, recovery was also sought to be made of the rifle which was made the basis of commission of crime and three numbers of cartridges were also found so a FIR u/s 25 Arms Act was also lodged.

4. After lodging of the FIR Investigating Officer was nominated and consequent to the death of Mool Chand Panchayatnama was prepared, body was sent for postmortem and the deposition of the prosecution witnesses were recorded and all the formalities which were required for conduction of the investigation was pressed into service.

5. As Mool Chand (since deceased) is stated to have subjected to fatal fire arm injuries so charge sheet was submitted in Case Crime No. 141/1997 u/s 302, 323, 504, 506 IPC read with section 3(2)5 SC/ST Act, P.S. Khana, Hamirpur and section 25 of the Arms Act in the subject Police Station in Case Crime No. 148/1997 (State of U.P. Vs. Khalbalia). During the pendency of the trial the accused Chuttan Singh expired and thus the present accused respondents were proceeded in the criminal case.

6. Case was committed to Sessions.

7. Charges were read over to the accused who are two in number they claimed to be tried while pleading innocence.

8. The prosecution in order to bring home the charges produced the following prosecution witnesses namely, (i) P.W. 1 Dully Chand, (ii) P.W. 2 Shiv Charan, (iii) P.W. 3 S. I. Atul Pradhan, (iv) P.W. 4 Chunna, (v) P.W. 5 Chakkan, (vi) P.W. 6 Dr. R.K. Khattar, (vii) P.W. 7 C. O. Ashok Kumar Verma, (viii) P.W. 8 S.H.O. Madhu

Sudan Singh, (ix) P.W. 9 H.C. Lala Ram, (x) P.W. 10 Pharmacist Pusawa Prajapati, (xi) P.W. 11 C.O. Ramyagya.

9. The defence also produced the following witnesses namely, (i) D.W. 1 Pharmacist Virendra Singh, (ii) D.W. 2 Lekhpal Bjagwat Prasad.

10. The learned trial court by virtue of the judgement and the order under challenge has acquitted the accused who are two in number. Challenging the said judgment and the order of acquittal now the State is before this Court in the present proceedings.

11. Before delving into the exercise so sought to be undertaken for determining as to whether the judgment and the order of acquittal has been proceeded in correct perspective or not this Court is to bear in mind that that the present proceedings emanates against the judgment and the order of acquittal so bestowing double presumption of innocence upon the accused. To put it otherwise this Court cannot venture into the judgment in a routine and cursory manner until and unless the circumstances are such which explicitly show that there has been palpable illegality committed by the learned trial court while recording perverse finding and misread the evidences on record. Without burdening the present judgment while reciting the mandate of the Hon'ble Apex Court as reduced in plethora of judgments this Court finds appropriate to refer to the recent judgments which itself is pregnant with the judgment which are on the same line right from inception.

12. Nevertheless in the Case of **Rajesh Prasad Vs. State of Bihar And Another** reported in **2022 (3) SCC 471** the Hon'ble Apex Court in following paragraphs have observed as under:-

"21. Before proceeding further, it would be useful to review the approach to be adopted while deciding an appeal against acquittal by the trial court as well as by the High Court. Section 378 of the Cr.P.C deals with appeals in case of acquittal. In one of the earliest cases on the powers of the High Court in dealing with an appeal against an order of acquittal the Judicial Committee of the Privy Council in Sheo Swarup vs. R. Emperor, AIR 1934 PC 227(2) considered the provisions relating to the power of an appellate court in dealing with an appeal against an order of acquittal and observed as under:

"16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in

disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."

It was stated that the appellate court has full powers to review and to reverse the acquittal.

22. In Atley vs. State of U.P., AIR 1955 SC 807, the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was perverse, it could not set aside the same. To a similar effect are the following observations of this Court speaking through Subba Rao J., (as His Lordship then was) in Sanwat Singh vs. State of Rajasthan, AIR 1961 SC 715:

"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup case afford a correct guide for the appellate court's approach to a case disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons', (ii) "good and sufficiently cogent reasons', and (iii) "strong reasons' are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

The need for the aforesaid observations arose on account of observations of the majority in Aher Raja Khimavs. State of Saurashtra, AIR 1956 SC 217 which stated that for the High Court to take a different view on the evidence "there must also be substantial and compelling reasons for holding that the trial court was wrong."

23. M.G. Agarwal vs. State of Maharashtra, AIR 1963 SC 200 is the judgment of the Constitution Bench of this Court, speaking through Gajendragadkar, J. (as His Lordship then was). This Court observed that the approach of the High Court (appellate court) in dealing with an appeal against acquittal ought to be cautious because the presumption of innocence in favour of the accused "is not certainly weakened by the fact that he has been acquitted at his trial."

24. In Shivaji Sahabrao Bobade vs. State of Maharashtra, (1973) 2 SCC 793, Krishna Iyer, J., observed as follows:

"In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

25. This Court in Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225, spoke about the approach of the appellate court while considering an appeal against an order acquitting the accused and stated as follows:

"While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are

palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can thenand then only reappraise the evidence to arrive at its own conclusions."

The object and the purpose of the aforesaid approach is to ensure that there is no miscarriage of justice. In another words, there should not be an acquittal of the guilty or a conviction of an innocent person.

26. In Ajit Savant Majagvai vs. State of Karnataka, (1997) 7 SCC 110, this Court set out the following principles that would regulate and govern the hearing of an appeal by the High Court against an order of acquittal passed by the Trial Court:

"16. This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court. These principles have been set out in innumerable cases and may be reiterated as under:

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused."

27. This Court in Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225 observed visàvis the powers of an appellate court while dealing with a judgment of acquittal, as under:

"7. ... While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question

in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then--and then only--reappraise the evidence to arrive at its own conclusions."

28. This Court in Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415, highlighted that there is one significant difference in exercising power while hearing an appeal against acquittal by the appellate court. The appellate court would not interfere where the judgment impugned is based on evidence and the view taken was reasonable and plausible. This is because the appellate court will determine the fact that there is presumption in favour of the accused and the accused is entitled to get the benefit of doubt but if it decides to interfere it should assign reasons for differing with the decision of acquittal.

29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

30. In Nepal Singh vs. State of Haryana- (2009) 12 SCC 351, this Court reversed the judgment of the High Court which had set aside the judgment of acquittal pronounced by the trial court and restored the judgment of the trial court acquitting the accused on reappreciation of the evidence.

31. The circumstances under which an appeal would be entertained by this Court from an order of acquittal

passed by a High Court may be summarized as follows:

31.1. Ordinarily, this Court is cautious in interfering with an order of acquittal, especially when the order of acquittal has been confirmed upto the High Court. It is only in rarest of rare cases, where the High Court, on an absolutely wrong process of reasoning and a legally erroneous and perverse approach to the facts of the case, ignoring some of the most vital facts, has acquitted the accused, that the same may be reversed by this Court, exercising jurisdiction under Article 136 of the Constitution. [State of U.P. v. Sahai, AIR 1981 SC 1442] Such fetters on the right to entertain an appeal are prompted by the reluctance to expose a person, who has been acquitted by a competent court of a criminal charge, to the anxiety and tension of a further examination of the case, even though it is held by a superior court. [Arunachalam v. Sadhananthan, AIR 1979 (SC) 1284] An appeal cannot be entertained against an order of acquittal which has, after recording valid and weighty reasons, has arrived at an unassailable, logical conclusion which justifies acquittal. [State of Haryana v. Lakhbir Singh, (1990) CrLJ 2274 (SC)] B)

31.2. However, this Court has on certain occasions, set aside the order of acquittal passed by a High Court. The circumstances under which this Court may entertain an appeal against an order of acquittal and pass an order of conviction, may be summarised as follows:

31.2.1. Where the approach or reasoning of the High Court is perverse:

a) Where incontrovertible evidence has been rejected by the High Court based on suspicion and surmises, which are rather unrealistic. [State of Rajasthan v. Sukhpal Singh, AIR 1984 SC 207] For example, where direct, unanimous accounts of the eyewitnesses, were discounted without cogent reasoning; *[State of UP v. Shanker,* AIR 1981 SC 879]

b) Where the intrinsic merits of the testimony of relatives, living in the same house as the victim, were discounted on the ground that they were "interested' witnesses; [State of UP v. Hakim Singh, AIR 1980 SC 184]

c) Where testimony of witnesses had been disbelieved by the High Court, on an unrealistic conjecture of personal motive on the part of witnesses to implicate the accused, when in fact, the witnesses had no axe to grind in the said matter. [State of Rajasthan v. Sukhpal Singh, AIR 1984 SC 207]

d) Where dying declaration of the deceased victim was rejected by the High Court on an irrelevant ground that they did not explain the injury found on one of the persons present at the site of occurrence of the crime. [Arunachalam v. Sadhanantham, AIR 1979 SC 1284]

e) Where the High Court applied an unrealistic standard of "implicit proof' rather than that of "proof beyond reasonable doubt' and therefore evaluated the evidence in a flawed manner. [State of UP v. Ranjha Ram, AIR 1986 SC 1959]

f) Where the High Court rejected circumstantial evidence, based on an exaggerated and capricious theory, which were beyond the plea of the accused; [State of Maharashtra v. ChampalalPunjaji Shah, AIR 1981 SC 1675] or where acquittal rests merely in exaggerated devotion to the rule of benefit of doubt in favour of the accused. [Gurbachan v. Satpal Singh, AIR 1990 SC 209].

g) Where the High Court acquitted the accused on the ground that he had no adequate motive to commit the offence, although, in the said case, there was strong direct evidence establishing the

guilt of the accused, thereby making it unnecessary on the part of the prosecution to establish "motive.' [State of AP v. Bogam Chandraiah, AIR 1986 SC 1899]

31.2.2. Where acquittal would result is gross miscarriage of justice:

a) Where the findings of the High Court, disconnecting the accused persons with the crime, were based on a perfunctory consideration of evidence, [State of UP v. Pheru Singh, AIR 1989 SC 1205] or based on extenuating circumstances which were purely based in imagination and fantasy. [State of Uttar Pradesh v. Pussu 1983 AIR 867 (SC)]

b) Where the accused had been acquitted on ground of delay in conducting trial, which delay was attributable not to the tardiness or indifference of the prosecuting agencies, but to the conduct of the accused himself; or where accused had been acquitted on ground of delay in conducting trial relating to an offence which is not of a trivial nature. [State of Maharashtra v. ChampalalPunjaji Shah, AIR 1981 SC 1675] [Source : Durga Das Basu - "The Criminal Procedure Code, 1973" Sixth Edition Vol.II Chapter XXIX]"

13. Keeping in mind the aforesaid aspects that the note of caution has been mandating now the present judgment is to analysed.

14. To start with the ocular testimony of the prosecution witness is to be taken not of.

15. P.W. 1 being the first informant Dully Chand entered as a prosecution witness and according to him he knows all the three accused, according to him on 27.04.1997 at 5-6 in the evening he along with the deceased Mool Chand, Chunna and Shiv Narain had gone to answer the nature's call and near the pond the accused were armed with rifles as discussed above and on controversy as regarding fishing coupled with the resistance, the accused were three in number with their respective rifles fired upon Mool Chand he fell down and when Shiv Narain tried to help Mool Chand then the accused with the aid of rifle butt hit him and Mool Chand died on the spot and the accused ran away. Though the incident of 5-6 in the evening on 27.04.1997 however, they were subjected to fear and their life was in peril so they came back to their house and stayed in the night and while concealing their identity they went to Echauli Station to catch the train and went to Mahodaya got the written report typed and after seeing the same they went to the police station and got the FIR lodged at 08:30 in the next i.e. 28.04.1997.

16. P.W. 2 Shiv Charan has appeared as prosecution witness he turned hostile, according to him though he knows accused Khalbalia but he never met the S.I. Atul Pradhan on 10.05.1997 in his presence no arrest was made and no recovery was also made.

17. P.W. 3 S.I. Atul Pradhan appeared as prosecution witness he claims himself to have conducted investigation consequent to the lodging of the FIR and according to him he prepared the site plan, sent the body for postmortem and also got prepared punchanama and recovery is being also sought to be shown which he states to have proved.

18. P.W. 4 Chunna deposed that he knows the accused and he has also narrated the incident which occurred on 5-6 in the evening of the fateful day when he had gone to answer the nature's call. Thus he supported the prosecution story.

19. P.W. 5 Chakkan in his statement has deposed that he knows the Khalbalia according to him, police has gone to the house of Khalbalia and recovery of one single bore and one double bore rifle was made from his house and according to Khalbalia single bore rifle belongs to accused Balrams's father. Thus he seeks to prove recovery.

20. P.W. 6 Dr. R.K. Khattar has proved postmortem according to him there were as many as six injuries and being one and two referable to temporal region three and four being injuries of the lungs, five and six are the injuries of the intestines.

21. P.W. 7 C.O. Ashok Kumar Verma, claims himself to be the Investigating Officer who had been entrusted with the investigation on 03.05.1997.

22. P.W. 8 S.H.O. Madhisudan Singh claims to be in the police station Khanna and he has tried to prove the FIR and all other aspects relating to recovery etc.

23. P.W. 9 H.C. Lala Ram has sought to prove the aspects relating to recovery of rifles as well as cartridges. As he claims to be the Moharrir in the police station.

24. P.W. 10 being Pharmacist Puswa Prajapati claims to be posted in the Community Health Center as Pharmacist from the period from 1990-2013 and claims that Dr. Virendra was posted in the Community Health Center.

25. P.W. 11 C.O. Ramyagya is seeking to prove the fact the he also conducted investigation in case crime no. 141/1997 and regarding preparation of site plan and other formalities etc.

26. So far as defence is concerned, they produced D.W. 1 Pharmacist Virendra Singh who tried to prove facts relating to medical aspects and D.W. 2 Lekhpal Bhagwat Prasad had sought to prove the issue relating to the fisheries auction of the pond in question.

27. Undisputedly, the incident occurred on 27.04.1997 at 5-6 pm wherein the first informant being Dully Chand along with Shiv Narian and Chunna had gone with the deceased for answering the nature's call wherein the accused who are three in number resorted to gun shot firing pursuant where to the deceased Mool Chand died and Shiv Narain sustained injuries by rifle butt. It has also come on record that the deceased died on the spot and the complainant fraction run away from the place of occurrence leaving the dead body over there which in fact was near/adjacent to the pond and the first informant and his associates went to their respective house and stayed over their the entire night and in the morning they claimed to have proceeded to Echaula Railway Station and they catch the train boarded at Mahoda Railway Station while coming up with stand that they caught the train at 6 in the morning of the next day reached Mahoda Railway Station at 07:15 am and from Mahoda they went to police station Khanna in a truck which they could able to board at 07:45 am and reach the police station at 08:30 am. According to the prosecution, the FIR was lodged at 08:30 am on 28.04.1997.

28. Though there has been a delay of more than 14 hours in lodging of FIR and a justification has been sought to be given by the prosecution that their life and liberty was under constant threat and that is why they were hiding their identity went to the

police station next day for lodging of the FIR but the fact remains that explanation for delay in lodging of the FIR remains unexplained particularly in view of the fact that according to the prosecution the first informant and their associates went to their houses stayed in the night and left the body all alone near the pond the entire night without taking support of the resident villagers so as to even take any prompt action while lodging FIR and also doing any activity relatable to the fact that at least some body ought to have stayed in the place of occurrence to save the dead body from being exposed to wild animal and the onslaught of climate or to take body to their house. It is not a case wherein the deceased is a stranger, however, the deceased happens to be the real brother of the first informant who has witnessed the said incident.

29. Hon'ble Apex Court on the question of delay in lodging the FIR and its impact upon the prosecution theory has observed in the case of **(1973) 3 SCC 114 Apren Joseph Alias Current Kunjukunju and others Vs. The State of Kerala** wherein para 11 following was mandated:

"11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr. P. C. As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue unreasonable delay in lodging the F. I. R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case."

30. In the case of **Tara Singh and others Vs. State of Punjab 1991 Supp (1) SCC 536,** the Hon'ble Apex Court in paragraph 4 has observed as under:-

"4. It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all

it is but natural in these circumstances for them to take some time to go to the police station for giving the report. Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case."

31. Yet, in the case of **P. Rajagopal and others Vs. State of Tamil Nadu (2019) 5 SCC 403,** the Hon'ble Apex Court in paragraph 12 has held as under:-

"12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely."

32. Keeping the issue of delay and its impact upon the prosecution case aside this Court has to also examine the fact as to why during the cross-examination the accused could not specify the name of the person who had typed his written complaint. According to the prosecution, first informant had gone to the police station with Shir Chand, Ram Swaroop, Shiv Narain and he got the FIR typed near a shop adjacent to Tehsil. The entire story so built up by the prosecution does not inspire any confidence as normally whenever deaths takes place in a close vicinity where at it becomes a normal routine for easing, a human being while answering the nature's call and that to in the presence of first informant along with two other persons then the said incident catches fire and everybody in a village comes to know about the same then obviously there cannot be a risk in not taking away the body to their respective house particularly when according to the prosecution the accused after committing crime ran away from the place of occurrence.

33. Another additional aspect of the matter needs to be further examined is the fact that P.W. 1 being Dully Chand had deposed that he was not present when the punchanama was being sought to be conducted. On the other hand P.W. 1 has further stated that he came with the police officials from police station Khanna then punchanama was done though he denies that when the punchanama was being reduced in writing he was not there. He has also shown his ignorance about the date of punchanama. The story was build up by the prosecution is also thoroughly unbelievable that in case the first informant was present when the incident of firing took place and his brother Mool Chand fell down after receiving gun shot injuries then it is quite implorable that the real

brother will not leave the injured and run away without even taking him for medication particularly when the accused fraction is stated to have ran away. The non effecting of the signature of P.W. 1 in the punchanama itself shows that the entire prosecution case is under cloud.

34. Notably, as per the prosecution the firing was administered from the front and not from any side consequent there to the deceased fell down and Shiv Narain also sustained injuries through rifle butt however, so far as the first informant is concerned, he through was there for three to four minutes but he was not subjected to any injury. Even otherwise, once as per the prosecution the firing was made by the accused who are three in number then it is quite implorable that the first informant would not have sustained even a hair line injury also.

35. Nonetheless, one of the prime witness would have been Shiv Charan however, Shiv Charan who stated to have sustained injuries was not put to examination in witness box to which there is no explanation at all. So far as P.W. 4 Chunna is concerned he happens to be present when the alleged incident took place and he in his cross examination had seen the accused committing crime but in his cross examination he has come up with stand that when the deceased Mool Chand was administered gun shot injury he was in the southern part of the pond and according to him he had not seen where the deceased sustained gun shot injury. According to P.W. 4 Chunna after the said incident he had gone to his house and he remained there at till 4 O' clock after that he went to Bibawar. P.W. 4 in his cross examination has also stated that he does not go for easing himself in the night.

36. As a matter of fact P.W. 1 who happens to be the real brother of the deceased and P.W. 4 happens to be the cousin brother, however, there are vast contradictions and inconsistency in the statement of both the prosecution witnesses which itself shows that some what a story is being sought to be erected just in order to implicate the accused herein.

37. Nonetheless, so far as the recovery of the rifles and cartridges are concerned, P.W. 2 Shiv Charan has deposed that in his presence Khalbalia was not arrested nor he had given any statement in this regard and recovery of double bore and single bore rifles from Khalbalia is concerned the same has not been witnessed by him.

38. Even the ballistic report was also obtained according to which the cartridges which were sought to be shown to be used for commission of the crime was opined to not have have been loaded in the rifle in question, meaning thereby that from the rifle itself which is stated to be possessed by the accused and used by the accused for resorting to gun shot injury is not proved and rather the accused cannot be said to have committed the said offence.

39. Cumulatively, analysing the present case from four corners of law and irresistible conclusions stands drawn that not only there has been delay in lodging of FIR which remains thoroughly unsatisfactory and unexplained, non-presence of the signature of P.W. 1 Dully Chand first informant in the punchanama coupled with the material contradictions in the statement of the P.W. 1 and P.W. 4 coupled with the fact that the ballistic report does not support the prosecution and last but not the least the most important the

conduct of the first informant in leaving the dead body of the deceased even after quiting of the accused from the place of occurrence without even taking any step for providing medication to the injured deceased and isolating the body of the deceased at the mercy of nature and staying in the house and non sustaining of a hairline injury shows that the entire prosecution case is a concocted one and encompasses with weak evidence so as to link the accused with respect to commission of crime.

40. Thus, we are of the considered opinion that the judgment of the learned trial court acquitting the accused is a well reasoned judgment considering each and every aspect of the matter lacking any perversity or miscarriage of any justice and also coupled with the fact that the view taken by the learned trial court is a possible and a plausible view which needs no interference while converting acquittal into conviction particularly in absence of any illegality shown to have committed by the court below.

41. We therefore, have no option but to concur the judgment of the learned trial court by affirming it.

42. Resultantly, no ground is made as to accord leave to appeal and accordingly, the same is rejected.

43. As the leave to file the present appeal stands rejected thus, the present appeal so instituted at the behest of the State-appellant u/s 378 (3) of the Cr.P.C. stands **dismissed.**

(2022) 9 ILRA 977
APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 04.08.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 200 of 2020

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

Counsel for the Appellant:
Govt. Advocate

Counsel for the Respondents:

Criminal Law – Criminal Procedure Code, 1973 - Sections – 161, 378 & 378(3) - **Indian Penal Code,1860 - Sections - 34, 201 & 302** - **Indian Evidence Act,1872 - Section 65-B (iv)** - Government Appeal – against order of Acquittal – unnamed FIR - offence of murder - allegation that when accused was going to bed in the night, while receiving 2-3 mobile phone calls he stepped out from the house but did not returned, his dead body was found near a pond in next morning outside the village - accused were charged - no eye witness - entire prosecution theory hinges upon the receiving phone calls - call details was not supported by a certificate under section 65-B(iv) as it is mandatory - prosecution could not link the accused for committing crime - there is nothing on the record which complete the chain - investigation so conducted is not only defective but in a causal manner - trial court acquitted all the accused - Appeal - prosecution has completely failed to prove beyond doubt that accused were committed offence - held - leave to appeal rejected even though same is not a case worth granting leave to appeal - accordingly, application for granting leave to appeal rejected - the Appeal stands dismissed.(Para –33, 35, 39, 48, 51, 54, 56)

Appeal dismissed. (E-11)

List of Cases cited:

1. Rajesh Prasad Vs St. of Bihar & anr. (2022 (3) SCC 471),

2. Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantayal & ors. (2020 (7) SCC 1),

3. Ravinder Singh @ Kaku Vs St. of Punj. (Criminal Appeal No. 1307/2019),

4. Sharad Birdhichand Sarda Vs St. of Mah. (1984 (4) SCC 16),

5. Padala Veera Reddy Vs St. of A.P. (1989 (Suppl. 2) SCC 706),

6. C. Chenga Reddy & ors. Vs St. of A.P. (1996 (10) SCC 193),

7. St. of Raj. Vs Raja Ram (2003 (8) SCC 180),

8. Shailendra Rajdev Rasvan& ors. Vs St. of Guj. etc. (Criminal Appeal No. 333-334 of 2017),

9. Raj Kumar Singh @ Raju @ Batya Vs St. of Raj. (2013 (5) SCC 722).

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Present government appeal, under Section 378(3) Code of Criminal Procedure (hereinafter referred to as "Cr.P.C.) has been preferred against the judgement and order dated 10.06.2020, passed by the Additional District and Sessions Judge, Court No.1, Gorakhpur in Session Trial No. 158 of 2012 (State of U.P. vs. Gaya Singh and others), arising out of Case Crime No. 163 of 2011, under Section 302/34,201 I.P.C, P.S. Sahjanwa, District Gorakhpur, whereby the accused, who are four in number, have been acquitted from the charges under Sections 302/34, 201 IPC.

2. Factual matrix of the case as worded in the present appeal are that the first informant Gulab S/o Suryabali-PW1 had submitted a written report before the Station House Officer, Police Station Sahjanwa, district Gorakhpur on 24.04.2011 with allegation that on 23.4.2011 his younger son Om Narayan after eating his meals and taking the bed cover and mattress had proceeded towards the roof of the house and thereafter, he received 2-3 calls on his mobile phone and he after receiving the mobile phone call came down from the roof and stepped out of the house. At that point of time, the family members who witnessed him going out asked him why he was proceeding from the house in question during the night then he assured that though he was going out from the house but he would returned back soon and despite the assurance so given to return back, he did not return back and at 5.30 a.m. on 24.04.2011, the dead body of deceased Om Narain was found in the eastern part of the pond in the village. After receiving the aforesaid information, the family members including the first informant proceeded towards the place whereat the dead body of Om Narain was found and they saw injuries being inflicted upon the body of the deceased and thus the family members took out the dead body from the pond. Prosecution further alleges that they proceeded to lodge an FIR against unknown persons, which was registered as case Crime No.163 of 2011, purported to be under section 302, 201 IPC.

3. One Pradeep Kumar Singh was nominated as Investigating Officer, he claims to have reached the place of occurrence and conducted the proceedings, which were to be adhered to, post lodging of first information report while preparing panchnama, sending the dead body for postmortem, preparation of site plan and recording of the statement, under sections 161 Cr.P.C.

4. It is come on record that the postmortem of the deceased was conducted on 24.04.2011 by Dr. J.K.Sinha who was

posted in Community Health Centre, Sahjanwa, district Gorakhpur.

5. The Investigating Officer after conducting investigation, submitted the charge sheet against the accused herein under section 302/34, 201 IPC.

6. Case was committed to Session.

7. Charges were readover to the accused who are four in numbers, they pleaded innocence and claimed to be tried.

8. The trial court by virtue of judgment and order under challenge acquitted the accused.

9. Challenging the judgment and order of the acquittal now the State of U.P. is before this Court in the proceedings under section 378(3) of the Cr.P.C.

10. In support of prosecution case, PW-1- Gulab Kahar, PW-2-Shiv Narayan, PW-3 Meera Devi, PW-4-Jang Narayan, PW-5 Head Constable Rameshwar Prasad, PW-6 Sub Inspector Pradeep Kumar Singh, PW-7 Dr. J.K.Sinha, PW-8-Vindhyachal, PW-9, Ram Milan Singh and PW-10, Suraj Singh were produced got themselves examined before the Court below.

11. Besides occular testimony the prosecution also produced documentary evidence in order to bring home the charges which is being discussed little later.

12. This Court indeed is oblivious of the fact that the present proceedings is at the behest of the State against the judgment and order of acquittal thus it is confronted that certain limitations which have to be not only noticed but kept in mind while deciding the present case.

13. The Hon'ble Apex Court right from very inception has cautioned the Appellate Court while entertaining and adjudicating the appeal against conviction that it should not substitute its own views viz.-a-viz. the view taken by the learned Trial Court acquitting the accused in a routine and cursory manner until and unless the judgment of the acquittal proceeds in a wrong direction while being palpably perverse and there has been complete misreading of the evidence so as to occasion mis-carriage of justice to the partin.

14. Recently, the Hon'ble Apex Court has occasion to consider the limit in extending of power of the Appellate Court in dealing with the judgment of the acquittal in exercise of the jurisdiction, under section 378 of Cr.P.C. In the case of **Rajesh Prasad Vs. State of Bihar and another, 2022 (3) SCC 471**, the Hon'ble Apex Court in paragraph nos. 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 to 31.2.2 are quoted as under:

"19. In the appeals filed by the accused and in the Death

Reference No.13/2008, the High Court, on considering the

submissions made on behalf of the accused as well as the

State, noted at the outset as under:

"It is trite law that acquittal of a coaccused cannot simpliciter be a ground for acquittal of other accused. There may be factors distinguishing the two cases.

Alternately, an erroneous acquittal and absence of any challenge to the same cannot be a ground to demand similar treatment by others. Likewise, the testimony of an interested witness cannot be discarded on that ground alone. It would only require the Court to be more cautious and scrutinize the evidence carefully. Evidence, otherwise cogent and convincing cannot be rejected on the ground that there was no independent witness, though the occurrence had taken place on a busy road. But, there may be circumstances where the witnesses are interested and the manner of occurrence as described requires corroboration by independent witness also. Ultimately, therefore, it shall all depend on the facts and circumstances of the case. It has also to be kept in mind that it shall be those close to the deceased, who shall be most keen that the real culprits be booked."

20. With the aforesaid observations, the High Court set aside the judgment of conviction of the accused who were convicted by the FastTrack Court as well as sentence imposed upon them and accordingly, allowed the appeals by acquitting all the accused.

21. Before proceeding further, it would be useful to review

the approach to be adopted while deciding an appeal against acquittal by the trial court as well as by the High Court. Section 378 of the Cr.P.C deals with appeals in case of acquittal. In one of the earliest cases on the powers of the High Court in dealing with an appeal against an order of acquittal the Judicial Committee of the Privy Council in Sheo Swarup vs. R. Emperor, AIR 1934 PC 227(2) considered the provisions relating to the power of an appellate court in dealing with an appeal against an order of acquittal and observed as under:

"16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

"....But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. To state this,however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."

It was stated that the appellate court has full powers to review and to reverse the acquittal.

22. In Atley vs. State of U.P., AIR 1955 SC 807, the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was perverse, it could not set aside the same. To a similar effect are the following observations of this Court speaking through Subba Rao J., (as His

Lordship then was) in Sanwat Singh vs. State of Rajasthan, AIR 1961 SC 715:

"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup case afford a correct guide for the appellate court's approach to a case disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons', (ii) "good and sufficiently cogent reasons', and (iii) "strong reasons' are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

The need for the aforesaid observations arose on account

of observations of the majority in Aher Raja Khimavs. State of Saurashtra, AIR 1956 SC 217 which stated that for the High Court to take a different view on the evidence "there must also be substantial and compelling reasons for holding that the trial court was wrong."

23. M.G. Agarwal vs. State of Maharashtra, AIR 1963 SC

200 is the judgment of the Constitution Bench of this Court, speaking through Gajendragadkar, J. (as His Lordship then was). This Court observed that the approach of the High Court (appellate court) in dealing with an appeal against acquittal ought to be cautious because the presumption of innocence in favour of the accused "is not certainly weakened by the fact that he has been acquitted at his trial."

24. In Shivaji Sahabrao Bobade vs. State of Maharashtra,

Krishna Iyer, J., observed as follows: (SCC p.799, para 6)

"6. .....In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

25. This Court in Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225, spoke about the approach of the appellate court while considering an appeal against an order acquitting the accused and stated as follows: (SCC p.229, para 7)

"7....While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can thenand then only reappraise the evidence to arrive at its own conclusions."

The object and the purpose of the aforesaid approach is to ensure that there is no miscarriage of justice. In another words, there should not be an acquittal of the guilty or a conviction of an innocent person.

26. In Ajit Savant Majagvai vs. State of Karnataka, (1997) 7 SCC 110, this Court set out the following principles that would regulate and govern the hearing of an appeal by the High Court against an order of acquittal passed by the Trial Court:(SCC pp.116017, para 16)

"16. This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court. These principles have been set out in innumerable cases and may be reiterated as under:

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused

should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness-box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused."

27. This Court in Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225 observed visàvis the powers of an appellate court while dealing with a judgment of acquittal, as under:

"7. ... While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then--and then only--reappraise the evidence to arrive at its own conclusions."

28. This Court in Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415, highlighted that there is one significant difference in exercising power while hearing an appeal against acquittal by the appellate court. The appellate court would not interfere where the judgment impugned is based on evidence and the view taken was reasonable and plausible.

This is because the appellate court will determine the fact that there is presumption in favour of the accused and the accused is entitled to get the benefit of doubt but if it decides to interfere it should assign reasons for differing with the decision of acquittal.

29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the

trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

30. In Nepal Singh vs. State of Haryana- (2009) 12 SCC

351, this Court reversed the judgment of the High Court which had set aside the judgment of acquittal pronounced by the trial court and restored the judgment of the trial court acquitting the accused on reappreciation of the evidence.

31. The circumstances under which an appeal would be entertained by this Court from an order of acquittal passed by a High Court may be summarized as follows:

31.1. Ordinarily, this Court is cautious in interfering with an order of acquittal, especially when the order of acquittal has been confirmed upto the High Court. It is only in rarest of rare cases, where the High Court, on an absolutely wrong process of reasoning and a legally erroneous and perverse approach to the facts of the case, ignoring some of the most vital facts, has acquitted the accused, that the same may be reversed by this Court, exercising jurisdiction under Article 136 of the Constitution. [State of U.P. v. Sahai, AIR 1981 SC 1442] Such fetters on the right to entertain an appeal are prompted by the reluctance to expose a person, who

has been acquitted by a competent court of a criminal charge, to the anxiety and tension of a further examination of the case, even though it is held by a superior court. [Arunachalam v. Sadhananthan, AIR 1979 (SC) 1284] An appeal cannot be entertained against an order of acquittal which has, after recording valid and weighty reasons, has arrived at an unassailable, logical conclusion which justifies acquittal. [State of Haryana v. Lakhbir Singh, (1990) CrLJ 2274 (SC)]

31.2. However, this Court has on certain occasions, set aside the order of acquittal passed by a High Court. The circumstances under which this Court may entertain an appeal against an order of acquittal and pass an order of conviction, may be summarised as follows:

31.2.1. Where the approach or reasoning of the High Court is perverse:

a) Where incontrovertible evidence has beenrejected by the High Court based on suspicion and surmises, which are rather unrealistic. [State of Rajasthan v. Sukhpal Singh, AIR 1984 SC 207] For example, where direct, unanimous accounts of the eyewitnesses, were discounted without cogent reasoning; [State of UP v. Shanker, AIR

1981 SC 879]

b) Where the intrinsic merits of the testimony of relatives, living in the same house as the victim, were discounted on the ground that they were "interested' witnesses; [State of UP v. Hakim Singh, AIR 1980 SC 184]

c) Where testimony of witnesses had been disbelieved by the High Court, on an unrealistic conjecture of personal motive on the part of witnesses to implicate the accused, when in fact, the witnesses had no axe to grind in the said

matter. [State of Rajasthan v. Sukhpal Singh, AIR 1984 SC 207]

d) Where dying declaration of the deceased victim was rejected by the High Court on an irrelevant ground that they did not explain the injury found on one of the persons present at the site of occurrence of the crime. [Arunachalam v.Sadhanantham, AIR 1979 SC 1284]

e) Where the High Court applied an unrealistic standard of "implicit proof' rather than that of "proof beyond reasonable doubt' and therefore evaluated the evidence in a flawed manner.[State of UP v. Ranjha Ram, AIR 1986 SC 1959]

f) Where the High Court rejected circumstantial evidence, based on an exaggerated and capricious theory, which were beyond the plea of the accused; [State of Maharashtra v. ChampalalPunjaji Shah, AIR 1981 SC 1675] or where acquittal rests merely in exaggerated devotion to the rule of benefit of doubt in favour of the accused. [Gurbachan v. Satpal Singh, AIR 1990 SC 209].

g) Where the High Court acquitted the accused on the ground that he had no adequate motive to commit the offence, although, in the said case,there was strong direct evidence establishing the guilt of the accused, thereby making it unnecessary on the part of the prosecution to establish "motive.' [State of AP v. Bogam Chandraiah, AIR 1986 SC 1899]

31.2.2. Where acquittal would result is gross miscarriage of justice:

a) Where the findings of the High Court, disconnecting the accused persons with the crime, were based on a perfunctory consideration of evidence, [State of UP v. Pheru Singh, AIR 1989 SC 1205] or based on extenuating circumstances which were purely based in imagination and fantasy. [State of Uttar Pradesh v. Pussu 1983 AIR 867 (SC)]

b) Where the accused had been acquitted on ground of delay in conducting

trial, which delay was attributable not to the tardiness or indifference of the prosecuting agencies, but to the conduct of the accused himself; or where accused had been acquitted on ground of delay in conducting trial relating to an offence which is not of a trivial nature. [State of Maharashtra v. ChampalalPunjaji Shah, AIR 1981 SC 1675]"

15. Bearing in mind the principle of law so culled out by the Hon'ble Apex Court now the present case is to be addressed.

16. To begun with ocular testimony of the prosecution witness is to be first scanned.

17. One Gulab Kahar son of Surya Bali (PW-1) got his statement recorded as prosecution witness being the father of the deceased though according to him he has not witnessed the commission of offence, however, according to him, he is the first informant who was present in his house when on 23.4.2021, the deceased after eating his meal had proceeded to the roof of the house in question with bed sheet so as to relax for the next day. According to him the deceased is stated to have received two phone calls and he came down from the roof and when he was proceeding to some place while stepping out from the house and when he was asked as to why in the late hours he was moving from the house then he assured that he was going for some work and he will return back soon but he did not return and the dead body was found on the next day in the morning at 5.30 A.M.on 24.4.2011 and then he along with his family members proceeded to the place of incident near a pond towards eastern section and witnessed the dead body of the deceased.

18. One Shiv Narayan came to the witness box as PW-2, and according to him, the incident occurred in the intervening night of 23/24.04.2011 when his brother (since deceased) after eating meal had gone to roof to sleep and in the meantime, a phone call came on the mobile of the deceased which was received by PW-3 Meera Devi and the caller itself apprised that he wanted to talk with the deceased, however, in the meantime the call dropped and after some time another call came which was received by the deceased and talking on mobile he proceeded from the house and the PW-1 being the father of the deceased when enquired as to where the deceased were going then he did not disclose the place where he was going but assured that he will come back soon and when he did not come back and on the next day, the body of the deceased was found in the pond, half of the body was submerged in the water and according to him his brother's blood was found near the elevated portion of the pond and according to him, his brother's body had been thrown away in the pond and the body of the deceased marked presence of injury. In his deposition, he further stated that at 12 noon on 24.4.2011 he came to know that his brother was disposed of due to election rivalry by the accused herein and they had thrown away the body in the pond and according to him he had given the said statement to the police.

19. PW-3 Meera Devi who happens to be the wife of the elder brother of the deceased being PW-2 Shiv Narayan has also got recorded her statement and according to her statement, the deceased Tilak ceremony was to be conducted on 28.04.2011 and the date of the marriage was 11.05.2011, however, in the intervening night of 23/24.4.2011, the

deceased after eating the meals had proceeded to the roof in order to sleep and the mobile of the deceased was in charging mode and at 8 P.M. in the night, a call came which was picked up by PW-3 and the caller apprised the receiver it that it was in urgent, as he wanted to talk to the deceased and she recognized the voice to be of the accused respondent no.1 Gaya Singh who happens to be of the same village. She thereafter apprised him and advised the caller to again call and thereafter, the deceased came to her room from the roof and the deceased took the mobile and went to the roof by the time the second call came and the deceased while talking with the caller came down from the roof and when he was about to proceed while stepping out from the house then PW-1 asked where he were going then the deceased apprised that he will come back soon as he was going for some work. According to PW- 3 on the next date i.e. 24.04.2011 at 6 a.m. in the morning they received information that the dead body of the deceased was found near a pond.

20. PW-3 Meera Devi has further made a deposition that the deceased has been done away on account of the election rivalry emanating from the election of the Gram Pradhan as he had canvassed and supported the other party being of Satya Prakash Singh which become the basis of murder. However, according to her statement, she had not seen the commission of the crime, however, when she had proceeded in the morning towards the place whereat the dead body of the deceased was found then accused was present therein and the accused had admitted the fact that they had murdered the deceased. She has further deposed that she had given the said statement under section 161 Cr.P.C. regarding the admission and presence of accused on the place of occurrence.

21. One PW-4, Jai Narayan had also got recorded his statement and he claims to be the younger brother of the deceased and he has supported the prosecution story alleging that the deceased after eating the meal had gone on the roof for sleeping and his room is just near the room of Shiv Narayan and Shiv Narayan's wife had received the calls, which were put in charging mode. According to him PW-3 picked up the call at 8 p.m. and the basis for commission of crime is the election rivalry.

22. PW-5 claims to be Head Constable Rameshwar Prasad who has proved lodging the first information report on 24.4.2011 at 7.30.

23. PW-6 is the Investigating Officer, who claims to have prepared Panchnama, site plan and also took samples of blood stained, earth and plain earth and preparation of site plan referable to recovery etc.

24. PW-7 is Dr. J.K. Singh who has proved the postmortem as according to him, he had prepared the post mortem report.

25. PW-8 Vindhyachal has proved the recovery of blood stained plain earth and preparation of Fard.

26. PW- 9 Ram Milan Singh claims to be present and witness the process of taking the blood stained and plain earth.

27. PW-10 Suraj Singh claims to be the resident of the same village and proved Panchnama.

28. We have heard Shri Yogesh Rai, State Law Officer in support of the appeal and perused the record.

29. Shri Yogesh Rai had submitted that the judgment and order of the acquittal is perverse and a classic example of misreading of the evidence as the accused have committed the offence particularly in view of the fact that PW-3 Meera Devi had recognized the voice of the accused Gaya Singh and further last call on the mobile of the deceased was of accused Gaya Singh, which proved beyond doubt that on the insistence of the accused, deceased proceeded from the house and did not return, however dead body was found on the next day. According to Shri Yogesh Rai, State Law Officer, accused was present when the body was recovered and he admitted that he had murdered the deceased. Further submission has been made to the extent that not only motive was present but all the factors pointed out towards the accused with respect to commission of crime.

30. Undisputedly the present case is not of an eye witness testimony as no body has seen the commission of crime, rather to the contrary the same is of circumstantial evidence.

31. As per the prosecution version the deceased in the intervening night of 23/24.04.2011 had gone from his house after receiving a call in his mobile phone and at that point of time, PW-1, PW-2, PW-3 and PW-4 are stated to be present in the house. First call is said to have been received by the wife of PW-2 being PW-3 and the second call itself by the deceased at 8 p.m. on 23.11.2011, whereat in the first call it was uttered by the caller to the PW-3 Meera Devi that the accused Gaya Singh had something urgent to talk, however, PW-3 apprised him to call again as the deceased was not in front of her, and thereafter, the deceased is stated to have come and he took the mobile phone and also received the call and after talking on mobile phone, he proceeded out of his house assuring that he will come back and he did not come back but on the next day his dead body was found.

32. The entire prosecution theory thus hinges upon the receiving of the call firstly by the PW-3 and secondly by the deceased and proceeding of the deceased from the house. Hence the entire basis for commission of crime and linking the accused is the phone call.

33. In the present case, PW-1, PW-2 and PW-4 have not named accused Gaya Singh as an accused for commission of crime while calling the deceased on mobile phone. However, it is PW-3 Meera Devi who in her cross-examination has stated that she could recognize and identify the voice of Gaya Singh when she received the first call while showing urgency in talking with the deceased. PW-3 Meera Devi in her cross-examination has come up with stand that she had never seen the accused Gaya Singh and as he has no point of time come to her place and he never talked with her. The said contradiction and inconsistency of PW-3, Meera Devi assumes significance as once a person who has not meet or interacted with a person that to being a stranger then by all probabilities it is not humanly possible to identify the voice of the caller by the receiver as such the testimony of PW-3 Meera Devi linking the accused Gaya Singh is highly unreliable. More over PW-3, Meera Devi made a deposition that she had narrated the entire fact including recognizing the voice of

accused Gaya Singh to PW-6, Inspector Pradeep Kumar being the Investigating Officer, however, he had denied the same. Truthfulness of the testimony of the PW-3, Meera Devi also stands belied from the fact that she had not apprised the fact of recognizing the voice of the accused Gaya Singh either to her husband's or to husband younger brother or to informant who happens to be father-in-law. This Court further finds that the testimony of PW-3, Meera Devi cannot be referred to or relied upon to support the prosecution case as her testimony does not even remotely inspire confidence.

34. Apart from the same another question arises with regard to the fact that first informant report in question was lodged against unknown person particularly when the date and time of lodging of the first information report is 24.04.2011 at 7.30 p.m. Prosecution has further alleged that the dead body of the deceased was recovered on 24.04.2011 at 5.30 in the evening. PW-3, Meera Devi as discussed above, is stated to have recognized the voice of the accused Gaya Singh and once she is possessing the knowledge about receiving of the call by Gaya Singh and it is on his request/direction the accused Gaya Singh, the deceased proceeded from the house and did not return then in these circumstances by all eventualities, the name of the accused Gaya Singh ought to have been marked as accused in the F.I.R. So much so, it is the PW-3, Meera Devi who in her statement has further come up with the stand that the accused were present in the place of occurrence where the dead body was recovered and the accused have made the statement, being a confession that they had committed the crime then obviously the name of the accused ought to have been mentioned in the first information report as the twin factors stood available with PW-3 firstly she recognized the voice of the accused Gaya Singh and secondly the presence of the accused in the place of occurrence which is a big factor for marking the accused in the FIR.

35. Another facet of the matter which needs to be considered at the stage is the fact as to whether the deceased actually received the phone call from accused Gaya Singh as receiving of the calls which are two in number firstly by PW-3 Meera Devi and secondly by the deceased had been made the basis of crime. Thus the call details (CDR) is the important device in order to determine and link the accused in respect of commission of crime. It has come on record that Mobile No.9792548711 is of the deceased as whereas Mobile No.9919050074 is of the accused Gaya Singh. The learned trial court has taken pains to go into the said aspect of the matter and as amongst other factors held that the certificate so required under section 65-B (iv) of Evidence Act, 1872, which is mandatory has not been either obtained or produced.

36. Even in fact PW-1 being the first informant and the father of the deceased deposed has stated in his deposition that he does not know the mobile number of his deceased son and PW-2 being elder brother of the deceased has deposed that he is not aware as to whether deceased possessed any mobile phone or not. PW-6, Pradeep Kumar Singh, the Investigating Officer has made statement that on 9.5.2011 as per Parcha No.9 he has put the mobile phone on the deceased on surveillance and on 18.05.2011 he was in receipt of the CDR and according to him on 23.4.2011 at 20.47 hours, 21.02 hours phone cell was made on the mobile phone of the deceased from

mobile no.9919050074 and thereafter the said phone got switched off. According to PW-6, the mobile no.9919050074 is owned by Gaya Singh S/o Raja Ram, resident of village Kodri, Police Station Sahjanwa, District Gorakhpur.

37. PW-6 Pradeep Kumar Singh, the Investigating Officer in his cross-examination deposed that he had not gathered any information while conducting investigation in coming to the conclusion as to whether the accused Gaya Singh was the owner or possessed the mobile phone or not and he did not make any enquiry with the accused. Even according to PW-6, he has not got recovered the handset and the SIM from which telephonic conversation was made to the deceased so as to link the accused herein. PW-6 has also deposed that he has not conducted any investigation to find out the ownership of IMIE and so much so he had not taken steps to recover the handset.

38. Notably the trial court has analysed the said issue and after perusing the evidences so adduced has recorded categorical finding that there exists no evidence so as to link the accused with the mobile phone and the SIM Card in this regard. So much so no interrogation was made with the accused regard to determination of the fact as to whether the phone belongs to accused Gaya Singh.

39. No doubt defective investigation cannot be the sole basis for demolition of the prosecution theory but the same is also one of the ground amongst others for determining the fact as to whether the prosecution had proved the case beyond doubt. As observed earlier PW-3, Meera Devi claims to have recognized the accused Gaya Singh while listening to her voice despite the fact that she had never met him and he is not her relative meaning thereby that the entire prosecution case hinges upon recovery of mobile call which is stated to be made the accused Gaya Singh. More so, this Court finds that the call details (CDR) cannot be pressed into service without certification so required under section 65-B (iv) of the Evidence Act.

40. Even in fact, the law in this regard is well settled that a certificate under Section 65-B (4) of the Evidence Act is necessary as in absence of the same, the call details cannot be said to be proved. The said aspect of the matter has already been taken note by the Hon'ble Apex Court in the case of ***Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others, (2020) 7 SCC 1***, which is observed in paragraphs no. 47, 51, 52 and 61 as under:-

"47. However, caveat must be entered here. The facts of the present case show that despite all efforts made by the respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65-B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a

summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is lex non cogit ad impossibilia i.e. the law does not demand the impossible, and impotentia excusat legem i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused. This was well put by this Court in Presidential Poll, In re, (1974) 2 SCC 33, as follows: (SCC pp. 49-50, paras 14-15)

"14. If the completion of election before the expiration of the term is not possible because of the death of the prospective candidate it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the expiration of the term is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.

15. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law impotentia excusat legem is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. 'Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him.' Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims, 10th Edn. at pp. 162-63 and Craies on Statute Law, 6th Edn. at p. 268.)"

It is important to note that the provision in question in Presidential Poll, In re24 was also mandatory, which could not be satisfied owing to an act of God, in the facts of that case.

.....

51. On an application of the aforesaid maxims to the present case, it a is clear that though Section 65-B(4) is mandatory, yet, on the facts of this case, the respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third party over whom the respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.

52. We may hasten to add that Section 65-B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V.2, this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record.

However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/ persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.

.....

61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V.2, and incorrectly "clarified" a in Shafhi Mohammad³. Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor40, which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose."

41. Recently Hon'ble Apex Court in **Criminal Appeal No.1307 of 2019 Ravinder Singh @ Kaku Vs. State of Punjab** decided on 4.5.2022 had followed the judgement in the case of **Arjun Panditrao Khotkar (Supra)** and paragraph 21 has held as under:-

"21. In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the court of law. As rightly stated above, Oral evidence in the place of such certificate, as is the case in the present matter, cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law".

42. Even taking the prosecution case on face value, the same is of circumstantial evidence. Notably no body has seen the commission of crime and its only PW-3 Meera Devi who on the basis of the phone call so received by her as discussed herein above has linked the accused with respect to commission of crime. It is well settled that in the case of circumstantial evidence there should be a complete chain so as to link the accused with respect of commission of crime and it should be prove beyond doubt that it is accused and nobody else who has committed crime.

43. The Hon'ble Apex Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra, 1984(4) SCC 116.** In paragraph no.153 has observed as under:

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra*(') where the following observations were made:*

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

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

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

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

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

44. In **Padala Veera Reddy Vs. State of A.P. (1989) Supp 2 SCC 706,** the Hon'ble Apex Court in paragraph nos. 10 and 11 held as under:-

"10. Before adverting to the arguments advanced by the learned Counsel we shall at the threshold point out that in the present case here is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. this Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests :

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra).

11. See also Rama Nand and Ors. v. State of Himachal Pradesh , Prem Thakur v. State of Punjab , Earabhadrapa alias Krishappa v. State of Karnataka Gian Singh v. State of Punjab 1986 Suppl. SCC 676, Balvinder Singh v. State of Punjab."

45. More so in the case of **C.CHENGA REDDY AND OTHERS VS. STATE OF A.P., 1996 (10) SCC 193.** In paragraph no.21, the Hon'ble Apex Court observed as under:-

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the

circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

46. In **STATE OF RAJASTHAN VS. RAJA RAM, 2003(8) SCC 180**. In paragraph no.9, the Hon'ble Apex Court observed as under:-

"9. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi *and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.* In Bhagat Ram v. State of Punjab *(AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt."*

47. Recently the Hon'ble Supreme Court in **Criminal Appeal Nos.333-334 of 2017, Shailendra Rajdev Pasvan and others Vs. State of Gujarat etc.** decided on 13.12.2019. In paragraph no.12, the Hon'ble Supreme Court has observed as under:-

" 12. Thus the entire case of the prosecution is based on circumstantial evidence. It is well settled that in a case which rests on circumstantial evidence, law postulates two fold requirements:-

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

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

48. Applying the principle of law as referred to in above noted judgment an enescapable conclusion stand drawn that the prosecution could not link the accused for committing the said crime as obviously barring the receiving of phone call which even in fact also does not stands proved by any prosecution there is nothing so as to complete the chain itself.

49. So much so the prosecution case does not stand on its own leg even while applying the theory of last seen of the deceased with accused as though prosecution has come up with the case that the deceased was lastly seen with the accused however, Satya Prakash and Shyamjeet did not enter into the witness box as a prosecution witness to prove and support the prosecution theory. Though a

stand had been taken by PW-1, Guab Kahar that the accused was lastly seen with the deceased in the intervening night of 23/24.04.2011 by the above two noted persons but the said fact was not apprised to the Investigating Officer.

50. In so far as the recovery of the dead body along with wood and iron rod is concerned, the same is also under cloud as though allegations have been made that on the pointing out the accused Gaya Singh and Vinod Yadav that incriminating articles alleged to be used committing crime was recovered but there had been no independent witness so as to substantiate the same. Even in fact the first informant being PW-1, Gulab Gahar in his cross examination has stated that though the proceedings of Panchnama were though done, however, the Investigating Officer got the signatures of the PW-1 Gulab Kahar effected on a plain paper and he signed the same near the house of Hari Ram that to on blank paper. The aforesaid fact itself shows that the recovery is a planted and the same does not inspire any confidence or can be made a basis to link the accused with respect to commission of crime.

51. The aforesaid facts itself reveals that the entire proceeding so lodged by the prosecution has been tailored in such of a manner so as to implicate the accused herein right from inception post lodging of the first information report as in the F.I.R, the accused was not marked. More so no independent witness was brought in the witness box on behalf of prosecution so as to surface the true picture. The Investigation so conducted is not only defective but in a casual manner.

52. This Court has to also bear in mind that suspicion however may be grave cannot partake the character of proof in the case of circumstantial evidence.

53. The Hon'ble Apex Court in the case of **Raj Kumar Singh alias Raju alias Batya Vs. State of Rajasthan, 2013 (5) SCC 722.** In paragraph no.21, the Hon'ble Apex Court observed as under:

"21. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that `may be' proved and `will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason, that the mental distance between `may be' and `must be' is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between `may be' true and `must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between `may be' true and `must be' true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely

probable doubt, but a fair doubt that is based upon reason and common sense. (Vide: Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343; Shivaji Sahabrao Bobade & Anr. v. State of Mahrashtra, AIR 1973 SC 2622; Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622; Subhash Chand v. State of Rajasthan, (2002) 1 SCC 702; Ashish Batham v. State of M.P., AIR 2002 SC 3206; Narendra Singh & Anr. v. State of M.P., AIR 2004 SC 3249; State through CBI v. Mahender Singh Dahiya, AIR 2011 SC 1017; and Ramesh Harijan v. State of U.P., AIR 2012 SC 1979).:

54. Marshalling the testimony of the prosecution witness and the documents so adduced by them, this Court has no hesitation but to form a firm opinion that the prosecution has completely failed to prove beyond doubt that the accused has committed the offence. More so, the learned trial court has meticulously analysed the case from four corners of law and after considering the evidence as well as occular testimony has acquitted the accused. The view taken by the trial court is not only plausible but a possible view and there is no occasion for this Court to take another view while substituting judgment of acquittal into conviction. This Court further finds that the judgment of acquittal is neither preserve nor is a case of misreading of evidence or it proceeds towards wrong direction. Obviously double presumption of innocence is available with the accused and it is not a case where any interference is warranted.

55. Accordingly, it is not a case worth granting leave to appeal. The application for granting leave to appeal is **rejected.**

56. Consequently, since the Criminal Misc. Application (Leave to Appeal) is rejected by order of this date, the present government appeal is also **dismissed.**

57. Record of the present case be sent back to the learned trial court.

(2022) 9 ILRA 995
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 316 of 2019

State of U.P. ...Appellant
Versus
Mahfooz & Ors. ...Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:
Sri Sadaful Islam Jafri, Sri Sadaful Islam Jafri, Nasira Adil, Ms. Ambreen Masroor, Sri N.I. Jafri (Sr. Advocate)

(A) Criminal Law - Criminal Procedure Code, 1973 - Sections 378 & 378(3) - Indian Penal Code,1860 - Sections 148, 149, 201, 302, 342 & 364, - Indian Evidence Act,1872 - Section- 65(b)(4) - Government Appeal – against order of Acquittal – offence of Kidnapping, wrongful restraint & murder - until and unless the judgment under challenge is perverse and there are substantial and compelling reasons followed by miscarriage of justice to be meted by the parties, the court in appeal should not in routine manner interfere with. **(**Para 15**)**

(B) Criminal Law - Criminal Procedure Code, 1973 - Sections 378 & 378(3), - Indian Penal Code,1860 - Sections 148, 149, 201, 302, 342 & 364 - Indian Evidence Act, 1860 – Section 65(b)(4) - Government Appeal – against order of Acquittal

- screening of evidence – on merits, inconsistency in St.ment of eye-witness of incident assumes significance particularly when entire prosecution theory has been laid down on foundation of his deposition – There is an unexplained delay of more than 24 days in lodging the FIR - there is enormous time gap between point of time when accused and deceased were last seen alive and when deceased is found death – Mandatory procedure so envisaged under Section 65-B (4) of Evidence Act has also not been followed – though merely because prosecution witnesses turned hostile may not ipso facto be a abstract principle of law that prosecution theory stands disbelieved but such situation is to be seen along with other factors – giving anxious consideration from four corners of law to the impugned judgment and order, the trial court has not committed any palpable illegality or perversity - acquittal upheld - Leave to appeal rejected - so St. appeal stands dismissed.**(**Para 67, 72, 77, 89, 90, 102, 105**)**

(D) Criminal Law - Criminal Procedure Code, 1973 - Sections 378 & 378(3), - Indian Penal Code, 1860 - Sections 148, 149, 201, 302, 342 & 364 - Indian Evidence Act,1872 - Section 65(b)(4) - Government Appeal – against order of Acquittal – Admissibility of electronic evidence – CDR - is also one of important factors along with other factors - if pressed into service can surface position of accused into order to determine as to whether he had committed crime or not – However, there is a complete procedure envisaged under Section 65-B(4) of Evidence Act wherein production of certificate has been held to be mandatory with certain exceptions.(Para – 86)

Appeal dismissed. (E-11)

List of Cases cited:

1. Rajesh Prasad Vs St. of Bihar, (2022) 3 SCC (471),

2. Padam Singh Vs St. of U.P., (2000) 1 SCC 621,

3. Apren Joseph @ Current Kunjukunju& ors. Vs The St. of Kerala (1973) 3 SCC 114,

4. Tara Singh& ors. Vs St. of Pun. 1991 Suppl. (1) SCC 536,

5. P. Rajagopal & ors. Vs St. of T. N., (2019) 5 SCC 403,

6. Dharam Deo Yadav Vs St. of U. P., (2014) 5 SCC 509,

7. Dhan Raj @ Dhand Vs St. of Har., (2014) 6 SCC 745,

8. Ashok Vs St. of Har., (2015) 4 SCC 393,

9. Chandrapal Vs St. of Chhattisgarh, AIR 2022 S.C. 2542,

10. Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal & ors., (2020) 7 SCC,

11. Ravindra Singh @ Kaku Vs St. of Punj. (Criminal Appeal No. 1307/2019 decided on Dt. 04.05.2022),

12. Nathiya Vs St. represented by Inspector of Police, Bagayam Police Station Vellore, (2016) 10 SCC 298,

13. Khekh Ram Vs St. of H. P. (2018 (1) SCC 202).

(Delivered by Hon'ble Vikas Budhwar, J.)

1. The present appeal purports to be under Section 378(3) of Criminal Procedure Code, 1973 (in short 'Cr.P.C.'), seeking to challenge the judgment and order dated 2.4.2019 passed by IVth Additional District & Sessions Judge/Special Judge, E.C. Act, Pilibhit in S.T. No.297 of 2014, (State of U.P. Vs. Mahfooz Ansari and 4 others), S.T. No.16 of 2015 (State of U.P. Vs. Irshad) and S.T. No.96 of 2015, (State of U.P. Vs. Kalloo Mewati), in Case Crime No.801 of 2014, P.S. Sungarhi, District Pilibhit under Sections 148, 364, 342, 302 read with Sections 149, 201 IPC acquitting the accused respondents, who are 7 in number.

INTRODUCTORY FACTS

2. Essence of the fact which lies in narrow compass as wrapped in prosecution story are that one Jai Prakash s/o Shri Ram Charan Lal r/o Village Gauneri Dan, P.S. Jahanabad, District Pilibhit submitted a written report before Deputy Inspector General of Police Bareilly on 19.5.2004 at 16.30 a.m. with an allegation that he solemnized marriage with Smt. Tabbasum @ Munni d/o Mahmood, r/o Chiriyadeh, P.S. Sungarhi, District Pilibhit on 18.12.2013, as the same was interfaith marriage thus, the accused fraction got furrated as their daughter married the informant, who happens to be of different religion.

3. Occasioning threats to the life, the first informant/complainant claims that he had no option but to prefer proceedings before this Court on writ side being W.P. No.20156 of 2004, Smt. Tabbasum @ Munni and others Vs. State of U.P. seeking police protection.

4. As per the first informant on 16.4.2014 a positive order was passed in their favour granting civil protection. Prosecution further asserts that Jaiprakash being the informant and the deceased being Smt. Tabbasum @ Munni were living together, however, on the fateful day i.e. 25.4.2014 when the informant was travelling from Bareilly to Pilibhit then at 5.00 in the evening at a place being Laveda, Police Station Hafizganj Bareilly, the accused respondents Mahfooz, Abdul Mazid, Mustkeem, Ayub and Irshad who happened to be the relatives of Smt. Tabbasum @ Munni while exerting pressure forcibly abducted his wife being Smt. Tabbasum @ Munni.

5. According to first informant, he proceeded to police station Hafizganj in order to submit written report but neither the same was taken note of nor any proceedings were conducted in that regard. In fact he tried his level best to search the whereabouts of his missing wife Smt. Tabbasum @ Munni but she could not be traced. Thus, he apprehends that the life of his wife is in danger.

6. It was further alleged that on 17.5.2014, he received a phone call from his wife Smt. Tabbasum @ Munni apprising him that she has been illegally confined in the house of his maternal uncle Irshad Master and he along with others had committed bad act with her and they are planning to murder her. The said call is stated to have been made from the mobile phone no.8273025296.

7. On the basis of the written complaint so lodged by the first informant before the Deputy Inspector General of Police, Agra region Agra on 19.5.2014 at 4.30 in the morning, a first information report was lodged. Accordingly, the Circle Officer city by virtue of the order dated 19.5.2014 directed for conduction of investigation in the said matter against the accused herein. The FIR was registered as Case Crime No.801 of 2014 under Sections 364, 342 IPC.

8. Records further reveal that on 20.5.2014 one Tilakram s/o Sunder Lal, r/o Gram Gauhania, P.S. Sungarhi, District Pilibhit lodged a written complaint before the Station House Officer, Sungarhi, District Pilibhit reporting that near the drain in Village Gauhania a dead-body of woman was found and adjacent to her the accessories being slipper, dupatta etc. was also noticed and the resident of village in question identified the girl to be the sister of Mahfooz Ansari being Smt. Tabbasum @ Munni.

9. Accordingly, Sections 302 and 201 IPC were also added in the Case Crime No.801 of 2014 which was proceeded to be investigated pursuant to the nomination of the Investigating Officer.

10. As per the prosecution Investigating Officer conducted the investigation prepared site plan, Panchnama sent the body for postmortem followed by recording the statement of the prosecution witnesses. Eventually, a charge-sheet was submitted under Sections 342, 364, 302, 148, 149, 201 IPC against the accused herein being Mahfooz Ansari, Mustakeem, Ayub, Abdul Mazid and Riyasat @ Mama Irshad and Kallu Mewati @ Daroga Khan.

11. Case was committed to trial to sessions by virtue of order dated 17.3.2005, 23.8.2014, 9.10.2014, 12.2.2015, 1.7.2015 and 12.11.2018. Charges were read over to the accused herein. Accused claimed to be tried and they pleaded innocence.

12. Learned Trial Court by virtue of the judgment and order under challenge has acquitted the accused herein.

13. Challenging the judgment and order of acquittal now the present appeal has been instituted at the behest of the State.

LEGAL POSITION

14. Before pondering into the niceties of the judgment of acquittal under challenge in the proceedings under Section 378(3) Cr.P.C. at the instance of the State, this Court has to re-memoirse itself the fact that the present proceedings are in a form of appellate jurisdiction occasioning scrutiny of a judgment of acquittal wherein there are certain limitations so provided therein which needs to be recognised before the delving in the issue.

15. Broadly speaking until and unless the judgment under challenge is perverse and there are substantial and compelling reasons followed by miscarriage of justice to be meted by the parties, this Court should not in routine manner interfere with the judgment of acquittal as the accused is possessed with double presumption of innocence.

16. To put it otherwise as a matter of right, this Court cannot at the instance of the appellant, who happens to be State exercise the jurisdiction while converting the judgment of acquittal into conviction.

17. The aforesaid principle of law has already been crystallized by Hon'ble Apex Court in plethora of decisions and just for the sake of illustration reference may be made to the judgment of **Rajesh Prasad Vs. State of Bihar (2022) 3 SCC (471)** wherein the Hon'ble Apex Court in paragraphs no.21, 22, 23, 24, 25 and 31.1.

21. Before proceeding further, it would be useful to review the approach to be adopted while deciding an appeal against acquittal by the trial court as well as by the High Court. Section 378 CrPC deals with appeals in case of acquittal. In one of the earliest cases on the powers of the High Court in dealing with an appeal against an order of acquittal the Judicial Committee of the Privy Council in Sheo Swarup v. King Emperor[2] considered the provisions relating to the power of an appellate court in dealing with an appeal against an order of a acquittal and observed as under: (SCC OnLine PC)

"16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

"..... But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as: (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."

It was stated that the appellate court has full powers to review and to reverse the acquittal.

22. In Atley v. State of U.P.3, the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was perverse, it could not set aside the same. To a similar effect are the following observations of this Court speaking through Subba Rao, J. (as his Lordship then was) in Sanwat Singh v. State of Rajasthant: (Sanwat Singh case4, AIR pp. 719-20, para 9)

"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup² afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

The need for the aforesaid observations arose on account of observations of the majority in Aher Raja Khima v. State of Saurashtra5 which stated that for the High Court to take a different view on the evidence "there must also be substantial and compelling reasons for holding that the trial court was wrong".

23. M.G. Agarwal v. State of Maharashtra is the judgment of the Constitution Bench of this Court, speaking through Gajendragadkar, J. (as his Lordship then was). This Court observed that the approach of the High Court (appellate court) in dealing with an appeal

against acquittal ought to be cautious because the presumption of innocence in favour of the accused "is not certainly weakened by the fact that he has been acquitted at his trial".

24. In Shivaji Sahabrao Bobade v. State of Maharashtra, Krishna Iyer, J., observed as follows: (SCC p. 799, para 6).

"6. ... In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

25. This Court in Ramesh Babulal Doshi v. State of Gujarats, spoke about the approach of the appellate court while considering an appeal against an order acquitting the accused and stated as follows: (SCC p. 229, para 7)

"7. ... While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can and then only reappraise the evidence to arrive at its own conclusions."

The object and the purpose of the aforesaid approach is to ensure that there is no miscarriage of justice. In another words, there should not be an acquittal of the guilty or a conviction of an innocent person.

31.1. Ordinarily, this Court is cautious in interfering with an order of acquittal, especially when the order of acquittal has been confirmed up to the High Court. It is only in rarest of rare cases, where the High Court, on an absolutely wrong process of reasoning and a legally erroneous and perverse approach to the facts of the case, ignoring some of the most vital facts, has acquitted the accused, that the same may be reversed by this Court, exercising jurisdiction under Article 136 of the Constitution. [State of U.P. v. Sahai[13]] d Such fetters on the right to entertain an appeal are prompted by the reluctance to expose a person, who has been acquitted by a competent court of a criminal charge, to the anxiety and tension of a further examination of the case, even though it is held by a superior court. [Arunachalam v. P.S.R. Sadhanantham[14]] An appeal cannot be entertained against an order of acquittal which has, after recording valid and weighty reasons, has arrived at an unassailable, logical conclusion which justifies acquittal."

18. Bearing in mind the principles of law so laid down by the Hon'ble Apex Court as referred to above the present case is to be proceeded with while giving it a logical end.

19. Heard Ms. Nand Prabha Shukla learned AGA and Sri N.I. Jafri, learned Senior Counsel assisted by Ms. Ambreen Masroor, learned counsel for the accused-respondents.

CONTENTIONS OF STATE/ APPELLANT

20. Ms. Nand Prabha Shukla learned AGA has made the manifold submissions namely:-

(a) The accused herein have committed offence which stood proved beyond doubt as the chain and sequence of events consistently points towards the commission of the offence beyond reasonable doubt.

(b) The accused was seen with the deceased lastly wherefrom she disappeared thus the last seen theory comes into play.

(c) The call details (CDR) itself points out that the deceased was with the accused which stood proved beyond doubt.

(d) There was a strong motive for commission of crime by the accused as the present case occasioned interfaith marriage.

(e) Mere contradictions in the statement of the PW4 Jai Prakash (first informant husband) coupled with other prosecution witnesses turning hostile will not be a factor to hold the accused non-guilty of commission of crime particularly when there was not only a strong motive but also the fact that circumstantial evidences consistently form the link of commission of crime by accused.

CONTENTIONS OF ACCUSED/RESPONDENTS

21. Sri N.I. Jafri, learned Senior Counsel assisted by Amreen Masroor, learned counsel for the accused respondents have made following submissions:-

A. The judgment of the learned trial court is well reasoned taking into account each and every aspect of the matter and does not warrant any interference by this Court while exercising appellate jurisdiction.

B. Once there the major contradictions and inconsistency and improvement have been made in the testimony of the PW4 (first informant) coupled with other prosecution witnesses turning hostile then this Court should not interfere in the present proceedings as view taken by the learned trial court is possible view.

C. The circumstantial evidence do not support the prosecution theory as the complete chain itself is missing while linking the accused to have committed crime.

D. In view of huge time gap of 24 days between the accused alleged to be lastly seen with the deceased and the date of death the last seen theory does not stand applied.

E. The entire prosecution case stands on suspicion which cannot be a ground to hold the accused guilty of commission of crime.

DETAILS & DESCRIPTION OF OCULAR TESTIMONY AND DOCUMENTS ADDUCED

22. At this stage, the court finds proper to give brief description and details of the prosecution witnesses namely:

1.	Qadir Khan	PW1
2.	Rafee Ahmad	PW2
3.	Tilakram	PW3
4.	Jai Prakash	PW4
5.	Omkar	PW5
6.	Ravi Sharma	PW6
7.	Dr. Mahabeer Singh	PW7
8.	Roshal Lal Retd. HCP	PW8
9.	Bhuvnesh Kumar Gautam PRO S.P. Pilibhit	PW9
10.	Atul Pradhan Inspector Crime Branch, Badaun	PW10
11.	Mohd. Rijwan	PW11
12.	Zakir Hussain	PW12
13.	Retd. S.I. Phool Singh	PW13
14.	Sumer Singh Siddhu	PW14

15.	Ramesh Saxena	PW15
16.	Brijesh Singh Inspector	PW16
17.	Uday Shankar	PW17
18.	Dalbir Singh Inspector	PW18
19.	Siyaram	PW19
20.	Babu Baksh	PW20
21.	Nasir Ahmad	PW21
22.	Nanhe Baksh	PW22
23.	Gopal Chandra Gupta	PW23
24.	Mohd. Fahim	PW24
25.	Sanjiv Kumar Saxena	PW25
26.	Triloki Nath Mishra	PW26
27.	Manoj Kumar	PW27
28.	Smt. Babli	PW28
29.	Surendra Pratap Singhs PRO Badaun	PW29

23. Besides ocular testimony following documents were adduced to support the prosecution:-

1	**Panchayatnama**	**Ex.ka1**
2	**Written Complaint**	**Ex.ka2**
3	**Fard**	**Ex.ka3**
	Letter No.4/2, 4/3 A-1/A	**Ex.ka1/A**
	Postmortem report	**Ex.ka-3**
4	**Chik FIR**	**Ex.A4**
5	**G.D. Carbon copy**	**Ex.ka4**
6	**Samples Stamp**	**Ex.ka6**
7	**Challan Naash**	**Ex.ka7**
8	**Letter D.M.**	**Ex.ka8**
9	**Letter CMO**	**Ex.ka9**
10	**Letter RI**	**Ex.ka10**
11	**Site plan of recovery of dead body**	**Ex.ka11**
12	**GD Carbon**	**Ex.ka12**
13	**CDR**	**Ex.ka13**
63	**Lagayat**	**Ex.ka63**
64	**Site plan of the place**	**Ex.ka64**
65	**Copy of Register**	**Ex.ka65**
66	**Photograph of Tabbasum**	**Ex.ka66**
67	**Photograph of Jai Prakash**	**Ex.ka67**
71	**Charge sheet against Kallu Mewati @ Daroga Khan**	**Ex.ka71**

24. So far as the prosecution witnesses are concerned as PW1 Qadir Ahmad appeared in the witness box and deposed that he knows accused Irshad son of Nisar, however he does not know the deceased Smt. Tabbasum @ Munni and he is not aware as to whether the deceased visited the house of accused Irshad. He has further deposed that he is not conversant with the fact as to whether before 25.4.2014 the deceased has visited the house of Irshad. In fact according to him he does not know the relatives of the deceased.

25. Rafi Ahmad appeared as PW2 and in his cross-examination, deposed that he knows Irshad but he showed his ignorance regarding deceased and he is not aware of the fact as to whether the deceased had visited the house of Irshad or not and he is not knowing the relatives of the deceased.

26. As PW3 Tilak Ram entered into the witness box and in his examination-in-chief, he came up with a stand that he neither knows deceased nor Jaiprakash the first informant. He also showed his ignorance regarding the fact that the deceased was with Jai Prakash, however according to him he found the dead-body of woman and when he went near then he could not recognise or identify the dead-body and he specifically stated that he had not submitted application in police station and the dead-body of the deceased was not sealed in his presence and no photograph of the same was clicked.

27. As PW4 Jai Prakash entered into the witness box claiming himself to be the

first informant and the husband of the deceased wife casting allegations upon the accused that on the date of the occurrence, the accused who are 7 in number were present. He has stated that he got married with the deceased and due to the marriage being interfaith marriage the accused bore-grudge against him. According to PW4, Kallu and Riyasat are not related to the deceased but other five accused are related and he further deposed that in connection with their safety of life and they preferred appropriate proceedings before the High Court seeking interim protection and he on 25.4.2014 had gone from Bareilly to Pilibhit and at about 5.00 in the evening in Gram Labeda the accused Mahfooz, Abdul Mazid, Mustkeem, Ayub, Irshad and others while loaded with unauthorised weapons forcibly abducted his wife and he had proceeded to police station Hafizganj for lodging written complaint but no action was taken and after searching the whereabouts of the deceased, he could not locate her and he received a phone call on 17.5.2014 from his wife and she apprised that she was under death threat and she was forcibly detained in a maternal uncle Irshad master place in Barkheda and she was also subjected to bad act and threatened to be murdered. According to PW4 the said information was received through mobile no.8273025296. He accordingly contacted the D.I.G. of Police while submitting written complaint on 17.5.2014 under a signature and then on 19.5.2014, first information report had been lodged. According to him his statements had been received by the Investigating Officer and on 20.5.2014 he received information that his wife has been murdered and he also received a phone call from the accused Mahfooz from mobile no.9720493938 wherein he was apprised that they have killed his wife. PW4 has further stated that he was running coaching in the house of Mahfooz wherein there are about 70 students whereat the deceased was also student and after being in close relationship they solemnized marriage on 18.12.2013.

28. PW5 Omkar also appeared as a prosecution witness. He claims to have witness the body of the deceased but he is ignorant about the name of the deceased. He further stated that he signed the Panchayatnama.

29. PW6 Ravi Sharma has stated on 20.5.2014 near the drain the body of the deceased was found along with slipper and Dupatta and the villagers identified her to be Smt. Tabbasum @ Munni.

30. Dr. Mahavir Singh appeared as PW7 and according to him he is Senior Consultant District Hospital, Pilibhit and he conducted postmortem of the deceased on 20.5.2014. According to him the deceased was possessed with certain marks with suggested that she had died on account of strangulation. According to PW7 the death occurred two days prior to conducting postmortem i.e. on18.5.2014.

31. As PW8 Roshan Lal retired HCP appeared as prosecution witness and he claims to have been posted in the police station concerned and he on the directions of SHO Sungarhi registered the FIR.

32. PW9 Bhuvenesh Kumar Gautam appeared as a witness and proved the Panchayatnama etc.

33. Atul Pradhan Inspector Crime Branch, Budaun appeared as PW10 according to him he was posted as Incharge Inspector and he conducted investigation

prepared site plan and executed necessary proceedings.

34. Mohd. Rizwan appeared as PW11, he in his examination-in-chief has stated that he knows Irshad Ahmad son of Nisar Ahmad and the deceased also and she used to the come to the house of Irshad. He pleaded ignorance regarding the marriage of the first informant with the deceased.

35. PW12 Zakir Hussain has stated that he does not know the deceased and he is not aware as to whether the deceased had visited the house of Irshad between 25.4.2014 and 20.5.2014.

36. PW13 retired S.I. Phool Singh stated that he was present when the deceased was found in a drain in village Gauhania and he had witnessed the Panchyatnama.

37. PW14 Subeg Singh Siddhu stated that he was at that point of time Circle Officer, police station Pilibhit on the written report dated 17.5.2014 so received on 19.5.2014 for lodging FIR and directed for conducting investigation.

38. PW15 Ramesh Saxena claimed himself to be the Clerk in the police station, he proved the lodging of the first information report.

39. PW16 Inspector Brijesh Singh appeared as prosecution witness, he claims himself to prove call details (CDR).

40. PW17 Udai Shankar Singh claims to have being the successor to conduct investigation as according to him he took the investigation from the stage which was left by his predecessor.

41. PW18 S.I. Dalbir Singh in his statement claimed that he had gone to the house of Irshad to trace the deceased.

42. PW19 Siyaram in his cross-examination has stated that he is not aware about the parentage of deceased and in his presence no recovery was made and no statement has been taken by the police.

43. PW20 Babu Baksh claim to be doing masonry work and in his examination has stated that he is not remembering as to whether he had visited the place of Riyasat @ Mama for laying down linter. He does not know the deceased and he is not aware about the same. He also denied giving any statement under Section 161 Cr.P.C.

44. PW21 Nasir Ahmad in his cross-examination has stated that he does not know Riyasat and he is not aware whether plastering was done in his house. He does not know the description of the girl and he denies giving any statement under Section 161 Cr.P.C.

45. PW22 Nanhe Baksh appeared in the prosecution box and according to him he did not lay down linter with Babu Baksh in the house of Riyasat @ Mama.

46. One Gopal Chandra Gupta PW23 appeared as a prosecution witness and he stated that on 18.12.2013 the deceased got married with the first informant, thus he proved the marriage.

47. Mohd. Fahim PW24 also deposed as a prosecution witness that he does not know the deceased and he is not aware whether she had eloped or not. He pleaded ignorance regarding the recovery of the

dead-body of the deceased as he was in his house at that point of time and further he stated that he has not given any statement as stated by the prosecution.

48. Sanjiv Kumar Saxena PW25 appeared as a prosecution witness and he also proved the marriage of the deceased with the PW4 Jai Prakash.

49. PW26 Triloki Nath Mishra appeared as prosecution witness and according to him he is the Manager of the Arya Samaz situate at Subhash Nagar and he proved the marriage of the PW4 Jai Prakash with the deceased.

50. PW27 Manoj Kumar appeared as a prosecution witness and according to him he is brother-in-law of the first informant and he has deposed that on 25.4.2014 Jai Prakash received call from Nand Gopal wherein the person who called Jai Prakash had uttered that Jai Prakash had taken a wrong decision to marry with Tabbasum @ Munni. Thus, he has supported the prosecution case.

51. Smt. Babli PW28 appeared as prosecution witness and she stated that four years ago i.e. the date of the incident Rajpal and Meena Devi who happens to be their relative had come at 6-7 in the evening along with the first informant and she had cooked food but they did not eat and as they were in tension. However, she was not told about Tabbasum @ Munni.

52. As PW29 Surendra Pratap Singh appeared as a prosecution witness claiming to be the Investigating Officer and according to him he after conducting the investigation submitted the charge sheet.

DISCUSSION AND FINDING

53. Undisputedly, the entire genesis of the present case revolves around the fact that the deceased, who happens to the wife of the first informant, had gone with the first informant on 25.4.2014 from Bareilly to Pilibhit and about 5 p.m. in village Laboda, Police Station Hafizganj, the accused who were armed with unauthorised weapons while exerting pressure abducted his wife. According to the first informant he had reported the said matter before the police station Hafizganj, however no action whatsoever have been taken and he continuously kept on searching his wife and when his wife was not traceable, he approached the D.I.G. Police Bareilly region, Bareilly while lodging its complaint and then first information report has been lodged on 19.5.2014 at 16.30 hours. The said events find place in the first information report which had been lodged by the first informant who claims to be eye-witness of the said incident.

54. Notably, in the first information report it has been further narrated that PW4 Jai Prakash received a phone call on 17.5.2014 from his wife that she was suspecting danger to her life and she was further subjected to bad act and the deceased maternal uncle Irshad Master had kept her in illegal confinement and the other accused Mahfooz, Mustkeem, Abdul Mazid, Ayub Mohammad and Irshad committed bad act and specifically details of mobile number being 8273025296 was mentioned. So much so on 20.5.2014 the dead-body of the deceased was found and accordingly a written complaint was lodged by one Sri Tilak Ram as alleged by the prosecution wherein the nearby villagers identified the deceased to be Tabbasum @ Munni.

55. Record reveals that on 22.5.2014 the Investigating Officer

recorded the statement of the first informant wherein the first informant deposed that on 25.4.2014, the first informant received a phone call from Nand Lal Gautam, District President of a political party in his mobile phone at about 11.00 in the morning saying that the phone caller belongs to the same community and he wants to extend help to the first informant. According to the statement of the PW4 Jai Prakash the girl fraction and the community to which she belonged were quiet angry and lots of pressure was being mounted upon and the Ex. M.L.A. Arshad Khan, wanted to get the matter pacified so as to eliminate the chances of bloodshed in village Gauneri Dan.

56. According to PW4 he on the proposal of Nand Gopal Gautam agreed however he is not aware mobile phone number of Nand Gopal Gautam as the sim card is not with him and he does not remember the number. As per PW4 the day was a Friday and after (the religious prayer of the other community) he went to the Satelite Bus Stand at 3.00 p.m. and at that point of time Nand Gopal Gautam came in white Marshal (four wheeler) in which both Nand Gopal Gautam and Ex. M.L.A. was sitting.

57. Further as per PW4 behind the said four-wheeler, there was another four-wheeler being a white Maruti Car in which the accused Kallu Mewati and the brother of the deceased being Mahfooz, Kallu and 2-3 persons was sitting. Even according to PW4 behind the said four-wheeler, there was another four-wheeler of green colour (Scorpio) in which the brother of the deceased Mustakim, Ayub and Abdul Mazid was sitting along with Irshad and Riyasat @ Mama.

58. PW4 has also deposed that on the Bareilly road while coming from Pilibhit after crossing village Labeda in the four wheeler of Nand Gopal Gupta, wherein the first informant and the deceased were sitting the accused Mahfooz and Kallu had overtaken the four-wheeler and stationed it in front of the four-wheeler in which the first informant was sitting and then they came out and forcibly took away the deceased and put her in the their vehcile. Thereafter Nand Gopal Gautam along with the first informant came to Satelite crossing. According to PW4 in the night of the fateful day at 8-9 p.m. he proceeded to police station Hafizganj for lodging FIR, some constables were standing for over there however no heed was made for lodging FIR. PW4 Jai Prakash has further stated that the accused did possess any weapon with them but normally they keep it in a concealed manner.

59. The Investigating Officer on 5.6.2014 again took the statement of the PW4 Jai Prakash wherein PW4 deposed that though he came to Satellite but before that he went along with Nand Gopal Gautam near Fun-city near one hospital where his brother-in-law Manoj Kumar s/o Ram Das r/o Nakatia, Police Station Cantt. Bareilly was present.

60. As per PW4 he did not meet his brother-in-law Manoj Kumar at an earlier point of time while coming to Pilibhit as he was accompanied with Nand Gopal Gautam and his wife. PW4 further stated that he had conversation with his brother-in-law for an half an hour and thereafter his brother Rajpal also came and subsequently he again went to Labeda along with his brother Rajpal who was riding motorcycle and in Labeda he left his brother-in-law and along with his brother Rajpal in a

motorcycle proceeded to his in-laws place being Sri Baburam and stayed there for 3-4 days. However in his inner heart, he was missing his wife and that is why he did not give any statement earlier.

61. The aforesaid statement so made by the first informant if put to conjoint reading will show that the narration of facts so made in the deposition so sought to be made by the first informant on 22.5.2014 and 5.6.2014 does not find place in the first information report which was lodged on 19.5.2004. It is not a case wherein the first informant is not an eye-witness as according to the first informant PW4 he claims to be the eye-witness and thus the things which had happened on 25.4.2014 ought to have been not only immediately reported before police station but also narrated in the first information report.

62. So much so the inconsistency and major contradictions so sought to be made in the deposition by the PW4 being star witness itself gets further highlighted from the fact that a different story had been narrated in the first information report so lodged on 19.5.2014 wherein there was no recital about the fact regarding receiving of telephonic call by Nand Gopal Gautam and with respect to role of Ex. MLA.

63. Even in a subsequent statement dated 5.6.2014 another story is being sought to be build up while coming up with a stand that he met his brother-in-law Manoj Kumar and Rajpal and further proceeded to the in-laws place of his brother whereat he stayed for 3-4 days.

64. The story so build up by the prosecution upon the base so erected by PW4 itself demolishes the entire prosecution case particularly when there are major contradictions and improvement sought to be made in this regard.

65. The inconsistency in the statement of PW4 Jai Prakash also marks its presence every where as on one hand, he in his statement so recorded under Section 161 of the Cr.P.C. as well as in the first information report in question had come up with a stand that he had received only once a call from the deceased in his phone number on 17.5.2014 regarding the atrocities which she was occasioning as she was put in illegal confinement by his maternal uncle Ishan Master and the accused had committed rape with her and the said fact is stated to be communicated and apprised to the first informant PW4 Jai Prakash through mobile number 8273025296. However, PW4 Jai Prakash in his statement under Section 161 of the Cr.P.C. had deposed that he had spoken with the deceased for 4-5 times and the deceased used to call her often after getting an opportunity behind the back of the accused when she was in-confinement and further uttered that PW4 Jai Prakash if he truly loved the deceased then he should change his religion and return the jewellery.

66. It is also come on record that in the statement so recorded of PW4 Jai Prakash, he has deposed that he on 1.5.2014 and 15.5.2014 had returned belongings of the deceased and Rs.60,000/- to the accused Kallu Mewati and Mustakeem in a market place being Buttler Plaza and near the Mosque at Aala Hazrat in Bareilly. He had further deposed that he even wanted to convert himself while changing the religion so as to live with the deceased.

67. The aforesaid inconsistency in the statement of the PW4 Jai Prakash, who

claims to be the eye-witness of the incident also assumes significance particularly when the entire prosecution theory has been laid down on the foundation of the deposition of PW4.

68. In the case of **Padam Singh Vs. State of U.P. (2000) 1 SCC 621** the Hon'ble Apex Court in paragraph 6 had occasioned to deal with the aspect relating to omissions and contradictions in the statements made under Section 161 of the Cr.P.C. and before the Court under Sections 164 of the Cr.P.C.

6. Even, if we examine the intrinsic oath of the prosecution witnesses, who are admittedly inimical, the omissions and contradictions between the statement made under Section 161 and the statement made in Court, as brought out in the cross-examination, makes the witnesses unreliable and the two learned Judges, without noticing the same have just brushed aside on the ground that the omissions and contradictions are not material. The said conclusion in our opinion cannot be sustained. After going through the cross-examination of the aforesaid witnesses, in our opinion, the witnesses do not stand the test of stricter scrutiny, they being admittedly inimical towards the d accused persons. In this view of the matter, no reliance could have been placed on their testimony and as such the conviction of the appellant cannot be sustained.

69. Another additional aspect of the matter needs to be considered at this stage is with regard to delay in lodging of the FIR. It has come on record that on 25.4.2014 the incident of abducting the deceased by the accused has been alleged that too in the back ground of the fact that the first informant being the husband of the deceased was the eye-witness of the same. However, the first information report in question has been lodged on 19.5.2014 before the concerned police station at 16.30 hours. An explanation has been sought to be offered by the first informant that prior to it he had approached the police station Hafizganj reporting the occurrence of the incident on 25.4.2014 at 5.00 in the evening. Meaning thereby that the first informant was possessed with the information of forcefully taking away of his wife by the accused as he claimed to be eye-witness of the occurence dated 25.4.2014. The first informant at that stage did not lodge the first information report, however, according to him on 17.5.2014, he received phone call from his wife that she was kept in illegal confinement by the accused and she was subjected to outrage of modesty by the accused. Thereafter, the first informant claims to have possessed alertness and he on 19.5.2004 wrote a written complaint before the D.I.G. of Police, Bareilly region Bareilly and thereafter first information report was lodged on 19.5.2014 at 16.30 hours.

70. As per PW4 Jai Prakash he in his statement under Section 161 of the Cr.P.C. on 22.5.2014 came up with a story that he was contacted by one Nand Lal Gautam at 11.00 on 25.4.2014 and he on his assurance came in contact with Ex.MLA and proceeded to Pilibhit.

71. PW4 Jai Prakash in his subsequent statement dated 5.6.2014 further narrated the tale that he met his brother-in-law Manoj Kumar just before Fun-city at Satellite Bareilly near a hospital and at that point of time incidentally his brother Rajpal also came and he as a pillion rider sat in the motorcycle of his brother

Rajpal and thereafter he went to the in-laws of his younger brother. Essentially the incident according to the PW4 Jai Prakash took place on 25.4.2014 however addition and subtraction were made in the deposition regarding the development in the incidents and it was not disputed and rather accepted by PW4 Jai Prakash that his wife was abducted on 25.4.2014.

72. Obviously, there is a delay of more than 24 days in lodging of the FIR that too in a case wherein the first informant is an eye-witness and husband, who even in fact had done interfaith marriage. The reasons of the delay have been thoroughly unexplained being unbelievable and inconceivable in the light of the fact that normally where a loving husband is witnessed with the situation whereat the wife gets abducted coupled with the fact that in-laws of the husband are not happy with the marriage then no prudent person would wait for 24 days in lodging the first information report. So much so in the statement of the PW4 Jai Prakash (Husband) it has also come on record that he on 25.4.2014 proceeded to his younger brother's in-laws place and stayed thereat for 3-4 days and did not discuss the said fact with the wife of the younger brother. The explanation so offered by PW4 Jai Prakash that he inner heart wanted his wife to be safe is not an explanation worth consideration particularly when it is not a case where Jai Prakash PW4 is not conversant with law and law enforcing authorities as it is an admitted case that PW4 Jai Prakash himself had approached the Hon'ble High Court while seeking civil protection in connection with this marriage with the deceased anticipating threat of his life.

73. Hon'ble Apex Court on the question of delay in lodging the FIR and its impact upon the prosecution theory has observed in the case of **Apren Joseph Alias Current Kunjukunju and others Vs. The State of Kerala (1973) 3 SCC 114** wherein para 11 following was mandated:

11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr. P. C. As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue unreasonable delay in lodging the F. I. R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.

74. In the case of Tara Singh and others Vs. State of Punjab 1991 Supp (1) SCC 536, the Hon'ble Apex Court in paragraph 4 has observed as under:-

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

75. Yet, in the case of **P. Rajagopal and others Vs. State of Tamil Nadu (2019) 5 SCC 403,** the Hon'ble Apex Court in paragraph 12 has held as under:-

12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely.

76. Now another question arises as to whether the theory of last seen is to be applied and pressed into service against the accused. Notably the prosecution has sticked to its case that the deceased was abducted and abducted by the accused herein on 25.4.2014. More so the dead-body of the deceased was found on 20.5.2014 that means after a period of about 24 days.

77. The postmortem of the deceased was conducted by PW7 20.5.2014 at about 1.45 p.m. from 20.5.2014 at 11.45 p.m. to 21.5.2014 at 12.45 a.m. As per PW7 Dr. Mahavir Singh the deceased died two days prior to the conduction of postmortem while strangulating her and in cross-examination he deposed that there might be difference of 6 to 8 hours. Meaning thereby that the death of the deceased occurred around 11.45 p.m. on 18.5.2014 and if the difference of 6 to 8 hours is accounted for then time of the death would be 5.00 p.m. on 18.5.2014 to 7.00 a.m. on 19.5.2014.

Co-relating the date of abduction being 25.4.2014 it has been stated by the prosecution that the accused had forcibly taken her away and the date of the recovery of the dead-body of the deceased on 20.5.2014 coupled with the opinion so tendered by PW7, who conducted the postmortem itself shows that there is enormous time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found death.

78. In **Dharam Deo Yadav Vs. State of Uttar Pradesh (2014) 5 SCC 509,** the Hon'ble Apex Court in paragraph 19 has observed as under:-

19. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence. PWs 1, 2, 3, 5, 9 and 10 have all deposed that the accused was last seen with Diana. But, as already indicated, to record a conviction, that itself would not be sufficient and the prosecution has to complete the chain of circumstances to h bring home the guilt of the accused.

79. In ***Dhan Raj @ Dhand Vs. State of Haryana (2014) 6 SCC 745,*** the Hon'ble Apex Court in paragraphs 15, 16 & 17 have observed as under:-

15. The above mentioned circumstantial evidence was supported with the statement of Raj Singh (PW 15), that when he was visiting his brother the deceased on 24-1-1997 after the deceased had left, the three accused came to the deceased's house and enquired about him after disclosing their names. Before discussing the admissibility of the said statement, we would refer to the landmark decision of this Court in Sharad Birdhichand Sarda v. State of Maharashtra regarding circumstantial evidence, where this Court held regarding the question of the accused last seen with the deceased, that where it is natural for the deceased to be with the accused at the material time, other possibilities must be excluded before an adverse inference can be drawn. It is evident from the above that this Court refrains from drawing adverse inferences in a factual matrix which points towards the guilt of the accused. Thus, we will consider the statement of Raj Singh also in the same light.

16. As per the statement of Raj Singh, the three accused had come asking

for the deceased but in the absence of other corroborating evidence and independent evidence, it is not established that the appellant-accused had abetted the co-accused Sanjay in the commission of the crime. Also it can be the defence case that the said statement has been added as an afterthought to strengthen the case of the prosecution. We have found no material on record which corroborated the statement of Raj Singh who is an interested witness. Furthermore, there is no other evidence which indicates or establishes the presence of the appellant-accused near the place of commission of crime. Also, as noted by the trial court in the trial of Badal, no footprints were found in the surrounding kutcha area where the body of the deceased was found.

17. We have noticed in Madhu v. State of Kerala, facts of which were discussed earlier, that this Court in spite of the factum that the accused were sighted close to the place of occurrence at around the time of occurrence reversed the conviction as guilt was not established. In the present factual matrix, it is only an interested witness stating that the accused had come asking for the deceased. This factum alone does not establish guilt as no other evidence is found that they were near the Bizdipur area where the crime was committed or had visited the house of the deceased.

80. In ***Ashok Vs. State of Haryana (2015) 4 SCC 393,*** the Hon'ble Apex Court in paragraphs 8, 9, 10 & 11 have observed as under:-

"8. The "last seen together" theory has been elucidated by this Court in 9 Trimukh Maroti Kirkan v. State of Maharashtra², in the following words:

"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof onto the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.

9. In Ram Gulam Chaudhary v. State of Bihar³, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor was his body found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every c justification for drawing an inference that they had murdered the boy.

10. In Nika Ram v. State of H.P.4, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

11. The latest judgment on the point is Kanhaiya Lal v. State of d Rajasthan5. In this case this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be

something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

81. In **Chandrapal Vs. State of Chhattisgarh AIR 2022 S.C. 2542,** the Hon'ble Apex Court in paragraphs 14, 15, 16 & 17 have observed as under:-

"14. In this regard it would be also relevant to regurgitate the law laid down by this court with regard to the theory of "Last seen together".

15. In case of Bodhraj and Ors. v. State of Jammu and Kashmir', this court held in para 31 that:

"31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible...."

16. In Jaswant Gir v. State of Punjab', this court held that in absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of "Last seen together", even if version of the prosecution witness in this regard is believed.

17. In Arjun Marik and Ors. v. State of Bihar ¹0, It was observed that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused, and therefore no conviction on that basis alone can be founded."

82. There is also a big question mark regarding the presence of the deceased along with the accused herein from the point of angle that the deceased called the first informant through the mobile phone bearing number 8273025296.

83. PW16, who claims to be Brijesh Singh L.O. Cell incharge District Lucknow came forward as a prosecution witness to prove the call details (CDR). According to him the mobile number of the accused Mahfooz being 93963971920 is stated to be owned by the accused, he is being shown to be with the deceased for the period from 16.5.2014 to 20.5.2014. PW16 produced Ex.ka13 and Ex.ka63 being the call details. The prosecution has further come up with a stand that the call detail list was submitted by PW16 to the Investigating Officer being Udai Shankar Singh.

84. On cross-examination the Investigating Officer Sri Udai Shankar Singh PW17 when asked about the call details, he deposed that the same may be available in is office but it has not been annexed. A specific statement has been made by PW17 that the mobile phone so sought to be recovered of the accused was not sealed and he had only taken the EMI number. He further deposed that he had not taken the EMI number of the other also.

85. The learned Trial Court has further gone into details and has recorded a finding that the call details with respect to the accused herein at the place of the occurrence was not proved.

86. CDR is also one of the important factors which along with the other factors if pressed into service can surface the position of the accused into order to determine as to whether he had committed crime or not. However, there is a complete procedure envisaged under Section 65-B(4)

of the Indian Evidence Act wherein the production of the certificate has been held to be mandatory with certain exceptions.

87. Hon'ble Apex Court in the case of **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others (2020) 7 SCC 1** paragraphs no. 47, 51, 52 & 61 have observed as under:-

47. However, caveat must be entered here. The facts of the present case show that despite all efforts made by the respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65-B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is lex non cogit ad impossibilia i.e. the law does not demand the impossible, and impotentia excusat legem i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused.This was well put by this Court in Presidential Poll, In re, (1974) 2 SCC 33, as follows: (SCC pp. 49-50, paras 14-15).

"14. If the completion of election before the expiration of the term is not possible because of the death of the prospective candidate it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the expiration of the term is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.

15. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law impotentia excusat legem is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. 'Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him.' Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the

compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims, 10th Edn. at pp. 162-63 and Craies on Statute Law, 6th Edn. at p. 268.)"

It is important to note that the provision in question in Presidential Poll, In re24 was also mandatory, which could not be satisfied owing to an act of God, in the facts of that case.

51. On an application of the aforesaid maxims to the present case, it a is clear that though Section 65-B(4) is mandatory, yet, on the facts of this case, the respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third party over whom the respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.

52. We may hasten to add that Section 65-B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V.2, this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/ persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.

61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V.2, and incorrectly "clarified" a in Shafhi Mohammad³. Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor40, which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.

88. Recently Hon'ble Apex Court in **Criminal Appeal No.1307 of 2019 Ravinder Singh @ Kaku Vs. State of Punjab** decided on 4.5.2022 had followed the judgement in the case of **Arjun Panditrao Khotkar (Supra)** and paragraph 21 has held as under:-

"21. In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the

court of law. As rightly stated above, Oral evidence in the place of such certificate, as is the case in the present matter, cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law".

89. The learned Trial Court has further observed that the mandatory procedure so envisaged under Section 65-B (4) of the Evidence Act has not been followed and even in fact nobody appeared on behalf of the telecom company so as to prove the CDR.

90. The prosecution in order to prove its case beyond doubt had relied upon and refered to the statement of PW1 Qadir Khan, PW2 Rafi Ahmad, PW11 Mohd. Rizwan, PW12 Zakir Hussain, PW20 Babu Baksh, PW21 Nasir Ahmad and PW22 Nanhe Baksh.

91. The aforesaid prosecution witnesses claimed to be the resident of Village Badkheda. However, PW1 Qadir Khan, PW2 Rafi Ahmad, PW11 Mohd. Rizwan, PW12 Zakir Hussain have though deposed that they are resident of Badkheda but showed their ignorance that they had seen deceased in the house of Irshad and accordingly, they were declared to be hostile. Similarly, so far as PW20 Babu Baksh, PW21 Nasir Ahmad and PW22 Nanhe Baksh are stated to be the prosecution witnesses who while doing masonry work in the maternal uncle's place of the deceased saw the deceased. However, the aforesaid witnesses have denied witnessing the deceased in her maternal uncle's house and they were also turned hostile.

92. Though merely because prosecution witnesses turned hostile may not ipso facto be a abstract principle of law that the prosecution theory stands disbelieved but the such situation is to be seen along with other factors.

93. Notably in the present case this Court finds that there are material contradictions and inconsistency in the statement of PW Jai Prakash, who happens to be an eye-witness, delay in lodging of the FIR, huge time gap between the deceased being last seen with the accused and with the deceased, followed by the fact that CDR details do not match or mark the presence of accused with the deceased and also the fact that the postmortem report though stands proved by PW7 discloses the fact that the death occurred between the intervening night of 18/19. 5. 2014.

94. Though it might be a strong case as per the prosecution that motive was behind the commission of the crime due to the interfaith marriage so solemnized herein but the same is not a necessary element in deciding culpability. Baring PW4 Jai Prakash none of the prosecution witnesses have supported the version of the prosecution though might be that the statements so recorded in a gap of one to two years. This Court might have ignored or kept aside the statement of the prosecution witnesses who had turned hostile due to lapse of time relating to recording of statement of prosecution witnesses but neither the medical evidence in the form of postmortem report supports the case of the prosecution nor the statement of PW4 Jai Prakash the star eye-witness inspire confidence as there are not only material contradictions which go into the root of the matter but the statements itself shown that they have been tailored so as to put the prosecution case in such position for holding the accused guilty of commission of crime.

95. No doubt suspicion as it becomes pointing towards the commission of offence by the accused but it cannot be partake the character of the accused committing the crime until and unless there is chain or link between the accused and the commission of crime specifically pointing the accused nobody else. The said fact also is quiet relevant as the PW4 first informant in his cross-examination so conducted on 18.8.2017 has come up with a stand that he did not recognise the accused as they were wearing cloth on their face and he suspects that the same be accused Mahfooz and their brother.

96. In **Nathiya Vs. State represented by Inspector of Police, Bagayam Police Station Vellore (2016) 10 SCC 298,** the Hon'ble Apex Court in paragraph 25 has observed as under:-

"25. On an analysis of the overall fact situation, we are of the considered opinion that the chain of circumstantial evidence relied upon by the prosecution to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record do raise a needle of suspicion towards them, the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof."

97. In Khekh Ram **Vs. State of Himachal Pradesh (2018) 1 SCC 202**, the Hon'ble Apex Court in paragraph 33 has observed as under:

33. It is a common place proposition that in a criminal trial, suspicion however grave, cannot take the place of proof and the prosecution to succeed has to prove its case and establish the charge by adducing convincing evidence to ward off any reasonable doubt about the complicity of the accused. For this. the prosecution case has to be in the category of "must be true" and not "may be true". This Court while dwelling on this postulation, in Rajiv Singh v. State of Bihar dilated thereon as hereunder: (Rajiv Singh case, SCC pp. 392-93. paras 66-69)

"66. It is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be. otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well-established cannon of criminal justice is "fouler the crime higher the proof". In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.

67. The above enunciations resonated umpteen times to be reiterated in Raj Kumar Singh v. State of Rajasthan [10] as succinctly summarised in para 21 as hereunder: (SCC pp. 731-32)

21. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved and "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be` and "must be" is quite large and divides vague conjectures from sure

conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.'

68. In supplementation, it was held in affirmation of the view taken in Kali Ram v. State of H.P.11 that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

69. In terms of this judgment, suspicion, howsoever grave cannot take the place of proof and the prosecution case to succeed has to be in the category of "must be" and not "may be": a distance to be covered by way of clear, cogent and unimpeachable evidence to rule out any possibility of wrongful conviction of the accused and resultant miscarriage of justice. For this, the Court has to essentially undertake an exhaustive and analytical appraisal of the evidence on record and register findings as warranted by the same. The above proposition is so well established that it does not call for multiple citations to further consolidate the same."

98. So far as the recovery of the dead-body of the deceased is concerned it has come on record that a written complaint was lodged by one Tilak Ram PW3 on 20.5.2014 as though he did not identify the deceased but the resident villagers identified the same being the sister of Mahfooz Ansari. PW3 in his statement has come up with a stand that he does not recognise the deceased. However, according to him he has stated that the FIR was written in the writing of one Ravi Sharma and he signed the same. He denied to have given any statement under Section 161 Cr.P.C. Eventually PW4 Tilak Ram got hostile. As PW6 Ravi Sharma deposed, that he wrote the complaint on the directions of his father Tilak Ram Sharma, who narrated the facts but he does not recognise the deceased. PW5 happens to be one Onkar, who is stated to have witnessed the Panchayatnama, he though deposed that he signed the Panchayatnama but he did not recognise the dead-body itself. PW19 Siyaram also deposed that he did not recognise the body of the deceased and he also turned hostile. PW24 Mohd. Fahim completely denied in his deposition that any dead-body was found on 20.5.2014, thus he also became hostile.

99. Though it has been alleged by the prosecution that the deceased was subjected to an occasion whereby her modesty was to be outraged by the accused while committing bad act but neither the same

could be surfaced in the postmortem nor there has been any evidence led by the prosecution so as to corroborate the same. The said aspect is also important as the same along with the other factors shows that the ocular testimony of PW4 also does not inspire confidence of the Court so as to support the prosecution case.

100. Net analysis of the background so painted by the prosecution goes to show that barring PW4 Jai Prakash nobody has supported the prosecution case entailing demolition of the entire prosecution theory.

101. Though learned AGA has sought to argue that the prosecution theory is erected upon solid foundation but we find that the case of the prosecution proceeds on weak foundation.

102. Cumulatively giving anxious consideration to the judgment and the order passed by the learned trial court acquitting the accused, this Court finds that the learned trial court has not committed any palpable illegality or perversity as the learned trial court has appreciated each and every aspect of the matter from the four-corners of law while acquitting the accused. The view taken by the learned trial court is a possible and plausible view based upon not only the appreciation of the testimony of the prosecution witnesses and the documents so adduced therein but also upon the cardial principles of law which govern the subject in question.

103. Thus, this Court has no option but to concur that the judgement of the learned trial court whereby the accused herein has been acquitted.

104. Resultantly no ground is made so as to accord leave to appeal and accordingly the same is rejected.

105. As the leave to appeal stands rejected thus the present Government Appeal so instituted by the State-appellant under Section 378(3) of the Cr.P.C. stands dismissed.

106. The record and proceedings be sent back to the court-below.

(2022) 9 ILRA 1019
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.08.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Government Appeal No. 778 of 2021

State of U.P. ...Appellant
Versus
Mukhtar Ansari & Anr. ...Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:
Sushil Kumar Singh, Abhishek Misra, Karunesh Singh, Satendra Kumar (Singh)

Criminal Law - Criminal Procedure Code, 1973 - Section 378, - Indian Penal Code, 1860 -Section 506 - Government Appeal – against order of Acquittal – written complainant - FIR - Complainant in his cross-examination admit that merely on the basis of suspicion, he gave the complaint, however those accused person did not commit any offence - court finds that, prosecution case was only based on suspicion and without there being any cogent and credible evidence to connect the accused person - A person cannot be convicted merely on the basis of suspicion if the suspicion is not otherwise proved - impugned judgment and order requires no interference - thus, appeal dismissed. (Para 18, 19, 20)

Appeal dismissed. (E-11)

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

1. The present appeal under Section 378 Cr.P.C. has been filed against the judgement and order dated 23.12.2020 passed by the Special Judge, MP/MLA/Additional Sessions Judge, Court No.19, Lucknow in Criminal Case No.970 of 2018, arising out of Case Crime No.126 of 1999, under Section 506 IPC, Police Station Krishna Nagar, District Lucknow, whereby the learned trial court had acquitted the respondents for the offence under Section 506 IPC.

2. The facts of the case, in brief, are that respondents, Mukhtar Ansari and Abhay Singh were imprisoned in Lucknow Jail as under trial. The complainant, S.P. Singh Pundir was serving in Uttar Pradesh Police as Additional Inspector General of Police (Prison). On 26.2.1999, a search operation was conducted in the Lucknow Prison and barracks were searched. It was alleged that respondent, Mukhtar Ansari, who was sitting Member of Legislative Assembly at that time and Abhay Singh, who are the Mafias, were unhappy with the search conducted by the police in the prison. Search was conducted on the order passed by Sri S.P. Singh Pundir, Additional Inspector General of Police (Prison). It was alleged that Mukhtar Ansari, respondent no.1 gave threat to kill Sri Sri S.P. Singh Pundir, Additional Inspector General of Police (Prison).

3. It was further said that on 27.2.1999 at around 10.30 P.M., Sri Manish Pundir, son of Sri S.P. Singh Pundir told the complainant that two persons were sitting on a motorcycle under the Eucalyptus tree near the house of the complainant and they were smoking cigarettes. They were staring towards the house of the complainant. When the complainant along with others came out of the house, two persons siting under the Eucalyptus tree had vanished from there. It was further alleged that out of two, one was well built of six feet height and the second one was of short height and fatty.

4. On 28.2.1999, again at 9.15 P.M. when the son of the complainant came out of the house with his dog for a walk, he noticed that a person jumping out from the vacant plot near the house of the complainant. One person of short height and well built wearing shirt and pant having stole was seen running towards eucalyptus tree. It was further said that two persons, who were seen under the eucalyptus tree on previous day, were also present near the eucalyptus tree. Two persons present near the eucalyptus tree were giving signals to a third person. Thereafter, these persons sat on rickshaw and went from there. Son of the complainant told the complainant about this incident and they could see three persons going on rickshaw at a little distance.

5. On 1.3.1999 at around 12.15 A.M., two persons on a motorcycle were seen near the house of the complainant in suspicious condition, and when the complainant could see them, they went inside the Hydel Colony, which was situated near the house of the complainant. It was further said that Hydel Colony was not a thoroughfare. The complainant informed about these incidents through telephone to police control room and also to other officers. The complainant could gather information that on 27.2.1999 and 28.2.1999, the persons who were seen near the house of the complainant, were also seen near the house of his official driver.

These persons were also seen on motorcycle near the office of the complainant. Two persons were on Yamaha Motorcycle having numbers UP32 W 5721 or UP32 K 5721. The complainant suspected that these persons were the men of Mafia, Mukhtar Ansari and they were being sent to kill the complainant, his family members, abduction or causing other damages to his family. It was further said that Mukhtar Ansari was trying to terrorise the complainant, so that he could flout the jail rules. Mukhtar Ansari by creating terror was interfering in the official work for the purpose of carrying out his illegal activities from the prison.

6. A written complaint was given on 1.3.1999 by Sri Sri S.P. Singh Pundir, Additional Inspector General of Police (Prison) and on the basis of written complaint, an FIR got registered at Case Crime No.126 of 1999, under Section 506 IPC. The Investigating Officer after conducting the investigation, filed the charge sheet against the Mukhtar Ansari and Abhay Singh under Section 506 IPC. Vide order dated 8.12.2003, the charge under Section 506 IPC was framed against the two respondents. The prosecution to prove its case examined as many as six witnesses.

7. P.W.-1, S.P. Singh Pundir, in his examination-in-chief had reiterated the allegations in the FIR. He proved the complaint, which was marked as Ext.Ka-1. In his cross-examination, he said that as per the direction given by the Government, a search was carried out in the prison, in which District Magistrate, Senior Superintendent of Police, Lucknow and the Sub-Divisional Magistrate were present. This search was conducted under his supervision. On 26.2.1999, Abhay Singh was brought to the court to attend a case. He further said that neither Mukhtar Ansari nor Abhay Singh gave any threat to him during search operation. The persons, who were seen loitering around the house of the complainant on 27.2.1999 and 28.2.1999 ,were not seen by the complainant himself. On 1.3.1999 at around 12.15 A.M., he saw the suspicious persons. He said that on the basis of the suspicion, he gave the complainant, on which the FIR got registered. He said that the suspicious persons, who were seen near the house of the complainant, were never spotted with Mukhtar Ansari or Abhay Singh.

8. P.W.-2, Manish Pundir, in his extermination-in-chief supported the prosecution case. However, in his cross-examination, he said that his father did not tell him and other family members who were the persons unhappy by the search operation. He deposed that during discussion in the house, he and other family members got suspicious about the persons coming or going near their house. He further said that road in front of their house was a thoroughfare and people would come and go on that road. On the basis of suspicion, he noticed the suspects and their built etc. On 27th and 28th February, 1999, the suspects who were noticed by him, did not say anything to him or any other family member. It was further said that he did not tell any number of the motorcycle in his statement recorded under Section 161 Cr.P.C., and if such a number had been mentioned in the case diary, he was not in a position to tell how the said number of motorcycle was mentioned in the case diary. He further said that no one had given any threat to him or any other family member in his presence.

9. P.W.-3, Saurabh Bhatnagar, in his statement said that motorcycle no.UP32 5721 mentioned in the statement of P.W.-1 under Section 161 Cr.P.C. was his

motorcycle and at the time of incident, he was in Moradabad and on 1.3.1999 at around 12 hours, this motorcycle was standing in his house. He further said that he would only ride the said motorcycle.

10. P.W.-4, Prem Shanker Dixit, in his extermination-in-chief said that on 26.2.1999, he was posted as warden in the District Jail, Lucknow, and he was on duty from 12 hours to 4 P.M. On 14.2.1999, some persons had come to meet the prisoner, Mukhtar Ansari. There was no stamp on their hands and he asked these persons to show permission as seal was not stamped on their hands, which would be stamped on the hands of the persons coming to meet a prisoner. He further said that nobody gave direct threat to him. On 26.2.1999, the search operation was conducted under the supervision of Sri S.P. Singh Pundir, Additional Inspector General of Police (Prison) and he was on duty at the gate. He could not hear any threat given by anyone as he was around 200 meters away from where the search operation was being conducted. He himself was not threatened by anyone when he asked the persons coming to meet Mukhtar Ansari to show permission to meet him. This witness was declared hostile. He said that respondent, Mukhtar Ansari and Abhay Singh did not threaten the complainant to kill him or his family members in front of him. He did not give any such statement to the Investigating Officer. This witness was cross-examined by the prosecution. However, in his cross-examination also, he said that the Investigating Officer did not take any statement of him.

11. P.W.-5, Constable, Daya Shanker in his examination-in-chief proved the FIR, which was marked as Ext.Ka-2.

12. P.W.-6. Javed Khan, Investigating Officer who conducted partial investigation and prepared the site plan, which was proved by him and marked as Ext.Ka-3. In his cross-examination, he said that he recorded the statement of the complainant, however, the complainant did not tell him about the persons, who were found loitering around his house on 26th and 27th February, 1999 and on 1.3.1999. He did not recover any motorcycle.

13. Learned trial court after analysing the evidence brought on record by the prosecution, was of the opinion that the prosecution had failed to bring on record any cogent and credible evidence against the respondents and the case was of no evidence. In view thereof, the respondents were acquitted for the offence under Section 506 IPC.

14. Sri Umesh Chandra Verma, learned AGA along with Sri Rao Narendra Singh, learned AGA for the appellant-State submits that the respondents were in prison in respect of the murder of Jail Superintendent, R.K. Tewari, who was brutally murdered near the Governor?s House on a busy road in broad day light. He further submits that the respondents are Mafia Dons having several cases of committing heinous offences to their credit. Allegedly, murder of Jail Superintendent, R.K. Tewari was planned by the accused-respondents, who command rein of terror in the minds and hearts of the people including the officials. He also submits that the accused-respondents did not appreciate that any jail staff or any official would stop and search a person coming to meet them. They would like free entry of people coming to meet them in violation of Jail Manual and relevant Rules. The accused-respondents had guts and confidence to

terrorise the jail staff and gave threats of killing the senior officer like the Additional Inspector General of Police (Prison) as search operation was conducted under his supervision in the prison on Government order.

15. Sri Umesh Chandra Verma, learned AGA further submits that threats were given in the prison, which was heard by P.W.-4. However, P.W. 4, out of fear and terror, turned hostile during his examination in the court. He also submits that P.W.-2, son of the complainant, soon after the search operation, on 26.2.1999 noticed suspicious persons loitering around the house of the complainant in the night to execute the threat. Testimony of the son of the complainant was not shaken during his cross-examination. Even P.W.-1 has supported the prosecution case in all respects. He, therefore, submits that considering the fact that the accused-respondents command, fear and threat in the minds and hearts of the general public as well as the officials, the trial court finding that the offence under Section 506 IPC was not proved against the respondents, is wholly erroneous. Soon after the complainant could come to know about the threats given by Mukhtar Ansari for his killing and abduction etc., suspicious persons loitered around his house were noticed by his son. If the testimony of P.W.-1 and P.W.-2 is considered together, offence under Section 506 IPC is clearly made out and, therefore, the impugned judgement and order passed by the trial court acquitting the accused-respondents for the offence under Section 506 IPC, is unsustainable and is liable to be set aside, and the accused-respondents should be convicted for offence under Section 506 IPC.

16. On the other hand, Sri Jyotindra Misra, learned Senior Advocate, assisted by Sri Sushil Kumar Singh, learned counsel for the accused-respondents has submitted that P.W.-1 in his evidence before the court, had said that he lodged the FIR on the basis of suspicion. He did not hear any threat given by the accused-respondents. He also submits that accused-respondents did not misbehave or utter anything when the search operation was conducted. However, he came to know that threats were given by the accused-respondents for his elimination. He. Further submits that P.W.-2 in his evidence before the court, has said that road in front of their house is thoroughfare and people would use that road for commuting. After his father discussed about the perceived threat, he started suspecting people, who would come and go from the road in front of their house, and he himself said that it was a mere suspicion as those persons, who were suspected, did not commit any wrong or harm P.W.-2 or any of the family members. Even the motorcycle, which was said to be present on 1.3.1999 near the house of the complainant, was of P.W.-5. He has, therefore, submitted that on the basis of mere suspicion without there being any cogent and credible evidence, the respondents could not have been convicted and there is no evidence on record, which can be said to be cogent and credible to prove the offence under Section 506 IPC against the respondents. Merely on the basis of suspicion and general and perception image of the respondents, the conviction cannot be recorded for an offence, which on the basis of the facts and circumstances and the evidence, is not made out against the respondents.

17. I have considered the submissions advanced by the learned counsel for the parties and perused the record.

18. P.W.-1, the complainant in his cross-examination, had clearly said that merely on the basis of suspicion, he gave the compliant,

on which the FIR in question came to be registered. From perusal of the evidence of P.W.-1 and P.W.-2, it would be evident that the complainant and his son had only suspicion about the perceived threat given by the accused-respondents and they believed that persons, who were noticed loitering around their house on 26.2.1999, 27.2.1999 and 1.3.1999, had come to execute that threat. It is further admitted that these persons did not commit any offence nor did they say anything to the complainant or his family members.

19. In view of the aforesaid facts and the evidence on record, this court is of the view that the prosecution case was based on suspicion without there being any cogent and credible evidence to connect the accused-respondents for commission of offence under Section 506 IPC. The prosecution is required to prove the charge by leading cogent and credible evidence. A person cannot be convicted merely on the basis of suspicion if the suspicion is not otherwise proved by leading cogent and credible evidence.

20. Considering the aforesaid facts and circumstances and the evidence, I am of the view that the impugned judgement and order passed by the learned trial court does not require any interference by this Court and thus, the appeal gets ***dismissed.***

21. Consigned to record.

(2022) 9 ILRA 1024
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2022

BEFORE

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

Government Appeal No. 1919 of 1985

The State of U.P. ...Appellant
Versus
Vijai Kumar & Ors. ...Respondents

Counsel for the Appellant:
G.A., Sri D.S. Mishra

Counsel for the Respondents:
Sri S.K. Agarwal, Sri Indra Bhan Yadav, Sri Onkar Singh

Criminal Law – Criminal Procedure Code, 1973 - Sections 313 & 378 - Indian Penal Code,1860 - Sections 34, 201 & 302 - Government Appeal – Acquittal – offence of murder - *FIR* - accused husband murder his wife for bring more and more money from her father - acquitted all the four accused - Govt. Appeal - held - in view of settled law lay down by Hon'ble Apex Court - when chain has been found to be incomplete and when evidence is so scanty than accused cannot punished or convicted for offences - interference with acquittal can only be justified when it is based on a perverse view - consequently Government Appeal stands dismissed.(Para –24, 25, 26)

Appeal dismissed. (E-11)

List of Cases cited:

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & Anr., (2006) 6 S.C.C. 39,

2. Chandrappa Vs St. of Karna., (2007) 4 S.C.C. 415,

3. St. of Goa Vs Sanjay Thakran & Anr., (2007) 3 S.C.C. 75,

4. St. of U. P. Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553,

5. Girja Prasad (Dead) by L.R.s Vs St. of M.P., 2007 A.I.R. S.C.W. 5589,

6. Luna Ram Vs Bhupat Singh & ors., (2009) SCC 749,

7. Mookkiah & anr. Vs St., rep. by the Inspector of Police, Tamil Nadu, AIR 2013 SC 321,

8. St. of Raj. Vs Sohan Lal & ors., (2004) 5 SCC 573,

9. St. of Karn. Vs Hemareddy, AIR 1981 SC 1417,

10. Shivasharanappa & ors. Vs St. of Karn., JT 2013 (7) SC 66,

11. St. of Pun. Vs Madan Mohan Lal Verma, (2013) 14 SCC 153,

12. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219,

13. Shailendra Rajdev Pasvan v. St. of Guj., (2020) 14 SC 750,

14. Samsul Haque v. St. of Assam, (2019) 18 SCC 161.

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

1. Heard Sri D.S.Mishra, learned counsel for the appellant. None present for the accused-respondents. This is a Government Appeal of the year 1985 listed time and again. We are ably assisted by Sri D.S. Mishra, learned counsel.

2. This appeal under Section 378 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), is preferred at the behest of the State of Uttar Pradesh, preferred against the judgment and order dated 19.04.1985 passed by learned Additional Sessions Judge, Court No.3, Saharanpur in Sessions Trial No. 69 of 1983 acquitting accused-respondents were tried for commission of offence under Sections 302/34 & 201 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

3. Brief facts as culled out from the record are that accused-respondents were alleged to have committed the murder of Savita Devi wife of Vijai Kumar on 26.11.1978, sometime in the morning in their own house. Smt. Savita Devi was married to Vijai Kumar in March 1976 and her father gave dowry best to his capacity but Vijai Kumar and his family members were not satisfied and exercised undue pressure on Savita Devi even to the extent of assaulting her to bring more and more money from her father. Several letters were also written by Vijai Kumar to Jaipal Singh, father of Savita Devi. On 15.11.1978 Savita Devi came to her father's home and requested him to pay a sum of Rs. 5000/- for buying motorcycle for her husband and informed that in case of failure to comply with the demand her life would be in danger. Jaipal could not understand the gravity of the situation and sent her back to her matrimonial home, however, the incident occurred immediately thereafter. The accused were arrested and were sent for trial to the Sessions Court as the cases were exclusively triable by the Court of Sessions.

4. As per the office report and C.J.M's report, Vijay Kumar and Smt. Heera Devi have passed away on 07.03.2012 and 30.10.2008 respectively. Dayaram and Sitaram are alive as per the office report.

5. It is submitted by learned counsel for the State that this appeal by the State is challenging mainly acquittal of Vijai Kumar and accused Heera Devi which have been proved by the letters produced at Exhibit 1 to 5 before the trial court. The circumstantial evidence is clear and that the chain is complete. The guilt of the accused persons is proved, just because there is delay in lodging the F.I.R, the benefit of doubt was granted. It is further submitted that it cannot be said that the prosecution case should be discarded on this ground. It

is further submitted that since 17.11.1978, when the deceased met her father there was demand of dowry and therefore there was a motive of committing the murder of Savita Devi. It is further submitted that father of deceased never received any message regarding she being ill.

6. The F.I.R culminated into charge-sheet and accused were committed to Sessions.

7. On being summoned, the accused-person pleaded not guilty and wanted to be tried. The offence for which accused was charged was triable by the Court of Sessions, hence, the accused-respondents were committed to the Court of Sessions. The learned Sessions Judge framed charge for commission of offence of murder punishable under Section 302 of the Indian Penal Code (IPC).

8. The Trial started and the prosecution examined 9 witnesses enumerated as below:

1	Kalu Ram	PW1
2	Nem Chand	PW 2
3	Baljeet	PW3
4	Ashok Kumar	PW4
5	Smt. Simla	PW5
6	Smt. Jogendra	PW6
7	Jaipal Singh	PW7
8	Dr. S.C. Singhal	PW8
9	Braham Singh	PW9
10	Inspector Satpal Singh Tyagi	PW 10

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

1	Five Letters	Ex.Ka.1 to Ex.Ka.5
2	Typed report	Ex.Ka.6
3	Private complaint	Ex.Ka.7
4	Postmortem report	Ex.Ka.8
5	Inquest report	Ex.Ka.9
6	Photo Nash	Ex.Ka.10
7	Challan Nash	Ex.Ka.11
8	Letter to C.M.O	Ex.Ka.12
9	Site Plan	Ex.Ka.13
10	Written application to police record keeper	Ex.Ka.14
11	Report of police record keeper	Ex.Ka.15

10. At the end of the trial and after recording the statement of the accused persons under section 313 Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellant as mentioned above.

11. In order the challenge the judgment of acquittal, learned A.G.A for the state has submitted that the learned Sessions Judge has illegally disbelieved statements of the prosecution witnesses and without assigning any cogent reasons has

disbelieved prosecution story. It is further submitted that the evidence on record and surrounding circumstances have not been properly appreciated by the Trial Court. It is further submitted that the learned Additional Sessions Judge after going through the evidence given by the P.W.-1 to P.W.-6 mentioned above acquitted all the 4 accused on the following grounds:

(i) Because the chain of evidence was not complete;

(ii) Because there was no motive for the accused persons to commit the murder of Savita Devi;

(iii) Because the prosecution evidence has failed due to infirmities;

(iv) Because there is delay in lodging first information report.

12. Before we embark on testimony and appreciate the reasonings in the judgment of the Court below, the contours for interfering in Criminal Appeals where accused have been held to be not guilty would require to be discussed.

13. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions.

In the case of **"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39,** the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

14. Further, in the case of **"CHANDRAPPA Vs. STATE OF KARNATAKA", reported in (2007) 4 S.C.C. 415**, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

15. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

16. In the case titled **"STATE OF GOA Vs. SANJAY THAKRAN & ANR.",** reported in **(2007) 3 S.C.C. 75**, the Apex Court has reiterated the powers of the High Court in appeals against acquital. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

17. Similar principle has been laid down by the Apex Court in cases titled **"STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553** and in **"GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP"**, **2007 A.I.R. S.C.W. 5589.** Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

18. In the case of **"LUNA RAM VS. BHUPAT SINGH AND ORS.",** reported in **(2009) SCC 749**, the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that

it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

19. In a recent decision of the Apex Court in the case titled **"MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU",** reported in **AIR 2013 SC 321,** the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

20. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of **"STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981, SC 1417,** wherein it is held as under:

"...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

21. The Apex Court in **"SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA",** JT 2013 (7) SC 66 has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

22. Further, in the case of **"STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA", (2013) 14 SCC 153,** the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

23. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219,*** has laid down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10.It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The

golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

24. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750,*** has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

25. We have perused the depositions of prosecution witnesses, documentary evidence supporting ocular versions, arguments advanced by learned counsel for the parties. We have been taken through the record. We are unable to accept the submissions of the State counsel for the following reasons and the judgments of the Apex Court which lay down the criteria for consideration of appeals against acquittal. The chain has been found to be incomplete. While going through the judgment it is very clear that the court below has given a categorical finding that the evidence is so scanty that the accused cannot punished and or convicted for the offences for which they are charged. The factual scenario in the present case will not permit us to take a different view than that taken by the court below. In that view of the matter we are unable to satisfy ourselves. Thus we concur the findings of the court below.

26. After considering the facts and circumstances of the present case and appraisal of the evidence available on record and on the contours laid down by the judgment of the Apex Court, we have no other option but to concur with the reasoning of acquittal recorded by the learned Sessions Judge for the aforesaid reasons.

27. The appeal sans merits and is dismissed. The record and proceedings be sent back to the Court below. The bail and bail bonds are cancelled.

28. We are thankful to Sri D.S. Mishra, learned counsel for the appellant for ably assisting the Court.

(2022) 9 ILRA 1031
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 2683 of 1983

State of U.P. ...Appellant
Versus
Ram Autar ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:

Sri S.B. Sahai, Sri Mohd. Ishraque Farooqui, Sri Pradeep Kumar

(A) Criminal Law – **Criminal Procedure Code, 1973 - Sections 82, 83, 161, 313, 378 & 384 - Indian Penal Code, 1860 - Section – 302** - Government Appeal – against order of Acquittal – offence of Murder - FIR - accused shoot brother of the complainant with a country made pistol whom has slapped his sister as well as abuse his mother when they were plucking Gram leaves in their filed -Trial court acquitted accused person - by adopting hyper technical approach giving importance of some minor lapses committed by the investigating officer rejected the evidences as a whole - appeal - prompt FIR - post-mortem report - recovery of empty cartridge - report of blood stain - site plan - testimony of eyewitness - all these proofs that incident taken place - while being conscious that no innocent person is punished we are also duty bound to see that a guilty person does not go unpunished - Court find that - impugned judgment passed purely on the basis of presumptions and by not reading the evidence as a whole and only picking up sentences in isolation from here and there from the St.ment of eyewitnesses - whereas direct evidence on record beyond any shadow of doubt is proves the manner, time and place in which incident had taken place and committed by accused person - hence, impugned judgment is set aside, accused is liable to be convicted under section 302 IPC - appeal stand allowed. (Para – 24, 25, 26, 41, 45)

(B) Criminal Law – **Criminal Procedure Code, 1973 - Sections - 82, 83, 161, 313, 378 & 384 - Indian Penal Code, 1860 - Section – 302 -** Government Appeal – against order of Acquittal – offence of Murder - applying principle of law as laid down in case of 'Karan Sigh' & 'Banwari Lal' - lapse of sufficient time coupled with other factors like age of accused cannot be a ground to bestow any benefit so as to wipe away the aftermath of commission of crime - accused is sentenced to undergo simple imprisonment for life with a fine - accused is directed to surrender before Learned CJM within 15 days failing which Ld. CJM shall take him in custody as per law. (Para – 44, 46, 47)

Appeal dismissed. (E-11)

List of Cases cited:

1. Virendra Singh Vs St. of U.P. & ors., 2022 (3) ADJ 354 DB,

2. St. of U.P. Vs Phool Singh & ors., 2022 (4) ADJ 397 (DB),

3. St. of U.P. Vs Krishna Master, (2010) 12 SCC 324,

4. St. of U.P. Vs Laxmi & ors., Government Appeal No.2995 of 1985, decided on 13.07.2022,

5. Mohabbat Vs St. of M.P., (2009) 13 SCC 630,

6. Nirmal Singh& anr. Vs St. of Bihar, AIR 2005 SC 1265,

7. Narendra Nath Khaware Vs Parasnath Khaware & ors., (2003) 5 SCC 488,

8. Ram Swaroop & ors. Vs St. of U.P., (2000) 2 SCC 461,

9. St. of Raj. Vs Satyanarayan, (1998) 8 SCC 404,

10. Karan Singh Vs The St. of U. P.& ors., Criminal Appeal No.327 of 2022, decided on 02.03.2022,

11. St. of Raj. Vs Banwari Lal& anr., Criminal Appeal No.-- of 2022 (Arising out of Special Leave Petition (Criminal) No.-- of 2022), arising out of Diary No.21596 of 2020, decided on 08.04.2022.

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Vikas Budhwar, J.)

1. Heard Sri Ratan Singh, learned AGA appearing for the appellant-State of UP, Sri Pradeep Kumar, learned counsel appearing for the accused-respondent and perused the record.

2. Present government appeal has been preferred against the judgment and order dated 26.07.1983 passed by the Learned Special Judge, Fatehpur in Session Trial No. 104 of 1983 (State vs. Ram Autar Kori), arising out of Case Crimes No. 172/1982, under Section 302 IPC, Police Station Khakhreru, District Fatehpur.

3. Prosecution story, in brief, is that on 07.12.1982 the complainant- Shiv Saran Singh along with his brother Babu Singh went to their Gram field situated the western side of the village and at about 1:00 pm (noon), they saw the mother and sister of the accused Ram Autar were plucking Gram leaves in their field. Babu Singh asked them not to pluck the same as the plants were too small but they did not listen and continued to plucking out the gram leaves. On this, Babu Singh inflicted two slaps to the sister of accused-Ram Autar and banished her from his field. On this the mother and sister of the accused returned to their house abusing him. After taking round of the field while Shiv Saran Singh and Babu Singh were coming back to their house for taking bath and meals, when they reached near the house of Ram Autar, accused Ram Autar surrounded them and asked Babu Singh as to why he slapped his sister and took out country made pistol from his waist and fired on the chest of Babu Singh. The alleged incident was witnessed by neighbours Dasrath, Shiv Mohan, Govardhan and others. Ram Raj and Ram Ballaiya also saw the occurrence. When they tried to catch hold the accused, he reloaded the country made pistol, threatened the witnesses and ran away towards west. On receiving gun shot injury, complainant brother Babu Singh fell on the ground and thereafter the injured was placed on the Chabutara of Goverdhan where he died. The accused shot complainant's brother at 2.00 pm. Thereafter, a first information report of the incident was lodged at police station - Khakreu on the same day at 3.00 pm. in the presence of Investigating Officer, who recorded the statement of the complainant under Section 161 Cr.P.C. The investigating Officer proceeded to place of occurrence and inspected the dead body and sealed the same. Site plan was prepared and after completing investigation a charge-sheet under section 302 IPC was submitted against the accused Ram Autar.

4. In support of prosecution case, PW-1-Shiv Saran Singh, PW-2-Dashrath, PW-3-Station House Officer-Madan Singh and PW-4 Dr. Satish Chandra Srivastava were produced and examined before the Court below.

5. Apart from other formal documents, site plan is Ext. Ka-9, recovery memo of bloodstained and plain earth is Ext. Ka-10, recovery memo recovering one empty cartridge recovered from the place of occurrence is Ex. Ka-11, charge-sheet is Ext. Ka-13 and Post mortem report is Ex. Ka-14.

6. PW-1-Shiv Sharan Singh, who was the eye witness of the incident, in his statement had stated that he works in Maya Press, Allahabad and used to do the same job during the days of the incident and he had come home on leave. He further stated that deceased Babu Singh was his younger brother and at the time of incident he was working as Constable in the Police Department and was posted in Allahabad and was also on leave during those days. He further deposed that his house and the accused's house is on the same road and when we come from our field, the accused house comes first and thereafter we would

reach to his own house. He further stated that the residence of Ram Autar was in front of the house of Dashrath Dhobi and thereafter there is residence of Goverdhan. While narrating the incident he stated that on 07.12.1982 at about 11.30 am when he and his younger brother Babu Singh had gone to their field they found that the mother and sister of the accused Ram Autar were plucking gram leaves, which was objected to by his brother and when they did not stop, his brother Babu Singh twice slapped the sister of Ram Autar and banished her from his field. On this the mother and sister of the accused returned to their house abusing him. After some time when they were returning home at about 1.45-2.00 pm and when they reached near the house of Ram Autar, Ram Autar came out and stood in front of his brother and said that since you have slapped my sister, I will teach you a lesson and took out a country made pistol from his waist and fired on the chest of Babu Singh. Babu Singh fell on the ground. He further stated that when he tried to move forward and started shouting then villagers Goverdhan, Dasrath, Shiv Mohan, Layak Singh and Ram Raj came to the spot, who have seen the incident and when they tried to catch hold the accused, he reloaded the country made pistol, threatened the witnesses and ran away towards west. He further deposed that after the incident the injured lay down on the Chabutara of Goverdhan, where he died.

7. PW.2-Dashrath in his statement had stated that it is six months from today that Babu Singh was killed. On that date he was sitting at his door. It was the day time around 1.30 am. He saw Babu Singh alongwith his brother Shiv Sharan coming from West. When Babu Singh reached near the house of Ram Autar, the accused Ram Autar came out of his house and told Babu Singh that why did you slap my sister and took out a country made pistol from his waist and fired at Babu Singh. Thereafter Babu Singh fell on the ground. Seeing this incident Goverdhan and he, sitting on the Chabutara in front of his house, ran towards the spot. The other villagers Ram Raj, Layak Singh also came to spot and they have also witnessed the incident. We all tried to catch hold the accused but he reloaded the country made pistol, threatened us and ran away towards west first and thereafter ran towards south. When the Investigating Officer came to the spot then he recovered the empty cartridge lying on the ground. He also told the Investigating Officer about the incident. After the incident Shiv Sharan Singh, brother of deceased- Babu Singh lifted the deceased from the way and laid down him in the Chabutara of Goverdhan, where he died. Then Shiv Sharan Singh went to lodge the report. He further deposed that on the date of occurrence, he was at home as he could not go to work on account of illness. He stated that he heard that Ram Autar was saying why do you slap my sister and that I do not know other things. The mother and sister of accused were present at home but they did not come outside the door. He further deposed that the deceased Babu Singh was empty hand and he wore an underwear only. Ram Autar was sitting on his Chabutara but when his mother and sister came then he went inside the house and after 10 to 15 minutes he again came outside and sat on Chabutara. He further deposed that the accused was sitting on his Chabutara earlier and when he saw Babu Singh coming he rushed towards him. Accused asked Babu Singh repeatedly why did you slap my sister but Babu Singh did not reply. After murder he did not ask anyone why did this murder

took place. When Ram Autar stopped Babu Singh then he was towards east of Ram Autar. He further deposed that Babu Singh was aged about 25 years and not married but his conduct was not bad and it would be wrong to say that his murder took place on account of illicit relationship.

8. PW-3-Station House Officer-Madan Singh has stated on oath that he was posted as Station House Officer in Police Station Khakrau from 07.12.1982 to 17.12.1982 and this incident was reported in front of him. Head Constable Bindravan Sharma has also worked with him. he recognize his writing and signature. He further stated that on the basis of the written complaint, he prepared Chick FIR and G.D, on which Ex.A-2 was inserted. He further stated on oath that he started the investigation of this case and recorded the statement of appellant at the police station and then went to the place of occurrence where he found the dead body of Babu Singh lying on Chabutara of Goverdhan Kori. Panchayatnama was prepared. He further stated on oath that he inspected the place of occurrence and site plan was also prepared. He also recovered plain earth and bloodstained earth from the spot and prepared the fard report by filling it in different boxes, on which Ex.A-10 was inserted. He further stated that he recovered an empty cartridge from the spot and sealed the same, on which Ex.A-11 was inserted. Thereafter PW-3 searched the accused house. Accused was not found there. Illegal cartridges were recovered from the accused house and he had prepared the fard report and sealed the same. Thereafter PW-3 took the statements of Goverdhan and Dashrath Kori and a police team was sent to search for the accused. On 08.12.1982 he took the statements of other witnesses. The accused kept on running and could not be arrested. On the same day PW-3 gave the report of Section 82-83 Cr.P.C. and after receiving the warrant from the court he attached the goods of accused and on 14.12.1982 he has prepared a fard report. PW-3 further stated on oath that latter the accused appeared before the Court and Investigating Officer gave the chargesheet before the Court, which is Ex.A-13. He further stated that during the investigation he could not find the sister and mother of the accused nor did he try to find them. He found the dead body at the same place where the deceased was shot and he took the blood from the Chabutara of Goverdhan where the dead body was lying. In the site map he has shown the place of occurrence as "A". No blood was found on that place. It is wrong to say that investigation was not done properly.

9. PW-4 Dr. Satish Chandra Srivastava has stated on oath that on 08.12.1982 he was posted as Medical Officer in Sadar Hospital, Fatehpur and on this day he did the post mortem of the deceased Babu Singh. He stated that the deceased died a day before; he was about 26 years old; rigor mortis was present; the legs were swollen and the eyes were half open. PW.4 found two scratches measuring ¾ x ¾ cm on the left side in front of the chest and both were present at the distance of ¼ cm. He also found gun shot wound ¾ x ¾ x to the depth of the chest on the left side and blackening was present; the direction of pallet was from left to right. PW.4 has further stated that he conducted the internal examination of the dead body and found first and second ribs on the left side were fractured and torn; Pluria was also torn; right and left lungs and heart were also punctured and torn; collected blood was found on the chest; half digested food was found in the stomach; small

intestine was empty and large intestine was full; no injury was found on the stomach; a big pallet was found inside the chest, which was sealed in an envelop and sent to S.P. Fatehpur. He further stated on oath that the deceased died of shock and bleeding due to above mentioned injuries. He further stated that the death of the deceased was possible on 07.12.1982 at 2.00 pm due to fire arm injury; scratches can also come from falling on the ground. He next stated that looking at the direction of the bullet injury, it appears that the deceased was fired from the left side; there should be a difference of 4-6 hours in the time of death.

10. The judgment of acquittal was passed on the ground that it is alleged that PW-1-Shiv Sharan Singh, real brother of the deceased Babu Singh was accompanying the deceased while coming back from his field and when the deceased fired upon by accused Ram Autar several persons have also gathered on the spot but no one including the PW-1-Shiv Sharan Singh tried to stop the accused from running away, therefore, he had acted contrary to the natural reaction which makes his presence doubtful as had he being there he would have chased the accused and would have gone to the house of the accused and would have caught hold of him. Presumption was raised that since the informant side and his brother are the owner of the agricultural field whereas the accused belonging to labour class therefore, it is not understandable that the deceased Babu Singh slapped only the sister of the accused, who was aged about 9-10 years and why he has not slapped the mother of the accused, therefore, on these very ground the Trial Court has drawn the presumption that it appear that the informant was not present on the spot. It was further recorded that the gram plants were too small to be plucked and therefore, the allegation of plucking gram plants does not appear to be correct. By drawing inference from the statement of PW-2-Dashrath, who is also an eye witness that when the accused Ram Autar was scolding and was repeatedly asking the deceased why he slapped his sister but he did not reply and that he did not try to snatch countrymade pistol from the accused hands and at that point of time some other witnesses, namely, Ram Raj, Layak Singh and Goverdhan including some other persons have gathered on the spot, therefore, as he has not mentioned the name of informant-PW-1- Shiv Sharan Singh alongwith names of other persons, who have seen the incident establishes that PW-2-Dashrath has admitted that the informant was not present on the spot. Further inference from the statement of PW-2 Dashrath was drawn that as the deceased was wearing only underwear and was not wearing any other cloth on his body, therefore, there is a presumption of his bad character as alleged, which could be the motive of being fired upon, otherwise he would have wearing shirt, banyan or paijama etc. while he was going to or coming from his field, moreso, when he was in police and was a reputed person of the village. As such a conclusion was drawn by the trial court that the incident has not taken place in the manner as alleged. The place of incident was also found to be doubtful on the ground that the Investigating Officer did not collect any blood from the spot and that blood was found only on the Chabutara of Goverdhan where the dead body was lying and it is from there only the blood stained and plain soil was collected. The Trial Court further observed that the Investigating Officer has not visited the gram field and has not shown the same in the site plan and nothing

has been written about the aforesaid field in the case diary. The Trial Court further recorded that the Investigating Officer did not meet the mother and sister of the accused or any other family members of the accused during investigation and made no enquiry from them and that he did not find any blood on the spot and has also not recovered any empty cartridge on the spot. It was further found that although allegation is that the deceased was fired from the front side, however, he had suffered firearm injuries on the left side and the post mortem report reflected that semi digested food was present in the stomach which proves that he must have eaten something about two hours before he was fired upon. Therefore, the Trial Court found that the informant and deceased has gone out to visit their agricultural field is not convincing, as they usually visit their field only in the morning hours and usually villagers take their lunch by 10-11 am and relax thereafter, therefore, prosecution story of informant and deceased visiting agricultural field at about 12.00-1.00 in the noon, is not correct. The Trial Court has further observed that there were no special circumstances for which accused could have murdered the deceased and the reason of plucking gram plants is false. The deceased could have treated the sister of the accused softly and send her back to her home. It was further observed that it appears that when the informant and his family members started suspecting about the murder of the deceased, therefore, for this reason the entire family of the accused including the accused-Ram Autar escaped from their house and for this reason the Investigating Officer did not find them at their home which indicates that the accused was not present on the spot or he had left the place and nobody has seen the incident. On these grounds the trial court has passed the judgment of acquittal.

11. Challenging the impugned judgment, Sri Ratan Singh, learned AGA submits that there was cogent evidence to convict the accused herein. He next submits that PW-1-Shiv Sharan Singh who is the informant and real brother of the deceased and is eye witness of the incident, narrated the entire incident with all clarity and details. He further submitted that PW-2-Dashrath is the independent witness near whose house murder had taken place and he has clearly spelled tout the reasons as to how he was present on the spot. It is next submitted that both the eye witnesses have withstood their cross examination and nothing adverse came out from their testimonies creating any doubt about the manner, time, place and spot of the murder and that the accused Ram Autar had committed cold blooded murder. By drawing attention to the site plan, learned A.G.A. has submitted that there is no dispute about the spot where the murder had taken place and in the site plan all directions have been shown including the directions from where the informant deceased were coming, from where the eye witnesses have seen the incident, the spot where the dead body was lying. He has further pointed out that in the site plan spot "H' has been shown where the empty cartridge was recovered. He further submitted that merely because blood was not found on the spot where the deceased was fired upon would not be sufficient to grant any benefit of doubt to the accused herein. He further submitted that even the Trial Court has recorded a finding that oral as well as documentary evidence available on records clearly establishes that the incident had taken place at the spot, time and date as alleged. He further argued that PW-1-Shiv Sharan Singh is the real brother of the deceased and his presence on the spot is quite natural as they both were

returning from the field. He further submitted that PW-2-Dashrath is the independent eye witness and in his statement he has clearly stated that PW-1-Shiv Sharan Singh and his brother-deceased-Babu Singh were coming together from their field. He submitted that the post mortem report clearly support the prosecution version. He next submitted that the empty cartridge was recovered from the spot and recovery memo of empty cartridge is Ex.Ka.11, therefore, finding of the Trial Court that no cartridge was found from the record is contrary to record. He further submitted that the bloodstained soil and plain soil was collected from the spot which was made Ex.Ka.10. He further submitted that PW-4- Dr. Satish Chandra Srivastava, who has conducted the post mortem has proved the post mortem report, had clearly stated and proved that a big size pallet was found inside the body of the deceased. He submitted that there was only one entry wound and further the deceased was immediately put on the Chabutara of Goverdhan from where the blood stained soil was collected, therefore, his blood was not found in the passage (Rasta). It is further submitted that no benefit of defective investigation can be extended to the accused in a case of direct evidence, therefore, in such a case of direct evidence absence of blood on the passage would not go in favour of the accused person. Learned AGA further submitted that the findings given by the Trial Court to the effect that why the informant and PW.2 did not chase the accused is absolutely perverse inasmuch as eye witnesses have categorically stated that the accused Ram Autar has re-loaded the country made pistol and threatened the persons present on the spot that he would kill them also. Learned AGA further submitted that allegation of bad character of the deceased is neither here nor there as nothing was placed on record to prove the same and this presumption is wholly perverse. He further submitted that the presumption that on such a small thing the murder could not have taken place is neither here nor there as in the case of direct evidence motive is irrelevant. He further pointed out that the accused in his statement under Section 313 Cr.P.C. has mentioned at one place that he was falsely implicated in the present case due to "enmity' and at an other place he has stated that he was falsely implicated due to "old enmity', however, he has not disclosed on what was the "enmity' or "old enmity'. Further submission of the learned AGA is that there was a prompt FIR as the incident had taken place at 2.00 pm and the FIR was lodged at 3.00 pm. Submission, therefore, is that the prosecution has proved his case beyond any shadow of doubt and the impugned judgment based purely on presumption is highly perverse and therefore, the same is liable to be reversed and accused is liable to be convicted for the offence under Section 302 IPC.

12. Per contra, Sri Pradeep Kumar, learned counsel for the accused respondents submitted that no blood was found at the spot "A' where the deceased was allegedly fired upon by the accused. He further submitted that PW-1 himself has stated that the deceased was fired upon in the passage but no blood was found therefrom and the Investigating Officer has collected the bloodstained and plain soil from the Chabutara of Goverdhan from spot "X' , therefore, the Trial Court has rightly disbelieved the manner and the spot where the crime was committed and rightly found that the same was not committed by the accused respondent-Ram Autar. He submits that therefrom, it is clear that the memo of recovery is false and place of occurrence is

highly doubtful. It is further submitted that PW-3, Station House Officer had stated in his statement that he had recovered one empty cartridge from the spot and he has also stated that thereafter he had recovered illegal cartridges and empty cartridges from the house of the accused, this clearly shows that the recovery memo of empty cartridges from the spot is not worth believed. He further submitted that as per alleged eye witness account the shot was fired from the front side but as per the post mortem report the fire has hit the deceased on the left side, therefore, post mortem report does not support the prosecution version and therefore, eye witness account is false. He further submitted that in the statement under Section 313 Cr.P.C. the accused has clearly stated that he was falsely implicated due to enmity. He submitted that as the deceased was wearing underwear only, therefore, presumption of his bad character has been correctly raised by the Trial Court to hold that murder may have been committed by someone and not the accused.

13. We have considered the submissions and have perused the record.

14. Before proceeding further, it would be appropriate to take note of law on the appeal against acquittal.

15. In a recent judgement of this Court in **Virendra Singh vs. State of UP and others,** 2022 (3) ADJ 354 DB, the law on the issue involved has been considered. For ready reference, paragraphs 10, 11 and 12 are quoted as under:

"10. In the case of Babu vs. State of Kerala (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179, the Hon'ble Apex Court has observed that while dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Paragraphs 12 to 19 of the aforesaid judgment are quoted as under:-

"12. This court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the Trial Court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be more, the probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P. AIR 1974 SC 2165; Shambhoo Missir & Anr. v. State of Bihar AIR 1991 SC 315; Shailendra Pratap & Anr. v. State of U.P. AIR 2003 SC 1104; Narendra Singh v. State of M.P. (2004) 10 SCC 699; Budh Singh & Ors. v. State of U.P. AIR 2006 SC 2500; State of U.P. v. Ramveer Singh AIR 2007 SC 3075; S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors. AIR 2008 SC

2066; Arulvelu & Anr. Vs. State (2009) 10 SCC 206; Perla Somasekhara Reddy & Ors. v. State of A.P. (2009) 16 SCC 98; and Ram Singh alias Chhaju v. State of Himachal Pradesh (2010) 2 SCC 445).

13. In Sheo Swarup and Ors. King Emperor AIR 1934 PC 227, the Privy Council observed as under:

"...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses...."

14. The aforesaid principle of law has consistently been followed by this Court. (See: Tulsiram Kanu v. The State AIR 1954 SC 1; Balbir Singh v. State of Punjab AIR 1957 SC 216; M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200; Khedu Mohton & Ors. v. State of Bihar AIR 1970 SC 66; Sambasivan and Ors. State of Kerala (1998) 5 SCC 412; Bhagwan Singh and Ors. v. State of M.P. (2002) 4 SCC 85; and State of Goa v. Sanjay Thakran and Anr. (2007) 3 SCC 755).

15. In Chandrappa and Ors. v. State of Karnataka (2007) 4 SCC 415, this Court reiterated the legal position as under:

"(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

16. In Ghurey Lal v. State of Uttar Pradesh (2008) 10 SCC 450, this Court re-iterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct

advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh @ Ram Naresh (2009) 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that an "order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused."

18. In State of Uttar Pradesh v. Banne alias Baijnath & Ors. (2009) 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances includes:

i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

ii) The High Court's conclusions are contrary to evidence and documents on record;

iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

v) This Court must always give proper weight and consideration to the findings of the High Court;

vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.

A similar view has been reiterated by this Court in Dhanapal v. State by Public Prosecutor, Madras (2009) 10 SCC 401.

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

11. Hon'ble Apex Court in the case of Ramesh Babulal Doshi vs. State of Gujarat (1996) 9 SCC 225 : 1996 SCC (Cri) 972 has observed that while deciding appeal against acquittal, the High Court has to first record its conclusion on the question whether the approach of the trial court dealing with the evidence was patently illegal or conclusion arrived by it is wholly untenable which alone will justify interference in an order of acquittal.

12. The aforesaid judgments were taken note of with approval by Supreme Court in the case of Anwar Ali and another vs. State of Himachal Pradesh (2020) 10 SCC 166, Nagabhushan vs. State of Karnataka (2021) 5 SCC 222, and Babu (supra) in Achhar Singh vs. State of Himachal Pradesh (2021) 5 SCC 543."

(Emphasis supplied)

16. In ***State of U.P. Vs. Phool Singh and Others, 2022 (4) ADJ 397 (DB)*** also this Court has considered the law on appeal against acquittal, para 43, 44, 45, 46, 47 and 48 whereof are quoted as under:

*"43. In **State of U.P. v. M.K. Anthony, (1985) 1 SCC 505,** the Hon'ble Supreme Court has held that: -*

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a

whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer....."

44. In ***State of U.P. v. Krishna Master, (2010) 12 SCC 324*** *the Hon'ble Supreme Court explained the manner in which the Court should examine the statement of witnesses in the following words:-*

"15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

16. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless the reasons are weighty and formidable, it would not be proper for the appellate court to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/Trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a

shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it.

17. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eyewitnesses examined in this case proves the prosecution case."

45. In ***Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1*** *the Hon'ble Supreme Court formulated the principles to be kept in mind by the appellate Court while dealing with appeals against acquittal:-*

"27.The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly against an order of acquittal:

(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded.

(ii) The appellate court in an appeal against acquittal can review the entire evidence and come to its own conclusions.

(iii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iv) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.

(v) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(vi) While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed."

46. In ***Achhar Singh v. State of H.P., (2021) 5 SCC 543****, the Hon'ble*

Supreme Court explained the scope of powers of the High Court in appeals against acquittal in the following manner: -

"16. It is thus a well-crystalized principle that if two views are possible, the High Court ought not to interfere with the trial court's judgment. However, such a precautionary principle cannot be overstretched to portray that the "contours of appeal" against acquittal under Section 378 Cr.P.C. are limited to seeing whether or not the trial court's view was impossible. It is equally well settled that there is no bar on the High Court's power to re-appreciate evidence in an appeal against acquittal. This Court has held in a catena of decisions (including Chandrappa v. State of Karnataka, State of A.P. v. M. Madhusudhan Rao and Raveen Kumar v. State of H.P.) that the Cr.P.C. does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal and that the appellate court is free to consider on both fact and law, despite the self-restraint that has been ingrained into practice while dealing with orders of acquittal where there is a double presumption of innocence of the accused."

The Hon'ble Supreme Court further held that "homicidal deaths cannot be left to judicium dei. The court in its quest to reach the truth ought to make earnest efforts to extract gold out of the heap of black sand. The solemn duty is to dig out the authenticity. It is only when the court, despite its best efforts, fails to reach a firm conclusion that the benefit of doubt is extended."

47. The principles which emerge from the aforesaid decisions, are that the "contours of appeal" against acquittal under Section 378 CrPC are not limited to seeing whether or not the trial court's view was impossible. There is no bar on the High Court's power to reappreciate evidence in an appeal against acquittal. Cr.P.C. does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal. The appellate court is free to consider on both fact and law, despite the self-restraint that has been ingrained into practice while dealing with orders of acquittal where there is a double presumption of innocence of the accused.

48. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be, but that is a shortcoming from which no criminal case is free. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities occurring in the evidence. In the latter, however, no such benefit may be available to it. In the light of these principles, this Court will have to determine whether the evidence of the eyewitnesses examined in this case proves the prosecution case. When the trial court has ignored the evidence or misread the material evidence or has ignored material

documents like the dying declaration, the appellate court is competent to reverse the decision of the trial court depending on the materials placed."

(emphasis supplied)

17. In a latest judgment in ***Government Appeal No.2995 of 1985 (State of U.P. vs. Laxmi and Others), decided on 13.07.2022,*** this Court once again had the opportunity to consider the law on appeal against acquittal, para 18 and 19 whereof are quoted as under:

"18. While dealing with an appeal against acquittal by invoking Section 378 Cr.P.C. the appellate court has to consider whether the trial court's view be deemed as possible one, particularly when evidence on record has been analyzed. The Hon'ble Supreme Court in Jafruddin and others vs. State of Kerala 2022 SCC Online SC 495 in para 25 has held that "while dealing with an appeal against acquittal by invoking Section 378 of the Cr.P.C, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters."

19. Hon'ble Supreme Court in Mohan @ Srinivas @ Seena @ Tailor Seena vs. State of Karnataka, [2021 SCC OnLine SC 1233] has observed as herein-under:-

"20. Section 378 Cr.P.C. enables the State to prefer an appeal against an order of acquittal. Section 384 Cr.P.C. speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be

appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under Section 378 Cr.P.C. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali vs. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under : (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179]) "20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501], Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372]

It has been further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with."

18. In ***Phool Singh (Supra)*** law relating to the effect of defect in investigation has been discussed, para 56 and 57 whereof are quoted as under:

56. The law relating to the effect of a defect in investigation has been discussed and summarized by the Hon'ble Supreme Court in Gajoo v. State of Uttarakhand, (2012) 9 SCC 532, in the following words: -

"20. In regard to defective investigation, this Court in Dayal Singh v. State of Uttaranchal, (2012) 8 SCC 263 while dealing with the cases of omissions and commissions by the investigating officer, and duty of the court in such cases, held as under: (SCC pp. 280-83, paras 27-36) "27. Now, we may advert to the duty of the court in such cases. In Sathi Prasad v. State of U.P. (1972) 3 SCC 613 this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in Dhanaj Singh v. State of Punjab, (2004) 3 SCC 654, held: (SCC p. 657, para 5) "5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.'

28. Dealing with the cases of omission and commission, the Court in Paras Yadav v. State of Bihar (1999) 2 SCC 126, enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

29. In Zahira Habibullah Sheikh (5) v. State of Gujarat (2006) 3 SCC 374, the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of Bentham, who states that witnesses are the eyes and ears of justice. The court issued a caution that in such situations, there is a greater responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that: (SCC p. 398, para 42) "42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure a fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interest of the individual accused. In this courts have a vital role to play.' (emphasis in original)

30. With the passage of time, the law also developed and the dictum of the court emphasised that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.

31. Reiterating the above principle, this Court in NHRC v. State of

Gujarat (2009) 6 SCC 767, held as under: (SCC pp. 777-78, para 6) "6. ... "35. ... The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice--often referred to as the duty to vindicate and uphold the "majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators." (Zahira Habibullah case, SCC p. 395, para 35)'

32. In State of Karnataka v. K. Yarappa Reddy (1999) 8 SCC 715, this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the investigating officer could be put against the prosecution case. This Court, in para 19, held as follows: (SCC p. 720) "19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the court be influenced by the machinations demonstrated by the investigating officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigating officers. The criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case.'

33. In Ram Bali v. State of U.P. (2004) 10 SCC 598, the judgment in Karnel Singh v. State of M.P. (1995) 5 SCC 518 was reiterated and this Court had observed that: (Ram Bali case, SCC p. 604, para 12) "12. ... In case of defective investigation the court has to be circumspect [while] evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the

investigation officer if the investigation is designedly defective.'

34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a "fair trial', the court should leave no stone unturned to do justice and protect the interest of the society as well.

(Emphasis supplied)

57. In ***State of Karnataka v. Suvarnamma, (2015) 1 SCC 323,*** *the Hon'ble Supreme Court held that "It is also well settled that though the investigating agency is expected to be fair and efficient, any lapse on its part cannot per se be a ground to throw out the prosecution case when there is overwhelming evidence to prove the offence."*

(emphasis supplied)

19. In Mohabbat vs. State of M.P., (2009) 13 SCC 630, Hon'ble Supreme Court has held that it is well settled that relationship is not a ground affecting the credibility of a witness, relevant extract of paragraph 11, 12 and 13.5 are quoted as under:

"11. Learned counsel for the respondent State on the other hand supported the judgment of the High Court.

"12. Merely because the eyewitnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering the prosecution version.

13. "5. ... Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

(emphasis supplied)

20. In ***Nirmal Singh and Another vs. State of Bihar, AIR 2005 SC 1265,*** the Hon'ble Supreme Court has held that if eye witness account is convincing on firing by accused or deceased, some infirmity in investigation like nonsending of blood stained cloth wrapped around the wound for chemical examination were not fatal to prosecution, para 16, 17 and 18 whereof are quoted as under:

"16. Counsel then submitted that the prosecution has failed to prove that the dalan of the deceased was the real place of occurrence. This submission is based on the fact that no blood stained earth was seized from the place of occurrence. It is true that no blood stained earth was seized

from the place of occurrence but there is also evidence of several witnesses including the investigating officer that no blood had fallen on the earth. Eye witnesses explained that on receiving the injury the deceased pressed his wound with his hands whereafter a piece of cloth was tied around the wound which soaked the blood which may have come out. There was, therefore, no likelihood of the earth getting blood stained. Counsel for the appellants submitted that the intestines were protruding as described in the inquest report, and in such a situation there must have been some bleeding,. That may be so, but in view of the explanation offered by the prosecution witnesses it appears probable that no blood had fallen on the ground at the place of occurrence. In any event, if some blood had fallen at the place of occurrence which the investigating officer failed to notice, that by itself will not be fatal to the case of the prosecution. We must observe that the investigation in this case has been most unsatisfactory and the investigating officer was not conscious of his responsibilities. The blood stained piece of cloth which was wrapped around the wound of the deceased appears to have been seized by the investigating officer, but when questioned as to why it was not sent for chemical examination, he answered that he had hung that piece of cloth on a guava tree in the police station. The statement is comical but discloses the utter non-seriousness with which the investigation was conducted. We had expected better from the investigating officer who was investigating a serious case of murder. However, for this reason we will not reject the case of the prosecution entirely.

17. With these facts in the background, we have to consider whether the ocular testimony of Pws. 1, 3, 4, 5, 6, 8 & 11 should be discarded. It is no doubt true that the eye witnesses are related to each other but that is to be expected since the occurrence took place in the dalan of the house of the deceased. The evidence of the eye witnesses does not suffer from any infirmity, and appears to be convicting. No significant contradiction or infirmity has been brought to our notice.

18. In these circumstances, we do not feel persuaded to discard the case of the prosecution only on account of some infirmities which we have noticed earlier. There appears to be no reason why so many eye witnesses should falsely implicate the appellants, and there is in fact, nothing on record to suggest that the witnesses had any

21. In ***Narendra Nath Khaware vs. Parasnath Khaware and Others, (2003) 5 SCC 488,*** it was held by the Hon'ble Supreme Court that absence of bloodstains on the spot is of no consequence where there was no doubt about the actual occurrence having taken place and about the spot where it took place; relevant extract of para 7 whereof is quoted as under:-

"7. .....Another factor which had weighed with the courts below is the absence of blood on the spot. This was explained as wholly of no consequence in the facts of the present case where there is no doubt about the actual occurrence having taken place and about the spot where it took place. It is also emerging from the record that the courtyard where the incident took place was open to sky and it was a rainy day. Therefore, as argued by the learned counsel for the appellant, the bloodstains might have been washed away."

22. A reference may also be made in this regard to **Ram Swaroop and Others**

vs. State of U.P., (2000) 2 SCC 461, para 12 whereof is quoted as under:-

"12. According to the learned counsel for the appellants, as no blood had collected or found on the platform, it is a serious infirmity in the case for the prosecution. This point was also urged before the High Court and the High Court rightly rejected this point on the ground that the victim were immediately taken to the police station and people were also moving here and there at the place of the occurrence. Therefore, by the time the investigating officer went to the place, even if blood had fallen on the ground, the officer could not have collected the blood."

23. Same view was taken in ***State of Rajasthan vs. Satyanarayan, (1998) 8 SCC 404***, para 7 whereof is quoted as under:-

"7. Merely because no blood was found near the house of the respondent, it cannot be said that no incident took place there. The fact that kesar Lal had received a knife blow near his house was admitted by the accused though according to him the knife was with PW 2- Satyanarayan and not with him As the trial court has pointed out, the place was a public road and there was lot of traffic on that road. That could have been the reason why no blood was found when the spot panchnama was made after few hours. Moreover, the evidence discloses that intestines of Kesar Lal had come out and that could have blocked the flow of much blood. Some blood was absorbed by the clothes. Therefore, the circumstance that not sufficient blood was noticed when the spot panchnama was made should not have been utilised by the High court for holding that the prosecution version was not correct and that the defence version was more probable."

24. As per the law discussed above, it is the duty of this Court not only merely discharge the function to ensure that innocent person is not punished but also that guilty person does not escape. Settled law is that both are public duties of the Court then alone law and order can be maintained. As held, for truly attaining this object of a "fair trial' the Court should leave no stone unturned to do justice and protect the society as well. We are conscious of the fact that this appeal is of the year 1983, however, bound by the aforesaid duty, we proceed to record our findings.

25. As per the law discussed above, we find that the judgment of the trial court is wholly perverse and is not sustainable in the eye of law. We find that the approach of the trial court dealing with the evidence was patently illegal as the conclusion arrived at is wholly unsustainable and requires interference. We also find that the evidence of the witnesses read as a whole has a ring of truth and the trial court has adopted a hyper technical approach by giving importance to some minor lapses committed by the Investigating Officer and on that basis rejected the evidence as a whole. The trial court has picked up sentences from here and there from the statements of the eye witnesses and has raised presumption regarding innocence of the accused. We are of the firm opinion that the entire judgment is based on complete misreading of the evidence and the same is purely based on conjectures and surmises and is perverse in nature. Therefore, as per the settled law, we are incline to reconsider the entire evidences on record.

26. We find that the first information report was lodged promptly without any delay. The incident had taken place at 1.00 pm and the first information report was

lodged on the same day at 3.00 pm. The Investigating Officer promptly recorded the statement of the informant under Section 161 Cr.P.C. and proceeded to the place of occurrence and inspected the dead body and sealed the same. The bloodstained soil and plain soil were collected and recovery memo was prepared. One empty cartridge was recovered from the spot, recovery memo whereof was prepared as Exhibit-11. PW.1-Shiv Sharan Singh, who is the eyewitness of the incident and the real brother of the deceased had clearly stated that if they return from their field, house of the accused comes first and thereafter, would reach to his own house and by explaining the site plan he had clearly specified the spot where the incident had taken place. It is clearly stated that the residence of Ram Autar is in front of the house of Dashrath Dhobi and that of Goverdhan. He had also stated that his brother Babu Singh had slapped the sister of the accused while she was plucking gram leaves alonwith her mother. On this the mother and sister of the accused returned to their house abusing them and after some time when they reached near the house of Ram Autar, Ram Autar came out and stood in front of his brother-deceased Babu Singh and said that since you have slapped my sister, he will teach him a lesson and took out a country made pistol from his waist and fired on the chest of Babu Singh. He had also stated that when he tried to move forward and started shouting then other villagers Goverdhan, Dasrath, Shiv Mohan, Layak Singh and Ram Raj came to the spot, who have seen the incident and when they tried to catch the accused, he reloaded the country made pistol, threatened the witnesses and ran away towards west. This clearly show that a categorical description of the spot, time and the manner in which the offence has been committed by the accused Ram Autar has been given by the PW-1, which also finds categorical support from the statement of PW-2-Dashrath. The aforesaid statement further reflects that the accused Ram Autar was prepared with his country made pistol to commit the crime and has actually committed the same. He further stated that after incident he removed his brother and placed him on the Chabutara of Goverdhan where he died. He had withstood the cross examination and had also stated the distance that Ram Autar fired from a distance of about four feets (Chaar Hath Ki Duri) away.

27. Similarly, PW-2 Dashrath, whose house is in front of the house of the accused- Ram Autar and spot where the murder was committed, had categorically proved his presence on the spot and has also given exact description of the place and the manner in which the offence was committed, which could not be dislodged by the defence witnesses. The informant as well as the prosecution witnesses after investigation was not shy in stating that when the deceased Babu Singh was fired upon he was standing on the Kaccha Rasta and immediately after being shot was shifted to Chabutara of Goverdhan where he died and where the dead body was found lying when the Investigating Officer had reached the spot. PW-2 having proved his presence on the spot from the time much earlier to the time of incident had clearly stated that when the mother and sister of the accused Ram Autar came to the spot abusing the deceased they all went inside the house and accused Ram Autar came out after about 10-15 minutes and sat on Chabutara and when he saw Babu Singh coming, he rushed towards him blocked his way and repeatedly asking him why did he slap his sister, who did not answer the said

question, thereafter Ram Autar took the country made pistol from his waist and fired on the chest of the deceased.

28. At this stage, we would like to refer to the post mortem report and the defence argument that the evidence has come that the deceased was fired upon from the front side but as per post mortem report deceased suffered injury on the left side, therefore, ocular account of prosecution version is not correct. We find that the incident has been clearly narrated that accused Ram Autar came in front of Babu Ram and stopped him from the front side and was repeatedly asking him why he had slapped his sister. It is quite possible that until the accused Ram Autar was asking him this question, he might have been standing straight, however, as a natural human reaction, when he had seen the accused taking out his countrymade pistol, he might have naturally turned side way and therefore, he suffered injury on the left side. This appears to be quite natural coupled with the fact that injury is on the chest and which by itself clearly proves that the accused Ram Autar has fired upon him with a clear intention to kill him, therefore, we find that this fact that the deceased suffered fire arm injury on the left side of his chest does not help the accused.

29. PW.3-Station House Officer-Madan Singh had clearly stated that he prepared Chick FIR and G.D. and had recorded the statement of the appellant in the police station and inspected the place of occurrence where he found that the dead body of the deceased Babu Singh lying on the Chabutara of Goverdhan. He had prepared the panchnama and site plan was also prepared. He had proved that he has collected the bloodstained soil and plain soil from the spot. He had proved the recovery of empty cartridge from the spot. Thereafter, he searched the house of the accused where nobody was found but he recovered illegal cartridges from the house of the accused. On the next day, he had recorded statements of other witnesses. He had also proved that accused was absconding and proceedings under Section 82-83 Cr.P.C. were initiated against him and after receiving the warrants from the Court, he attached the goods of the accused and had prepared a "fard' report dated 14.12.1982. He had also stated that during investigation he could not find sister and mother of the accused and had shown the place of occurrence as place "A" and no blood was found on that place and the dead body was lying on the Chabutara of Goverdhan. The distance between spot on Kaccha Rasta and Chabutara is extremely short, may be 3-4 paces. Therefore, place of occurrence of crime is very much ascertainable, more so, coupled with specific eye witness account.

30. Much emphasis has been placed by the learned counsel appearing for the accused respondents that blood was not found on the place of occurrence, i.e. Kaccha Rasta and therefore, the incident as alleged has not taken place and Ram Autar is not guilty of committing such murder. From perusal of the post mortem report, we find that there is a entry wound and margins were inverted and blackening was present. One big pallet (Chharra) was also found inside the chest. Normally, this kind of wound, if any fatal injury suffered without any exist firearm wound, blood would not immediately started oozing out as the big pallet might have blocked the blood from immediately oozing out from the injury and it has come in the evidence that after committing murder the accused immediately reloaded his country made

pistol, threatened the witnesses and ran away towards west side and immediately thereafter the body of Babu Singh was lifted from the place of occurrence to the Chabutara of Goverdhan. It is nobody's case that the murder had taken place at any other place except the place shown in the site plan, therefore, it is clear that if the defence version is taken to be true that the murder had taken place at some other place, it could not have been possible to bring the body of the deceased to the Chabutara of Goverdhan without there being any blood trail on the floor/passage/rasta etc. There is absolutely no evidence on record to prove or even to suggest that place of occurrence could have been different. The blackening present on the wound further supported the eye witness account of PW-1 that the deceased was fired upon in close range (Chaar Hath Ki Doori).

31. In the case of **Nirmal Singh (supra)** the Hon'ble Apex Court has held that in case if some blood had fallen on the place of occurrence, which the Investigating Officer has failed to notice that by itself will not be fatal to the case of the prosecution. Similar view has been expressed in **Narendra Nath Khaware (supra), Ram Swaroop and Others (supra)** and **Satya Narayan (supra)**. Therefore, in our opinion, even if the Investigating Officer has stated that no blood was found on the spot marked as spot "A" it would not help the defence. At the worst this could have been a case of defective investigation of which no benefit can be granted to the accused person when there is a direct evidence available on record. Therefore, the benefit granted to the accused that as no blood was found at place "A" the murder has not taken place in the manner as alleged is wholly perverse and in the totality of evidence available on record is not sustainable in the eye of law.

32. PW-4-Dr. Satish Chandara Srivastava has clearly stated that the death of the deceased was possible on 07.12.1982 at 2.00 pm due to firearm injury. He has also stated that collected blood was found in the chest of the deceased and a big pallet was also found inside the chest.

33. In this background, this Court is of the opinion that the presumption raised by the trial court in granting benefit of doubt that since the informant and the deceased are the owner of agricultural field whereas the accused belonging to labour class, therefore, it is not understandable as to why the deceased Babu Singh slapped only sister of the accused, who was aged about 8-10 years and why he did not slap mother of the accused, is neither here nor there and it is only on this ground that the trial court has perversely drawn the presumption that the informant was not present on the spot by taking the sentence from the statement of PW-2, Dashrath, who is also an eyewitness that the deceased was coming alongwith his brother-PW-1-Shiv Sharan Singh when the incident had taken place and although he named the other witnesses namely Ram Raj, Layak Singh and that some other persons were gathered on the spot but as he has not mentioned the name of PW.1 alongwith the names of persons who have seen the incident. Therefore, presumption raised by the trial court that presence and hence, the testimony of PW-2-Dashrath was not worth belief is also highly perverse.

34. Another presumption was raised by the trial court that as the deceased Babu Singh was wearing only Kaccha (underwear) at the time of incident,

therefore, it reflects his bad character due to which he was murdered, is also not reflected from the entire evidence on record. The incident is dated 07.12.1982 and it is of common knowledge that at times villagers usually used to roam around wearing only underwear particularly when they visit their field, hence that alone, without any evidence, is not sufficient to raise such presumption. Even otherwise, even such presumption of bad character of deceased, by no standard proves the innocence of the accused.

35. In the statement of accused recorded under Section 313 Cr.P.C. he has talked about "enmity' and at other place "old enmity'. However, he had given no description of the enmity or old enmity as alleged by him, therefore, presumption raised by the trial court about enmity is also not sustainable in the eye of law.

36. The trial court observed that once the allegation was that the deceased Babu Singh has slapped sister of the accused while she was plucking gram leaves but still the Investigating Officer is not included the same in the site plan and has not recorded the same in his case diary is also per se illegal inasmuch this ground i.e. non-highlighting the aforesaid spot in the site plan would not have effected the prosecution case. Therefore, wholly irrelevant factor has been taken into account to grant benefit of acquittal to the accused. Admittedly, mother and sister of the accused Ram Autar were missing from the spot and since no allegation were levelled against them, therefore, this does not effect the merit of the investigation conducted by the Investigating Officer.

37. A presumption again raised by the trial court that villagers usually visit their field in the morning hours and thereafter usually take their lunch by 10-11 am and relax thereafter is neither here nor there when the time, spot and manner of the incident was clearly proved beyond doubt. In the post mortem report it is further reflected that semi digested food was present in the stomach of the deceased. The time of incident was at 1.00 o'clock and therefore, presence of semi digested food in the stomach was natural as the deceased must have taken something in the morning, which was present in his stomach in the shape of semi digested food.

38. We, therefore, find that the present judgment is purely based on presumption whereas direct evidence on record beyond any shadow of doubt proves the manner time and place in which the incident had taken place committed by the accused Ram Autar.

39. The defence argument is also to the effect that PW-1-Shiv Sharan Singh is the real brother of the deceased and highly interested witness. Suffice to say that merely because the eyewitnesses are the family members there evidence cannot per se be discarded as held by the Hon'ble Apex Court in **Mohabbat (supra).**

40. We, therefore, find that the judgment of acquittal is patently illegal and the conclusion arrived at by the trial court is wholly untenable and requires interference and reversal. The evidence of PW-1-Shiv Shankar Singh and PW-2-Dashrath, who are the eyewitnesses clearly reflects ring of truth and proves beyond shadow of doubt that the accused Ram Autar has committed murder of Babu Singh and is liable to be convicted under Section 302 IPC.

41. We are also of the view that a crime has been committed in breach and violation of the public rights and duty and

it is harmful to the society. We are, therefore, duty bound to maintain public confidence and administration of justice and to uphold the Majesty of law. We cannot turn a blind eye to the highly perverse judgment passed purely on the basis of presumptions and by not reading the evidence as a whole and only picking up sentences in isolation from here and there from the statements of eyewitnesses, we are, therefore, of the opinion that while being conscious that no innocent person is punished, we are also duty bound to see that a guilty person does not go unpunished.

42. Hon'ble Apex Court in Criminal Appeal No.327 of 2022 ***(Karan Singh vs. The State of Uttar Pradesh and Others)***, decided on 02.03.2022, had the occasion to consider the contingencies whereat a ground was taken by the accused that since a long span of time has elapsed and thus, it would not be proper to convict him, however, the Hon'ble Apex Court in paragraph 47 has observed as under:-

"47. We find no grounds to interfere with the concurrent findings of the Trial Court and the High Court. The fact that the trial/appeal should have taken years and that other accused should have died during the appeal cannot be a ground for acquittal of the Appellant. The appeal is thus dismissed."

43. Recently, yet in ***Criminal Appeal No.-- of 2022 (Arising out of Special Leave Petition (Criminal) No.-- of 2022, further arising out of Diary No.21596 of 2020, State of Rajasthan vs. Banwari Lal and Another,*** decided on 08.04.2022, the Hon'ble Apex Court in paragraphs 7 & 8 has held as under.

"7. At this stage, few decisions of this Court on principles for sentencing and tests for awarding an appropriate sentence in a given case are required to be referred to and considered.

i) In the case of Mohan Lal (supra), the High Court modified the judgment and order passed by the learned trial Court and sentenced the accused to the period already undergone by him, which was only six days and absolutely no reasons, much less valid reasons, were assigned by the High Court. While setting aside the order passed by the High Court, this Court has observed in paragraphs 9 to 13 as under:

"9. The High Court simply brushed aside the aforementioned material facts and sentenced the accused to the period already undergone by him, which is only 6 days in this case. In our view, the trial court and the High Court have taken a lenient view by convicting the accused for offences under Sections 325 and 323 IPC. Absolutely no reasons, much less valid reasons, are assigned by the High Court to impose the meagre sentence of 6 days. Such imposition of sentence by the High Court shocks the judicial conscience of this Court.

10. Currently, India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. However, the courts have framed certain guidelines in the matter of imposition of sentence. A Judge has wide discretion in awarding the sentence within the statutory limits. Since in many offences only the maximum punishment is prescribed and for some offences the minimum punishment is prescribed, each Judge exercises his discretion accordingly. There cannot, therefore, be any uniformity. However, this Court has repeatedly held that the courts will have to take into

account certain principles while exercising their discretion in sentencing, such as proportionality, deterrence and rehabilitation. In a proportionality analysis, it is necessary to assess the seriousness of an offence in order to determine the commensurate punishment for the offender. The seriousness of an offence depends, apart from other things, also upon its harmfulness.

11. This Court in Soman v. State of Kerala [Soman v. State of Kerala, (2013) 11 SCC 382 : (2012) 4 SCC (Cri) 1] observed thus: (SCC p. 393, para 27)

"27.1. Courts ought to base sentencing decisions on various different rationales -- most prominent amongst which would be proportionality and deterrence.

27.2. The question of consequences of criminal action can be relevant from both a proportionality and deterrence standpoint. 27.3. Insofar as proportionality is concerned, the sentence must be commensurate with the seriousness or gravity of the offence. 27.4. One of the factors relevant for judging seriousness of the offence is the consequences resulting from it.

27.5. Unintended consequences/ harm may still be properly attributed to the offender if they were reasonably foreseeable. In case of illicit and underground manufacture of liquor, the chances of toxicity are so high that not only its manufacturer but the distributor and the retail vendor would know its likely risks to the consumer. Hence, even though any harm to the consumer might not be directly intended, some aggravated culpability must attach if the consumer suffers some grievous hurt or dies as result of consuming the spurious liquor."

12. The same is the verdict of this Court in Alister Anthony Pareira v. State of Maharashtra [Alister Anthony Pareira v. State of Maharashtra, (2012) 2 SCC 648 : (2012) 1 SCC (Civ) 848 : (2012) 1 SCC (Cri) 953] wherein it is observed thus: (SCC p. 674, para 84) "84. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

13. From the aforementioned observations, it is clear that the principle governing the imposition of punishment will depend upon the facts and circumstances of each case. However, the sentence should be appropriate, adequate, just, proportionate and commensurate with the nature and gravity of the crime and the manner in which the crime is committed. The gravity of the crime, motive for the crime, nature of the crime and all other attending circumstances have to be borne in mind while imposing the sentence. The court cannot afford to be casual while imposing the sentence, inasmuch as both the crime and the criminal are equally important in the sentencing process. The courts must see that the public does not lose confidence in the judicial system. Imposing inadequate sentences will do more harm to the justice system and may

lead to a state where the victim loses confidence in the judicial system and resorts to private vengeance."

ii) In the case of Udham (supra), in paragraphs 11 to 13, it is observed and held as under:

"11. We are of the opinion that a large number of cases are being filed before this Court, due to insufficient or wrong sentencing undertaken by the courts below. We have time and again cautioned against the cavalier manner in which sentencing is dealt in certain cases. There is no gainsaying that the aspect of sentencing should not be taken for granted, as this part of Criminal Justice System has determinative impact on the society. In light of the same, we are of the opinion that we need to provide further clarity on the same.

12. Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).

13. Additionally, we may note that under the crime test, seriousness needs to be ascertained. The seriousness of the crime may be ascertained by (i) bodily integrity of the victim; (ii) loss of material support or amenity; (iii) extent of humiliation; and (iv) privacy breach."

In the said decision, this Court again cautioned against the cavalier manner in which sentencing is dealt with in certain cases.

iii) In the case of Satish Kumar Jayanti Lal Dabgar (supra), this Court has observed and held that the purpose and justification behind sentencing is not only retribution, incapacitation, rehabilitation but deterrence as well.

8. Applying the law laid down by this Court on principles for sentencing, to the facts of the case on hand, we are of the opinion that the approach of the High Court is most cavalier. Therefore, the order of the High Court merits interference by this Court. Merely on the technical ground of delay and merely on the ground that after the impugned judgment and order, which is unsustainable, the accused have resettled in their lives and their conduct has since been satisfactory and they have not indulged in any criminal activity, is no ground not to condone the delay and not to consider the appeal on merits. Hence, the delay of 1880 days in preferring the appeal is condoned."

44. Applying the principles of law so laid down in the case of ***Karan Singh (supra)*** and ***Banwari Lal (supra)*** an inescapable principle of law stands culled out that merely after lapse of sufficient time coupled with other factors, namely, the age of the accused and his resettlement, if any post acquittal by the trial court, cannot be a ground to bestow any benefit so as to wipe away the aftermath of commission of crime.

45. In view of the aforesaid discussion, the instant appeal stands **allowed.** The judgment and order dated

26.07.1983 passed by the Learned Special Judge, Fatehpur in Session Trial No. 104 of 1983 (State vs. Ram Autar Kori), arising out of Case Crimes No. 172/1982, under Section 302 IPC, Police Station Khakhreru, District Fatehpur, acquitting the accused-respondent-Ram Autar s/o Ram Swarup Kori is set aside and reversed. The accused-respondent-Ram Autar s/o Ram Swarup Kori is held guilty of committing offence punishable under Section 302 IPC.

46. For the offence under Section 302 I.P.C., the accused-respondent Ram Autar s/o Ram Swarup Kori is sentenced to undergo simple imprisonment for life and to pay a fine of Rupees Twenty Thousand Only (Rs. 20,000/-) and if he fail to pay the amount of fine, he shall have to undergo imprisonment for a period of six months in lieu thereof.

47. The accused-respondent -Ram Autar s/o Ram Swarup Kori is directed to surrender before the learned Chief Judicial Magistrate, Fatehpur within a period of 15 days from the date of this order to serve out the sentence awarded to him. In case he does not surrender within the stipulated time, learned Chief Judicial Magistrate, Fatehpur shall commit him to custody as per law.

48. Let a certified copy of this judgment and order be sent to the Court concerned immediately for ensuring its compliance.

(2022) 9 ILRA 1059
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2022

BEFORE

THE HON'BLE OM PRAKASH TRIPATHI, J.

Habeas Corpus Writ Petition No. 486 of 2022

Master Riyansh Singh (Minor) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Avnish Kumar Srivastava, Sri Mohammad Anas Raza

Counsel for the Respondents:
G.A., Sri Syed Riyaz Askari

Civil Law - Constitution of India,1950 - Article 226, - Indian Penal Code, 1860 - Sections 323, 363, 504 & 498-A, - The Dowry Prohibition Act, 1961 - Sections 3 & 4 - Domestic Violence Act, 2005 - Sections - 12 & 323 - Writ of Habeas Corpus - object and scope - to maintainability of a writ of Habeas Corpus detention by parents or others is found to be illegal and without any authority of law - in the instant case claim of petitioner relating to custody of a minor child from her husband - there is a matrimonial dispute between husband and wife - mother lodged an FIR with allegation that her husband along with his family member had forcibly snatched her son - alleged child is not under unlawful or illegal detention, and applicant can avail an equally and efficacious alternative remedy under the Hindu Marriage and Guardianship Act, or under the Guardians and Wards Act, as the case may be - hence, court is not inclined to exercise its extraordinary jurisdiction to entertain the present petition - the prerogative writ of Habeas Corpus is in the nature of extraordinary remedy when there is no any ordinary remedy provided under the law is available - petition lacks merit and is hereby dismissed.(Para 8, 9, 10)

Appeal allowed. (E-11)

List of Cases cited:

1. Sayed Saleemuddin Vs Dr. Rukhsana & ors. (2001) 5 SCC 247,

2. Nithya Anand Raghvan Vs St. (NCT of Delhi)& anr. (2017) 8 SCC 454,

3. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors. (2019) 7 SCC 42.

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

1. Counter affidavit filed Shri Syed Riyaz Askari on behalf of opposite party nos. 4 & 5 today in the Court, is taken on record.

2. Heard leaned counsel for petitioner, learned counsel for opposite party nos. 4 and 5 and learned A.G.A. for State.

3. This habeas corpus writ petition has been filed by seeking following reliefs:-

(i) Issue a writ order or direction in the nature of Habeas Corpus directing the respondent nos. 4, 5 and 6 to produce the detenue petitioner, namely Master Riyansh Singh (Minor Detenue) before this Court.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the respondents to set free the petitioner from the illegal detention and to allow him to go and live with his natural guardian i.e. mother and not to interference/create any kind of hindrance in the peaceful living of the petitioner- detenue with his mother.

4. Learned counsel for petitioner submitted that marriage between deponent (Smt. Komal)and the opposite party no. 4 (Satendra) was solemnized on 13.07.2016 under Hindu Rites and Rituals. Due to their wedlock, a male child namely Riyansh Singh was born who is presently four years old. When deponent came to know that opposite party no. 4 was earlier married with one Alka and the said fact was concealed thereafter deponent protested the said concealment then opposite party no. 4 started she was being subjected with cruelty and torture. It is further submitted that opposite party no. 4 is not treating the petitioner o. 1 well and that he has been illegally detained by the respondent nos. 4 to 6. In this connection the mother of the corpus has approached police authorities but of no avail. No information is being given in regard to the petitioner no. 1. It was submitted that custody of petitioner no. 1 be handed over to his mother.

5. It is well settled that writ of habeas corpus is a prerogative writ and an extraordinary remedy. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in case of ***Sayed Saleemuddin vs. Dr. Rukhsana and others (2001) 5 SCC 247*** and it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. In said case it was held as under:-

"11. ...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a

matter of custody of a child the welfare of the child is of paramount consideration of the Court..."

6. Similarly, in the case of ***Nithya Anand Raghvan v State (NCT of Delhi) and another 2017 8 SCC 454,*** it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. The relevant observations made in the judgement are as follows:-

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674, has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247, has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42, it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [see Paul Mohinder Gahun Vs. State (NCT of Delhi), 2004 SCC OnLine Del 699, relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by

the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

7. The issue of maintainability of a habeas corpus petition under Article 226 of the Constitution of India in matters of custody of minor was also considered in case of ***Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others (2019) 7 SCC 42,*** and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:-

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

x x x

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it

is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

8. What emerges from above stated authorities is that the exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be considered to be dependent on the jurisdictional fact, where the applicant establishes a prima facie case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant would become entitled to the writ. In an application seeking a writ of habeas corpus for custody of minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether his/her welfare requires that the present custody should be changed and the child should be handed over in the care and custody of someone else. Proceedings in the of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. The power of the High Court, in granting a writ, in child custody matters, may be invoked only in cases where the detention of a minor is by a person, who is not entitled to his/her legal custody.

9. From the perusal of record it appears that Smt. Komal had lodged F.I.R under Sections 498-A, 323, 363, 504 I.P.C. and Section 3/4 D.P. Act, P.S.- Babugadh, District- Hapur in Case Crime No. 157/2022 in which it has been stated that on 29.04.2022 when she was coming from the school with her son Riyansh, her mother-in-law and husband forcibly snatched her son in which accused Alka Chaudhary and Satendra have been granted anticipatory bail. Komal has also filed a case under Section 12 of Domestic Violence Act against Satendra and others, pending before the competent court. The minor son Riyansh is living in the custody of his father who is natural guardian and Smt. Komal had also lodged F.IR. against the husband and family members of the husband. It shows that custody of the alleged child is not unlawful or illegal and applicant has equally efficacious relief which can be availed by her for the custody of child.

10. Considering the facts of the matter as well as the aforesaid position of law, it is apparent that the remedy in such matters would lie under the Hindu Minority and

Guardianship Act, 1956 or Guardians and Wards Act, 1890 GWA, as the case may be. In view of aforesaid, this Court is not inclined to exercise its extraordinary jurisdiction to entertain the present petition seeking a writ of habeas corpus.

11. The instant habeas corpus petition lacks merit and it is hereby **dismissed.**

(2022) 9 ILRA 1064
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.09.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ C No. 19316 of 2020

Mtv Buddhist Religious And Charitable Trust & Anr. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anuj Dayal, Amit Jaiswal Ojus Law, Nipun Singh, Raghav D. Garg

Counsel for the Respondents:
C.S.C., Gyanendra Kumar Srivastav, Kshitij Mishra, Rishabh Kapoor

Civil Law - The Constitution of India, 1950- Allahabad High Court Rules- Chapter XXII Rule 7 - Filing the earlier writ petition wherein liberty was granted to the petitioners to approach the authorities for redressal of their grievances, cannot amount to abandonment of the claim of the petitioners to seek a direction that the petitioner-institution be treated as Minority Institution and other ancillary reliefs.

Withdrawal of writ petition with liberty to approach the authorities would not amount to abandonment of claim and a subsequent writ petition will be maintainable against the order so passed by the authority.

Civil Law - The National Commission for Minority Educational Institutions Act, 2004- Section 2(g)- Section 11- Uttar Pradesh Private Professional Educational Institutions (Regulation of Admission and Fixation of Free) Act, 2006- Sections 2 & 3 (a)- Section 3(h)- Minority Institution as defined in U.P. Act No.24 of 2006 in an institution which is not only established and is being administered by a minority but it should be notified as such by the State Government- Thus, mere administration of an educational institution by minority or minorities is not sufficient or enough to declare such an Educational Institution to be a Minority Educational Institution even within the meaning of section 2(g) of the Act, 2004 - When the petitioner no.2 was established, the petitioner no.1, on its own showing was not a minority. Merely because after the members of the Trust-petitioner no.1 adopted Bhuddhism and thus the petitioner no.1 became minority and it has since been administering the petitioner no.2, petitioner no.2 will not become a Minority Educational Institution for the reason that it was established at a time when admittedly the petitioner no.1 was not a minority which is said to have become minority only in the year 2015- If a society or a Trust did not comprise of members of any Minority Community (either linguistic or religious) at the time when it established an educational institution and subsequently attains the status of a minority and starts administering such an institution, in our considered opinion, in such a situation the educational institution concerned will neither be a Minority Institution within U.P. Act No.24 of 2006, nor shall it be Minority Educational Institution within Act, 2004.

Merely administering the educational institution is not sufficient to grant it minority status but it is incumbent that the society or trust has to comprise of minority members at the time of establishing the Institution and any conferment

of minority status subsequently will not grant minority status to the educational institution. (Para 11, 12, 18, 33, 36)

Writ Petition rejected. (E-3)

Case law/Judgements relied upon:-

1. V. D. Barot Vs St. of Guj. & ors.,(2002) 10 SCC 668

2. H.P Fin. Corp. Vs Anil Garg & ors.,(2017) 14 SCC 634

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

1. Heard Shri Sudeep Seth, learned Senior Advocate, assisted by Shri Amit Jaiswal and Shri Anuj Dayal for the petitioners, Shri Sanjay Bhasin, learned Senior Advocate, assisted by Shri Rishabh Kapoor, learned counsel representing the Director General Medical Education and Training, Uttar Pradesh, learned State Counsel for other State-respondents and Shri Gyanendra Kumar Srivastava, learned counsel representing the National Medical Commission.

2. By instituting these proceedings under Article 226 of the Constitution of India initially a challenge was made to the orders dated 05.10.2020 and 07.10.2020, both issued by the Director General Medical Education and Training, U.P. requiring the Management/Principals of all Dental College and Medical Colleges in the State of U.P. running in private sector to submit their proposals so that the fee to be charged by these institutions from the students may be determined. Another prayer made in the writ petition is to quash the order dated 26.07.2018 passed by the State Government in the Department of Medical Education and Training, whereby the representation dated 12.06.2018 preferred by the petitioner was rejected. The said order dated 26.07.2018 was passed by the State Government in compliance of an order dated 22.06.2018 passed by this Court in Writ Petition No.21980 of 2018 instituted by the petitioners whereby the State Government was directed to look into the grievance of the petitioners and pass appropriate orders on their representation. By the said order dated 26.07.2018 the State Government has refused to treat the petitioners-institution as Minority Institution.

3. The petitioners have also prayed to issue a direction to the Director General Medical Education and Training to treat the petitioner no.2-College as a Minority Institution in view of the minority status granted to the said College by National Commission for Minority Educational Institutions (herein after referred to as "National Commission"). It has also been prayed that the respondents-State of U.P. in the Department of Minority Welfare as also in the Department of Medical Education and Training be directed to allow the privileges of a Minority Institution to the petitioner-college. Subsequently by amending the writ petition, the petitioners have also prayed for quashing of a Government Order dated 06.11.2020, issued by the State Government, in the Department of Medical Education and Training, whereby the fee to be charged by the petitioner no.2-College from its students for pursuing MBBS and MDS courses has been determined. By amending the writ petition, another prayer has been made to quash the Government Order dated 28.08.1999, whereby the State Government in the Department of Medical Education

and Training has determined certain criteria for declaration of a non-Government Medical/Dental/Para Medical College to be a Minority Institution on the basis of language and religion, that is to say, Linguistic Minority Institution and Religious Minority Institution.

4. Shri Sanjay Bhasin, learned Senior Advocate, representing the Director General Medical Education and Training at the outset has submitted that this petition is not maintainable for the reason that prior to filing of the instant writ petition the petitioners had instituted Writ-C No.31941 of 2018 whereby a challenge was made to quash the order dated 26.07.2018 which is under challenge in this petition as well. He has also stated that another prayer made in the Writ-C No.31941 of 2018 was for issuing a direction to the State authorities to acknowledge and treat the petitioner-College as Minority Institution and to confer all benefits available to Minority Institutions. He has further stated that during the pendency of the Writ C No.31941 of 2018 the Director General Medical Education and Training had issued two letters/orders dated 29.01.2019 and 04.02.2019 directing the petitioner-College to submit its proposal for fixation of fee for its Post Graduate Courses and these two letters/orders dated 29.01.2019 and 04.02.2019 were challenged by the petitioners by filing Civil Misc. Writ Petition No.5612 of 2019. He has further stated that the aforesaid writ petitions, namely,Writ-C No.31941 of 2018 and Civil Misc. Writ Petition No.5612 of 2019 were withdrawn by the petitioners with the liberty to approach the respondent-authorities for redressal of their grievances. In view of these facts, it has been submitted that in terms of the provisions contained in Chapter XXII Rule 7 of the Rules of the Court this petition is a successive writ petition on the same cause of action, which cannot be entertained.

5. It has, thus, been argued by Shri Sanjay Bhasin, learned Senior Advocate representing the Director General Medical Education and Training that the instant writ petition seeks a prayer to quash the orders dated 05.10.2020 and 07.10.2020 which are akin to the orders dated 29.01.2019 and 04.02.2019 which were challenged in the earlier writ petition which was withdrawn without seeking liberty to file a fresh petition. Further submission of Shri Bhasin is that the order dated 26.07.2018 which has been challenged in this writ petition was challenged in Writ C No.31941 of 2018 which was also withdrawn without seeking liberty to challenge the same. Accordingly, he submits that the instant writ petition being second writ petition for the same relief is not maintainable which is liable to be dismissed.

6. In reply to the objection raised by Shri Bhasin regarding maintainability of the writ petition, it has been argued on behalf of the petitioners by Shri Sudeep Seth that the instant writ petition has been preferred after disclosing filing of the earlier writ petitions and the order dated 05.08.2019 granting liberty to the petitioners to withdraw the said writ petitions so as to approach the authorities for redressal of the grievances. It has further been argued by Shri Sudeep Seth that through letters/orders dated 29.01.2019 and 04.02.2019 which were challenged in Writ-C No.5612 of 2019 proposal for fee fixation for the academic session 2019-20 was required to be submitted whereas by means of the orders dated 05.10.2020 and 07.10.2020, which are under challenge in the instant writ petition, proposal has been

sought from the petitioner-College for fee fixation for the academic session 2020-21 and hence these orders dated 05.10.2020 and 07.10.2020 give fresh cause of action and hence the instant writ petition is maintainable. It has also been urged that the order dated 06.11.2020, whereby fee to be charged by the petitioner-College has been fixed by the State Government, also gives a fresh cause of action for which the instant writ petition is maintainable.

7. In respect of the order dated 26.07.2018 whereby the representation for treating the petitioner-College as Minority Institution was rejected by the State, it has been submitted that the said order was challenged by filing Writ-C No.31941 of 2018, however, the same was permitted to be withdrawn by this Court by means of the order dated 05.08.2019 with liberty to approach the authorities for redressal of the grievances. Further contention is that despite representations/letters made by the petitioners on 18.07.2020 and 27.09.2020 to the State Government in respect of the decision dated 26.07.2018 with the prayer to reconsider the same, since no decision was taken by the authorities as such the said order dated 26.07.2018 has been challenged in this writ petition which accordingly is maintainable in respect of the prayer for quashing the order dated 26.07.2018 as well.

8. When we consider the rival submissions made by the parties in respect of the maintainability of the writ petition, what we notice is that so far as the challenge to the orders/letters dated 05.10.2020 and 07.10.2020 is concerned, the same pertain to proposal for fee fixation for the academic year 2020-21 which were never challenged in earlier writ petitions filed by the petitioners. As regards the prayer relating to quashing of the order dated 06.11.2020, we may record that the said order was also never challenged in the earlier writ petitions and as a matter of fact, the said order gives fresh cause of action to the petitioners to challenge the same. In respect of the decision dated 26.07.2018, which though was challenged in the earlier writ petition, we may observe that the representation made by the petitioners dated 12.06.2018 was considered in compliance of the order dated 26.06.2018 passed by this Court in Writ Petition No.21980 of 2018. By the said order, the prayer of the petitioners for treating the petitioner-College as Minority Institution was rejected. This order was challenged in Writ C No.31941 of 2018, however, the same was permitted to be withdrawn by this Court by means of the order dated 05.08.2019 with liberty to the petitioners to approach the authorities for redressal of their grievaces. The petitioners are said to have made representations on 15.07.2020 and 27.09.2020 in regard to the order dated 26.07.2018 to reconsider the same and when no decision was taken by the authorities, in the present writ petition amongst other prayers, a prayer has been made to quash the said order dated 26.07.2018 as well.

9. Hon'ble Supreme Court in the case of **V. D. Barot vs. State of Gujarat and others, reported in (2002) 10 SCC 668** has held that in case earlier writ petition is permitted to be withdrawn by the Court without liberty to file a fresh petition to enable a person to approach departmental authorities to make representation in the matter, the same will not amount to abandonment of the claim. Hon'ble Supreme Court has held that such matter should not be dealt with in a hypertechnical manner but the totality of the circumstances

arising in a particular case has to be taken into consideration.

10. Dealing with the law relating to withdrawal of suit or abandonment of claim under the Code of Civil Procedure, Hon'ble Supreme Court in the case of **Himachal Pradesh Financial Corporation vs. Anil Garg and others, reported in (2017) 14 SCC 634,** has held that the language of the order for withdrawal will not always be determinative and that the backgrounds facts are to be necessarily examined for a proper and just decision. In the case of **Himachal Pradesh Financial Corporation (supra)** the appellant therein made an application for withdrawal of the suit stating therein that such application for withdrawal was made to pursue the remedies under H. P. Public Moneys (Recovery of Dues) Act, 1973. Hon'ble Supreme Court has held that since withdrawal of the suit was sought with the intention to pursue the remedy available under H. P. Public Moneys (Recovery of Dues) Act, 1973, hence the appellant in the said case never intended to abandon its claim by withdrawing the same. In this background Hon'ble Supreme Court has observed in the case of **Himachal Pradesh Financial Corporation (supra)** that the language of the withdrawal order cannot be determinative without considering the background facts.

11. If we consider the submissions made by Shri Bhasin raising the issue of maintainability of the writ petition in the background facts of the case and law laid down by Hon'ble Supreme Court in the cases of **V. D. Barot (supra) and Himachal Pradesh Financial Corporation (supra)**, we are of the opinion that filing the earlier writ petition wherein liberty was granted to the petitioners to approach the authorities for redressal of their grievances, cannot amount to abandonment of the claim of the petitioners to seek a direction that the petitioner-institution be treated as Minority Institution and other ancillary reliefs.

12. For the reasons as aforesaid, the preliminary objection raised by Shri Sanjay Bhasin, learned Senior Advocate representing the Director General Medical Education and Training, merits rejection, which is hereby rejected. Thus, we hold that the writ petition is maintainable.

13. Before considering the submissions of the learned counsel for the parties on merit of their respective claims, we may note certain facts which are essential for appropriate adjudication of the issues involved in this case.

14. By means of the Government Order dated 28.08.1999 determination of certain standard/criteria for the purposes of declaring non-Government Medical/Dental/Par Medical Colleges to be religious or linguistic Minority Institutions has been provided. The National Commission for Minority Educational Institutions Act, 2004 (herein after referred to as "Act, 2004") was enacted by the Parliament to constitute a National Commission for Minority Educational Institutions and to provide for matters connected or incidental thereto. Section 2(g) defines "Minority Educational Institution" to mean a college or an educational institution established and administered by a minority or minorities. Section 2(g) of the Act, 2004 is extracted herein below:

"2(g). "Minority Educational Institution" means a college or an

educational institution established and administered by a minority or minorities;"

15. Section 11 of the Act, 2004 defines functions and powers of the Commission which empowers the Commission created under the said Act, *inter alia,* to decide all questions relating to the status of any institution as a Minority Educational Institution and declare its status as such. In pursuance of a judgment and order rendered by a Division Bench of this Court, dated 26.11.2015 in Special Appeal (Defective) No.552 of 2015 which was filed by the National Commission for Minority Educational Institutions challenging the judgment of learned Single Judge, the State Government in the Department of Minority of Welfare and Waqf issued a Government Order 18.05.2016 providing therein that if an institution is declared to be Minority Institution by the National Commission, the concerned department shall treat such institution as Minority Institution and accordingly give a certificate to the said effect to such an institution. The State Government in the Department of Higher Education also issued a Government Order dated 24.07.2017 which provided that the institutions which have been declared as Minority Institutions by the National Commission may make appropriate application for being treated as a Minority Institution, to the State Government annexing therewith certain documents as mentioned in the said Government Order.

16. The State Legislature enacted Uttar Pradesh Private Professional Educational Institutions (Regulation of Admission and Fixation of Free) Act, 2006 (U.P. Act No.24 of 2006). The said enactment was passed by the State Legislature with the object to provide for regulating admission and fixation of fee in private professional educational institutions and the matters connected therewith or incidental thereto. Section 2 of U.P. Act No.24 of 2006 provides that this act shall be applicable to the private aided or unaided professional educational institutions, excluding minority institutions. Thus the said Act excludes Minority Institution from its operation. Section 2 of U.P. Act No.24 of 2006 is quoted herein below:

"2. This Act shall be applicable to the private aided or unaided professional educational institutions, excluding minority institutions."

17. Section 3 (a) of U.P. Act No.24 of 2006 defines "aided institution" to mean a private professional educational institution, other than a minority institution. Sub section (h) of section 3 of the said Act defines "minority institution" to mean an institution established and administered by a minority and notified as such by the State Government. Section 3(o) defines "unaided institution" to mean a private professional educational institution, not being an aided institution. Section 3(h) of U.P. Act No.24 of 2006 is extracted herein below:

"3(h). Minority Institution means an institution, established and administered by a minority and notified as such by the State Government."

18. Thus, Minority Institution as defined in U.P. Act No.24 of 2006 in an institution which is not only established and is being administered by a minority but it should be notified as such by the State Government. Accordingly, an institution to acquire the status of Minority Institution,

within the meaning of U.P. Act No.24 of 2006, should be established and administered by a minority and it should also be notified as such by the State Government. In other words, unless and until an institution established and administered by a minority is not notified as such by the State Government, it will not be treated to be Minority Institution so far as the application of U.P. Act No.24 of 2006 is concerned.

19. Petitioner no.1 was accorded permission on 23.01.2001 by the Central Government to establish a new Medical College at Meerut. Pursuant to the said permission accorded to petitioner no.1 by the Central Government on 23.01.2001 the petitioner no.1 established Subharti Medical College, Meerut which is the petitioner no.2 in this writ petition. An application was made in the month of September, 2015 by the President of petitioner no.1-Trust to the National Commission for declaring the petitioner no.2 as Minority Institution. The National Commission took a decision on 20.03.2017 and decided to issue Minority Institution status certificate to the petitioner no.2. The said decision dated 20.03.2017 was communicated to the President of the petitioner no.1-Trust vide letter dated 26.04.2018 by the Secretary of the National Commission.

20. Accordingly, a certificate declaring the petitioner no.2 as Minority Educational Education covered under section 2(g) of the Act, 2004 was issued by the Secretary of the National Commission on 26.04.2018. After the said certificate was issued by the National Commission to the petitioner, an application was made to the State Government for issuance of a certificate for treating the petitioner no.2 as a Minority Institution as per the Government Order dated 24.04.2017. The petitioner thereafter instituted a writ petition before this Court bearing No. 21980 of 2018 with the prayer to issue a direction to the State Government to treat the petitioner no.2 as Minority Institution and not to interfere in its working. The said writ petition was disposed of finally by a Division Bench of this Court by means of the order dated 22.06.2018 whereby the State Government in the Department of Medical Education and Training was directed to look into the grievance of the petitioners and pass appropriate order on the representation dated 12.06.2018.

21. In compliance of the said order dated 22.06.2018 passed by this Court, the matter was considered by the State Government in the Department of Medical Education and Training and the representation dated 12.06.2018 of the petitioners was rejected by means of the order dated 26.07.2018 which is one of the orders of the State Government which is under challenge in this writ petition.

22. While the matter was being considered by the State Government in the Department of Medical Education and Training which culminated in the order dated 26.07.2018, reports were called for by the State Government from the Director General Medical Education and Training which informed the State Government that before issuing the certificate declaring the petitioner no.2 as Minority Educational Institution under the Act, 2004, though opportunity was granted to the State Government, however, none of the representatives of the State Government could appear in the proceedings before the National Commission and accordingly the certificate issued by the National Commission is a result of ex-parte

proceedings. The State Government while passing the order dated 26.07.2018 has also stated that in the proceedings before the National Commission, the Minority Welfare Department was impleaded as a party-respondent which was a mischief played by the petitioners for the reason that the Medical Education Department was not impleaded as a party-respondent in the said proceedings though the institution in question, namely, petitioner no.2 comes under the supervision of Medical Educational Department of the State Government and not that of Minority Welfare Department. The order dated 26.07.2018 thus also observes that so far as the Department of Medical Education of the State Government is concerned, it did not have any information regarding the proceedings in which the petitioner no.2 was declared as Minority Educational Institution under the Act, 2004.

23. Regarding the applicability of the Government Order dated 18.05.2016 issued by the Minority Welfare Department of the State Government, it has been stated in the order dated 26.07.2018 that by the said order no direction was issued to the Medical Education Department. The State Government, thus, rejected the representation made by the petitioners whereby the prayer was made to treat the petitioner no.2 as Minority Institution. The order dated 26.07.2018, as noticed above, was challenged by the petitioners by filing Writ C No.31941 of 2018 which was withdrawn with liberty to approach the authorities for redressal of the grievances. The said order permitting withdrawal of Writ-C No.31941 of 2018 was passed by this Court on 05.08.2019.

24. As already noticed above, by means of the letters/orders dated 29.01.2019 and 04.02.2019 the Director General Medical Education and Training required the petitioner no.1 to submit its proposal for fixing the fee to be charged by the College for the academic session 2019-20. These orders dated 29.01.2019 and 04.02.2019 were challenged in Writ C No.5612 of 2019 which was dismissed on 05.08.2018 with liberty to approach the authorities for redressal of the grievances. It is the case of the petitioners, as noticed above, that after withdrawal of Writ-C No.31941 of 2018 the petitioners made representation/application to the authorities concerned for redressal of their grievances in terms of the order dated 05.08.2019 passed by this Court, however, no decision was taken and accordingly the order dated 26.07.2018 has been challenged in this writ petition. On 11.05.2020 and 05.10.2020 the Director General Medical Education and Training again required the petitioners to submit the proposal for fixation of fee to be paid by the students pursuing MBBS and BDS courses for the academic session 2020-21. The State Government by means of the order dated 06.11.2020 again determined the fee to be charged by the petitioner-College for the Academic Session 2020-21 from its students pursuing MBBS and BDS courses. These three orders, namely, orders dated 05.10.2020, 07.10.2020 and 06.11.2020 have been challenged in this writ petition.

25. It has been argued by Shri Sudeep Seth, learned Senior Advocate appearing for the petitioners that it is only the National Commission which is empowered to declare status of an institution as Minority Institution for the reason that sections 2 and 3 of U.P. Act no.24 of 2006 clearly exclude the applicability of the said Act so far as the Minority Institutions are concerned. It has further been argued by Shri Seth that so far as the occurrence of the phrase "notified as such by the State

Government" in section 3 (h) of U.P. Act No.24 of 2006 is concerned, once an institution has been declared as Minority Institutionby the National Commission under the Act, 2004 the question of declaration as Minority Institution by the State Government does not arise. He has further argued that U.P. Act No.24 of 2006 not being applicable to Minority Institutions declared under the Act, 2004, which is a central enactment, its status so declared under the Act, 2004 cannot be altered.

26. Shri Sudeep Seth has further argued that so far as the instructions contained in the Government Order dated 28.08.1999 are concerned, after enactment of 2004 Act the same have lost significance for the reason that the Act, 2004 vests power only with the National Commission to declare and decide status of an institution as Minority Institution. He has thus, argued that the Government Orders dated 18.05.2016 and 24.07.2017 were issued not only in compliance of the judgment dated 26.11.2015 passed by a Division Bench of this Court in Special Appeal (Defective) No.522 of 2015 but also in view of the acceptance by the State Government of the authority/power of the National Commission under the Act, 2004 to declare an institution a Minority Institution.

27. Vehemently making the aforesaid submissions, Shri Seth has argued that refusal of the State Government to recognize the petitioner no.2 as Minority Institution and to issue a certificate to the said effect even after declaration having been made by the Central Commission under the Act, 2004, cannot be sustained as the same is in derogation of the statutory authority vested in and available to the National Commission under the Act, 2004.

28. Opposing the writ petition, Shri Sanjay Bhasin, learned counsel representing the Director General Medical Education and Training has vehemently submitted that section 10 of the Act, 2004 though refers to right to establish a Minority Educational Institution and provides that anyone who desires to establish a Minority Educational Institution may apply to the competent authority for the grant of no objection certificate for the said purpose, however, the said provisions of section 10 of the Act, 2004 is subject to the provisions contained in any other law for the time being in force.

29. Shri Bhasin has further argued that section 3(h) of the U.P. Act No.24 of 2006 defines Minority Institution to mean an institution **"established"** and **"administered"** by a minority and notified as such by the State Government. He has, thus, submitted that an institution to quality as Minority Institution should not only be administered by a minority but should also have been established by a minority. He has stated that so far as the petitioner no.2 is concerned, the said medical college was established on permission accorded for the said purpose to the petitioner no.1 by the Central Government in the year 2001 and since then petitioner no.2 has been running the petitioner no.2-Medical College whereas for the first time the petitioner no.1 moved the National Commission for declaring the petitioner no.2 as Minority Institution only in the month of September, 2015 whereupon the Commission by means of the certificate dated 26.04.2018 granted the petitioner no.2, run by the petitioner no.1, the status of Minority Educational Institution. In his submission, Shri Bhasin has urged that Subharti Medical College-petitioner no.2 was established by the Trust as a secular Trust in the year 2001 and the

Trust deed of petitioner no.1 was amended only in the year 2015 and thus the members of petitioner no.1 adopted the minority religion much after establishment of Subharti Medical College-petitioner no.2. It has, thus, been argued that mere adoption of minority religion by the members of petitioner no.1 several years after establishment of the Medical College will not permit the petitioner no.2-Subharit Medical College to be treated as a Minority Institution for the reason that at the time when the petitioner no.2-Medical College was established by the petitioner no.1, the petitioner no.1 was not a Trust comprising of members of any minority community.

30. It has also been argued by Shri Bhasin that though Article 30 of the Constitution of India provides for right of minorities to establish and administer the educational institutions, however, such rights are not available to the petitioner-College for the reason that the institution should not only be administered but should have been established also and in the instant case, admittedly, at the time when the petitioner no.2-Medical College was established, the petitioner no.1 did not comprise of members of Minority Community for the reason that for the first time an alteration in the Trust deed was made in the year 2015 when the board of the trust adopted a minority religion, namely, Bhuddhism.

31. On careful analysis and examination of the submissions made by the learned for the parties, what we find is that right to establish minority education institution as given in section 10 of the Act, 2004 is subject to the provisions contained in any other law in force. Section 10 provides that any person desirous of establishing of a Minority Educational Institution may apply to the competent authority for the grant of no objection certificate for the said purpose. The facts of the instant case, admittedly, are that at the time when petitioner no.2-Medical College was established by the petitioner no.1, members of the petitioner no.1-Trust did not belong to Bhuddhism, a minority; rather the members are said to have adopted Bhuddhism only in the year 2015 and it is only thereafter that in September, 2015 the petitioner no.1 sought and prayed for a declaration from the National Commission under the Act, 2004 to the effect that the petitioner no.2 is a Minority Educational Institution.

32. The Act, 2004 has been in force from 11.11.2004. The petitioner no.2 has been in existence atleast from the year 2001 when the permission was accorded by the Central Government to the petitioner no.1 to establish the Medical College. From 11.11.2004 i.e. from the date 2004 Act was brought in force, till September, 2015 the petitioner no.1 did not seek any declaration from the National Commission that the petitioner no.2 is a Minority Educational Institution.

33. The definition of the word "Minority Educational Institution" as given in section 2(g) provides that an institution shall be Minority Educational Institution if it is established and administered by a minority or minorities. Thus, mere administration of an educational institution by minority or minorities is not sufficient or enough to declare such an Educational Institution to be a Minority Educational Institution even within the meaning of section 2(g) of the Act, 2004. In the instant case at the time when the petitioner no.2 was established, the petitioner no.1, on its own showing was not a minority. Merely

because after the members of the Trust-petitioner no.1 adopted Bhuddhism and thus the petitioner no.1 became minority and it has since been administering the petitioner no.2, petitioner no.2 will not become a Minority Educational Institution for the reason that it was established at a time when admittedly the petitioner no.1 was not a minority which is said to have become minority only in the year 2015.

34. As already observed above, mere administration of an Educational Institution by a minority will not confer on such educational institution status of a Minority Educational Institution in terms of section 2 (g) of the Act, 2004. Further, section 10 of the said Act, 2004 provides that a person who desires to establish a Minority Educational Institution may apply for grant of no objection certificate for the said purpose. Section 10, thus, does not permit any application to be moved by a person who did not establish a Minority Educational Institution; rather is only administering a Minority Institution, to seek grant of no objection certificate.

35. We may also note that the Act, 2004 was enacted by the Parliament for a purpose different than the purpose for which U.P. Act No.24 of 2006 has been enacted by the State Legislature. The purpose of enactment 2004 Act was to constitute a National Commission for Minority Educational Institutions and to provide for matters connected therewith or incidental thereto, whereas the purpose of enacting U.P. Act No.24 of 2006 was to provide for regulation of admission and fixation of fee in private professional educational institutions and the matters connected therewith or incidental thereto. U.P. Act No.24 of 2006 excludes a Minority Institution from purview of its operation which, as observed above, operates to regulate admission and fixation of fee in private educational institutions.

36. What will be a Minority Institution for the purposes of U.P. Act No.24 of 2006 can be found in section 2(h) where Minority Institution has been defined to mean an institution established and administered by a minority and notified as such by the State Government. Thus for an institution to qualify a Minority Institution within the meaning of U.P. Act No.24 of 2006, it should be an institution not only being administered by a minority but it also ought to have been established by the minority and it should also be notified by the State as such. Thus, in terms of the provisions contained in section 2(h) of U.P. Act No.24 of 2006 there are three conditions for an institution to qualify as minority institution. The conditions are (i) that the institution should have been established by a minority, (ii) the institution should be administered by a minority and (iii) the institution should be notified as such by the State Government.

37. As already noticed above, the respondent no.2 was established at a time when the petitioner no.1 was not a minority as it became minority only in the year 2015. The petitioner no.1 currently said to be a minority since the year 2015 though at the time of establishment of petitioner no. 2, it was not a minority and hence the petitioner 2 will, in our considered opinion, not qualify to be a Minority Institution within U.P. Act No.24 of 2006. Once an institution does not qualify to be a Minority Institution under U.P. Act no.24 of 2006, it is difficult for us to hold that such an institution, despite being administered currently but was not established by a minority, will be excluded from operation

of U.P. Act No.24 of 2006. Establishing an institution and administering it are two different happenings. If a society or a Trust did not comprise of members of any Minority Community (either linguistic or religious) at the time when it established an educational institution and subsequently attains the status of a minority and starts administering such an institution, in our considered opinion, in such a situation the educational institution concerned will neither be a Minority Institution within U.P. Act No.24 of 2006, nor shall it be Minority Educational Institution within Act, 2004.

38. For the reasons given and discussion made above, we do not find any illegality in the decision of the State Government not to treat the petitioner no.2 as Minority Institution so as to exclude it from the purview of U.P. Act No.24 of 2006 and accordingly we also do not see any illegality in the orders dated 05.10.2010 and 07.10.2010 whereby the Director General Medical Education and Training had sought the proposal from the petitioner no.2 for the purposes of fixation of fee to be charged from the students pursuing their MBBS and BDS Courses for the academic year 2020-21. For these reasons, we also do not find any illegality in the impugned order dated 06.11.2020 passed by the State Government in the Department of Medical Education whereby fee to be charged from its students was fixed.

39. For all the reasons given above, we are unable to agree with the submissions made by the learned counsel for the petitioners. Accordingly, we find that the instant writ petition lacks merit.

40. Resultantly, the writ petition is hereby **dismissed.**

41. There will be no order as to costs.

(2022) 9 ILRA 1075
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.09.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Capital Case No. 3 of 2017
Along with
Criminal Appeal No. 1540 of 2017 with 1552 of 2017

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

Counsel for the Appellant:
Govt. Advocate

Counsel for the Respondent:
Manjusha Kapil

(A) Criminal Law – Criminal Procedure Code,1973 - Sections 313, 354(3), 366(1), 374(2) & 415 - Indian Penal Code, 1860 -Sections 201, 302, 304 & 323 – Evidence Act, 1872 - Section – 134, - Allahabad High Court Rules, 1952 - Rule 45 of Chapter XVIII - Conviction and Sentenced - Capital sentence - reference and criminal appeals - offence of Murdered of six persons inflicting injuries using an axe - Defence of plea of retaliation - Appreciation of evidence - allegation that convicted appellant on the account of illicit relationship with his *Bhabhi*, accused murdered his wife and three minor children as well as informant's wife and one minor child and also assaulted informant's daughter - contradictory stand was taken by the Defence witnesses - as well as convict/appellant admitted/supported the testimonies of PW2 under section 313 - testimony of defence witness not reliable - plea not acceptable. (Para 46, 53, 55)

(B) Criminal Law – Criminal Procedure Code, 1973 - Sections 313, 354(3), 366(1), 374(2) & 415 - Indian Penal Code, 1860 -Sections 201, 302, 304 & 323 – Evidence Act,1872 - Section – 134, - Allahabad High Court Rules, 1952 - Rule 45 of Chapter XVIII - Conviction and Sentenced - Capital sentence - reference and two criminal appeals from accused & co-accused - offence of Murdered of six persons by using an axe - Appreciation of evidence - Examination of prosecution witnesses - FIR lodges promptly, - illicit relationship with his *Bhabhi* (co-accused) & quarrels with his wife proves motive - recovery of weapon 'axe' was recovered on the pointing out of accused & co-accused, at that time blood was found on axe, - inquest report, site plan and arrest on same day was also proved - medical evidence showed that all the deceased were done to death on same day & time and injuries found on the body of deceased persons could be caused with recovered weapon 'axe' - further, no contradiction in testimonies of Eye-witnesses - merely because injured witness & eye-witnesses are related witnesses their testimonies could not be rejected unless any material, - prosecution proved that the accused in a pre-meditated manner armed with 'axe' caused death of six person and assault to one person by inflicting fatal injuries - conviction proper. (Para 63, 67, 74, 75, 76)

(C) Criminal Law – Criminal Procedure Code, Section - 313, 354(3), 366(1), 374(2), 415 - Indian Penal Code, Section – 201, 302, 304, 323 – Evidence Act, Section – 134, - Allahabad High Court Rules, 1952 - Rule 45 of Chapter XVIII - Conviction and Sentenced - Death Penalty - reference for confirmation - offence of murdered was committed when convict has illicit relationship with his Bhabhi - for quench his thirst he murdered his wife & three minor children including his neighbour/informant's wife & minor child in most brutal, grotesque, diabolical and dastardly manner - the magnitude of crime places the present incident in the category of anti-social or socially abhorrent nature of crime which calls for an exemplary punishment - balancing mitigating and aggravating circumstances high court finds that instant case can be said to in the category of 'rarest of rare' case and hence death penalty is liable to be confirmed. (Para 95, 96, 97)

(D) Criminal Law – Criminal Procedure Code, Section - 313, 354(3), 366(1), 374(2), 415 - Indian Penal Code, Section – 201, 302, 304, 323 – Evidence Act, Section – 134, - Allahabad High Court Rules, 1952 - Rule 45 of Chapter XVIII - Conviction and Sentenced - Death Penalty - reference for confirmation - execution of sentence - until the disposal of the appeal as provided under section 415 Cr.P.C. the execution of sentence is postponed - punishment shall be executed in accordance with law laid down by the Hon'ble Apex Court time and again.

Capital Case is allowed & both the Criminal Appeals are dismissed. (E-11)

List of Cases cited:

1. Bachan Singh Vs St. of Punj., AIR 1980 SC 898,

2. Bipin Kumar Mondal Vs St. of W.B., (2010) 12 SCC 91,

3. Abdul Sayeed Vs St. of M.P., (2010) 10 SCC 259,

4. Namdeo Vs St. of Mah. : (2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773,

5. Gulam Sarbar Vs St. of Bihar : (2014) 3 SCC 401,

6. Furman Vs Georgia, (1972) SCC On-Line US SC 171,

7. Machhi Singh Vs St. of Punj., (1983) 3 SCC 470,

8. Haresh Mohandas Rajput Vs St. of Mah. : (2011) 12 SCC 56,

9. Ramnaresh& ors. Vs St. of Chhattisgarh, (2012) 4 SCC 257,

10. Dharam Deo Yadav Vs St. of UP, (2014) 5 SCC 509,

11. Kalu Khan Vs St. of Raj., (2015) 16 SCC 492,

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

(A) **INTRODUCTION**

1. Two accused, namely, **Sarvan** and **Smt. Suman**, were tried by the Special Judge, C.B.I. Court No.2/Additional Sessions Judge, Lucknow in Sessions Trial No 754 of 2009 : *State Vs. Sarvan and another*, arising out of Case Crime No. 265 of 2009, under Sections 302, 201 of the Indian Penal Code, 1860 (in short, referred hereinafter as **''I.P.C.'**), Police Station Mohanlalganj, District Lucknow.

2. Vide judgment and order dated 29.08.2017, the Special Judge, C.B.I. Court No.2/Additional Sessions Judge, Lucknow, convicted and sentenced accused, **Sarvan** and **Smt. Suman**, in the manner as stated hereinbelow :-

"**Accused Sarvan**

I. Under Section 323 I.P.C. to undergo one year's rigorous imprisonment;

II. Under Section 201 I.P.C. to undergo four years' R.I. and a fine of Rs.2000/-. In default of payment of fine to undergo additional one month's imprisonment; and

III. Under section 302 I.P.C. to be hanged to death till he is dead and fine of Rs.5000/-. In default of payment of fine to undergo additional five months' imprisonment.

Accused Smt. Suman

I. Under section 201 I.P.C. to undergo four years' rigorous imprisonment and a fine of Rs.2000/-. In default of payment of fine to undergo additional one month's imprisonment.

All the sentences were directed to run concurrently and the period of incarceration was directed to be set off against the sentence of imprisonment.

3 . Aggrieved with their aforesaid conviction and sentences, accused **Smt. Suman** has preferred Criminal Appeal No. 1540 of 2017 : *Smt. Suman vs. State*, whereas accused **Sarvan** preferred Criminal Appeal No. 1552 of 2017 : *Sarvan Vs. State.*

4. Capital Case No. 3 of 2017 arises out of the Reference made by the learned trial Court under Section 366 (1) of the Code of Criminal Procedure, 1973 to this Court for confirmation of the death sentence of convict/appellant **Sarvan**.

5. Since the above-captioned capital sentence reference and criminal appeals arise out of a common factual matrix and impugned judgment dated 29.08.2017, this Court proceeds to decide the same by the common judgment.

(B) **CASE OF THE PROSECUTION**

6. The informant Kolai (P.W.1) was resident of Village Gaura, Police Station Mohanlalganj, District Lucknow. In front of his house, the house of Sarvan (convict/appellant) was situated. It has been alleged by the informant Kolai (P.W.1) that a gossip/talk spread throughout the village that Sarvan (convict/appellant) had an illicit relationship with his *bhabhi* (sister-in-law) Suman, on account of which, there was a lot of quarrel between Sarvan (convict/appellant) and his wife Smt. Santoshi (deceased). Often this quarrel escalated and Sarvan (convict/ appellant) would beat his wife (deceased Santoshi). Smt. Madhuri (informant's wife) would usually intervene in such situation to protect Santoshi (deceased), because of

which, Sarvan (convict/appellant) remained angry with Smt. Madhuri (informant's wife).

In the morning of 25.04.2009, at 06:30 a.m., altercation took place between Sarvan (convict/appellant) and his wife (deceased Santoshi). After that a sound of shouting came from Sarvan's (convict/appellant) house. Sarvan (convict/ appellant), while yelling inside his house, told his wife Santoshi (deceased) that "मै आज तुझे व तेरे बच्चो को जिन्दा नही छोडुगाा" *(today he would not leave her and her children alive)* and the wife of Sarvan (deceased Santoshi) was screaming to save her. On hearing the screams, Smt. Madhuri (informant's wife) ran to save her (deceased-Santoshi). At that moment, Sarvan (convict/appellant) armed with blood stained "axe' came out of his house saying to Smt. Madhuri (wife of the informant) that "सन्तोषी व तीनो बच्चो को आज ठिकाने लगा दिया है तु बहुत बीच बचाव करती है" *(he had put Santoshi and three children in their place and you intervene a lot).* Saying this, Sarvan (convict/appellant) assaulted Madhuri (informant's wife) with the same "axe' many times, as a consequence of which, Madhuri (informant's wife), while sustaining injuries, fell down on the *khadanja* (dirt road) and succumbed to her injuries on the spot. When Rajendra (informant's son) and Sangeeta (informant's daughter) ran to save their mother Madhuri (deceased), Sarvan (convict/ appellant) also assaulted and injured them.

7. Thereafter, informant Kolai (P.W.1) got the FIR scribed by one person, namely, Sewak, who after scribing read it over to him. He, thereafter, affixed his thumb impression on it and then proceeded to Police Station Mohanlalganj, where he lodged it.

8. The evidence of S.I. Anand Kumar Pandey (P.W. 8) shows that on the date of the incident i.e. on 25.04.2009, he was posted as Head Moharrir at Police Station Mohanlalganj. On the said date, at 07:30 a.m., informant Kolai (P.W.1) came to the police station Mohanlalganj and filed written report (Ext. Ka.1), on the basis of which, he prepared the chik FIR (Ext. Ka.9) and on the basis of which F.I.R. was registered against the accused.

In cross-examination, P.W.8 S.I. Anand Kumar Pandey had deposed before the trial Court that informant Kolai (P.W.1) and injured Sangeeta came to the police station Mohanlalganj with a written report. The informant Kolai (P.W.1) had handed over the written report to him on 25.04.2009 at 07:30 a.m. and at that time, S.H.O. Ashok Kumar Shukla was present at the police station. On the basis of the written report, the F.I.R. was registered by him. He further deposed that he prepared *Chithi Mazroobi* (letter for medical examination) for medical examination of injured Sangeeta. Except injured Sangeeta, no other injured or villager came along with informant Kolai (P.W.1) at the police station nor were brought for medical examination. At that time, Sangeeta (injured) was aged about 18 years. He further deposed that immediately after lodging the F.I.R., S.H.O. along with police personnel went to the place of occurrence at about 07:30 a.m. He denied that he gave false evidence under pressure. He also denied that informant (P.W.1) did not come along with scribed written report but it was written at police station.

9. A perusal of the chik FIR (Ext. Ka.9) shows that the distance between the place of incident and Police Station Mohanlalganj was three kilometers. It is significant to mention that a perusal of the chik FIR also shows that on its basis, a case

under Section 302 I.P.C. was registered against Sarvan (convict/ appellant).

10. It is pertinent to mention here that the investigation of the instant case was conducted by In-charge Inspector Shri Ashok Kumar Shukla but he was not examined by the prosecution as he died on 29.05.2014 during pendency of the trial. In order to prove the death of the Investigating Officer Shri Ashok Kumar Shukla, C.W.1-Constable CP 840 Sri Satish Kumar Kushwaha was examined, whose evidence shows that since 2013, he was posted as Constable at police station Mohanlalganj. He stated that S.I. Shri Ashok Kumar Shukla had conducted the investigation of the instant case and he (C.W.1) himself went as special messenger to serve summon notice to S.I. Shri Ashok Kumar Shukla. He had also filed the report in the Court wherein it was mentioned that S.I. Ashok Kumar Shukla died on 29.05.2014. He proved the said report (Ext. Ka. 16)

11. The evidence of P.W.12-S.I. Ram Vishal Suman shows that on 25.04.2009, he was posted as Sub-Inspector at Police Station Mohanlalganj. On the said date, he was accompanied with In-Charge Inspector Shri Ashok Kumar Shukla and on his direction, he went to village Gaura and prepared the *"panchayatnama'* of the dead bodies of Smt. Santoshi, w/o Sarvan aged 35 years (Ext. Ka.17), Ramroop s/o Sarvan aged 6 years (Ext. Ka. 18), Sumiran d/o Sarvan aged 4 years (Ext. Ka.19), Ravi son of Sarvan aged 1½ years (Ext. Ka.20) under his handwriting, upon which there was signature of the Investigating Officer Ashok Kumar Shukla. On the said date also, on the direction of Investigating Officer, *"panchayatnama'* of the dead body of deceased Madhuri (informant's wife) (Ext. Ka.20) was prepared by S.I. Dhrampal Singh (P.W.13), upon which there was signature of the Investigating Officer Shri Ashok Kumar Shukla. He further deposed that Dharmpal Singh (P.W.13) was posted along with him at police station Mohanlalganj, therefore, he knew his signature and handwriting.

P.W.12 had further deposed that in his presence, dead-bodies of the deceased were sealed and sent for post-mortem. He proved the signature of the Investigating Officer Ashok Kumar Shukla on Police Form No.13 (deceased Ravi, Ramroop, Madhuri, Sumiran, Santoshi) as Ext. Ka. 22 to Ext. Ka. 26. He also proved the photo lash (Paper nos. A14/1 to A14/5) prepared by the Investigating Officer Shri Ashok Kumar Shukla. He also proved the specimen seal of the dead bodies of the deceased (Paper Nos. A15/1, A15/2, A15/3, A15/5 and A15/6) prepared by the Investigating Officer Shri Ashok Kumar Shukla as Ext. Ka. 27 to Ext. Ka.31. He also proved the recovery memos (Ext. Ka. 32 to Ext. Ka.36) of blood stained soil and plain soil collected from the different places by S.I. Shri Dharmpal Singh (P.W.13), upon which there was signature of Shri Ashok Kumar Shukla.

In cross-examination, P.W.12 had deposed that proceedings of *"panchayatnama'* were conducted in his presence and at that time, he, Investigating Officer Shri Ashok Kumar Shukla, Shri Dharm Pal Singh, S.S.I. Shri P.K. Khare, other police personnel and villagers were present. He deposed that he prepared the *"panchayatnama'* in his own handwriting on the direction and dictation of the Investigating Officer. He denied that he gave false evidence.

12. The evidence of P.W.13-S.I. Shri Dharam Pal Singh shows that on 24.04.2009, he was posted as Sub-Inspector

at police station Mohanlalganj. On the said date, he was accompanied with Investigating Officer Shri Ashok Kumar Shukla. On 26.04.2009, the "axe' used in commission of crime was recovered in his presence on the pointing out of accused Sarvan and the recovery memo of it was prepared by him on the dictation of the Investigating Officer Shri Ashok Kumar Shukla. On the same date, Suman (convict/appellant no.1) was arrested from her house. He proved the recovery memo of "axe' as well as arrest of Suman (convict/appellant no.1) as Ext. Ka. 39. The site plan of the recovery of "axe' (Ext. Ka.40) was prepared by the Investigating Officer under his handwriting and signature. He also proved the site plan of the place of the occurrence (Ext. Ka.41) prepared by the Investigating Officer. He prepared the charge-sheet (Ext. Ka.42) on the dictation of the Investigating Officer under his handwriting and signature.

13. The evidence of P.W.10-Sri Balkrishna Singh shows that he was doing the work of agriculture. He was living in the village where the incident occurred. The *"panchayatnama'* of the dead-bodies of children of Sarvan, namely, Ravi, aged about 1½ years, Sumiran aged 4 years, Ramroop aged 5 years and his wife Santoshi aged 35 years were conducted at the house of Sarvan in his presence, whereas *"panchayatnama'* of the dead-body of Madhuri wife of Kolai aged 50 years was conducted on *khadanja* (dirt road) outside the house of Sarvan. The injuries of "axe' were on the bodies of the deceased. He proved his signature on *"panchayatnama'*. The dead-bodies were sent for post-mortem. The proceeding for *"panchayatnama'* started at 09:00 a.m. on 25.04.2009 and it continued for about 1-1½ hours. On the said date also, the Inspector had collected blood stained soil and plain soil in containers from both the places i.e. from the place where the dead-body of Madhuri was lying and from the courtyard of the house of Sarvan where the dead-bodies were lying, under recovery memo. On seeing the recovery memos, he proved his signature thereon.

In cross-examination, P.W.10 had deposed that his house was at a distance of 300-400 meters from the house of Sarvan. On the date of the incident, he was present in his house. He knew Sarvan from childhood, who was doing the work of Labour. He did not know whether on the date of the incident, Sarvan had gone for work or not nor he knew whether psychiatric treatment of Sarvan was going on somewhere or not. He did not know whether any quarrel of Sarvan took place with his neighbour Kolai. He stated that on the date of *"panchayatnama'* , he was present at the place of the incident. Apart from him, the signature of Pramod, Sambhoo, Banwari Ghasitey etc. were also taken in the *"panchayatnama'*. He could not say whose *"panchayatnama'* was done at hospital nor he could tell the reason for the incident. The signature of none of the family members of Kolai (P.W.1) was taken on the *"panchayatnama'* in his presence nor Kolai (P.W.1) and his family members were interrogated in his presence. The sons and daughters of Kolai were present at the place of occurrence. He denied the suggestion that incident occurred in his presence and also after preparation of *"panchayatnama'*, it was not read over to him and only his signature was taken thereon.

14. The injury of injured Sangeeta was examined on 25.04.2009 at 02:20 p.m. in Community Health Centre, Mohanlalganj, Lucknow by Dr. Shailendra

Kumar Dwivedi (P.W.4), who found on her person the following injuries :-

"Injury of injured Sangeeta, daughter of Kolai, aged about 16 years

L.W. 1.5 cm x 0.25 cm x skin deep. Left side of Arm, ant. aspect, 1.5 cm above left elbow joint. Clotted blood seen."

15. P.W.4-Dr. Shailendra Kumar Dwivedi, in his examination-in-chief, had reiterated the aforesaid injury and had deposed that on 25.04.2009, he was posted as Medical Officer at Community Health Centre, Mohanalalganj, Lucknow. On the said date, at 02.20 p.m., he examined the injury of injured Km. Sangeeta aged 16 years, who was brought by Woman Constable No. 2997 Anita Kashyap and Constable 2926 Rajesh Kumar Shukla of police station Mohanlalganj, Lucknow. He further deposed that after examining the injured Km. Sangeeta, he found that the injury was simple in nature; it could be caused by blunt and hard object; and it was half day's old. He stated that the injury on her person could be attributable from the back of the "axe' on 25.04.2009 at 06:30 a.m.

In cross-examination, P.W.4 had deposed that the medical examination of injured Km. Sangeeta was conducted on 25.04.2009 at 02:20 p.m. The injury occurred on her person could be 12-14 hours old and it could be attributable to falling on hard object but it was not from a sharp edged weapon. He further deposed that injury could be caused by falling upon *kharanja* (dirt road) and it could also be caused by lathi, danda but it could not be a self-inflicted injury.

16. The post-mortem examination of the dead-bodies of the deceased Ramroop, Smt. Santoshi and Ravi were conducted on 25.04.2009 at 08:30 p.m., 08:00 p.m and 09:30 p.m., respectively, at T.B. Hospital, Thakurganj, Lucknow by Dr. G.P. Tiwari (P.W.6), who found the ante-mortem injuries on their persons as enumerated hereinafter :-

"(I) Ante-mortem injuries of Ramroop, son of Sarvan, aged about 6 years

1. Abraded contusion 6 x 5 cm on Rt. side of face just below Rt. eye.;

2. Abrasion 3 x 1 cm on Rt. side of forehead 1 cm above Rt. eyebrow;

3. Incised wound 5 x 3 cm muscle deep on the side of neck 3 cm below Rt. ear, margins clear cut, sharp, well defined on opening echymosis present under neath all above injuries, soft tissues & large blood vessels, carotid Rt. cut.

(II) Ante-mortem injuries of Santoshi, wife of Sarvan, aged about 35 years

1. Abraded contusion 8 x 6 cm on Rt. side of face 1 cm below Rt. eye;

2. Incised wound 8 x 3 cm muscle deep on top of Rt. shoulder;

3. Incised wound 3 x 1 cm, muscle deep present on front of neck 2 cm above top of sternum;

4. Incised wound 4 x 2 cm, muscle deep present on front of neck 2 cm above injury no.3;

5. Incised wound 7 x 3 cm, muscle deep on front of neck 2 cm above injury no.4.

6. Incised wound 3 x 2 cm on top of Lt. shoulder.

All above injuries contain clear cut & well defined margin on opening echymosis present underneath above injuries. Soft tissues & large blood vessels larynx, trachea are cut.

(III) Ante-mortem injuries of Ravi son of Sarvan aged about 1½ years

1. Incised wound 3 x 1 cm muscle deep on back of neck 2 cm below occipital;

2. I.W. 1 x 1 cm on mid of chest;

3. Abraded contusions 6 x 4 cm on forehead 2 cm above root of nose. Margins are clean, sharp, well defined. On opening echymosis present underneath soft tissues & blood vessels clear cut.

The cause of death spelt out in the autopsy report of the deceased Ramroop, Santoshi and Ravi was due to shock and haemorrhage as a result of ante-mortem injuries.

17. It is significant to mention that P.W.6-Dr. G.P. Tiwari, in his examination-in-chief, had reiterated the aforesaid cause of death of deceased Ramroop, Santoshi and Ravi and had deposed that on 25.04.2009, he was posted as Medical Officer in T.B. Hospital, Thakurganj, Lucknow. On the said date, he was nominated by the District Magistrate to conduct post-mortem examination in artificial light, of the dead-bodies of deceased Ramroop, Santoshi and Ravi, which were brought in a sealed condition by Constable 130 Mohd. Shamim and Constable 129 Brij Kishore Patel of police station Mohanlalganj, Lucknow. He further deposed that on external examination of the dead-body of deceased Ramroop son of Sarvan, he found that deceased Ramroop was aged about six years; his physique was normal; rigor mortis on his both the hands and legs were present; his both eyes were closed; and his mouth was half opened. On internal examination of deceased Ramroop, he found that his brain and membranes were pale; his spinal cord, ribs, lungs, larynx, trachea, bronchi etc. were normal; his both chambers of heart were empty; his peritoneum was pale; his teeth was 8/9; in his stomach, 100 ml. semi digested food was present; in his small intestine, digested food and gas were present; in his large intestine, faecal matter and gases were present; his liver was 450 gm and was pale; his gall bladder was half full; his pancreas and spleen was pale; his both the kidneys were also pale; and his urinary bladder was empty. He further deposed that the ante-mortem injuries of the deceased Ramroop could be attributable on 25.04.2009 at 06:30 a.m. by a sharp edged weapon.

P.W.6-Dr. G.P. Tiwari had also stated that on internal examination of the deceased Smt. Santoshi, he found that her physique was normal; rigor mortis was present on her whole body; her eyes were closed; and her mouth was half opened. On internal examination of the deceased Smt. Santoshi, he found that her scalp and skull were normal; her membranes and brain were pale; her base and vertebrae were normal; ribs, cartilages, pleura were normal; her both the lungs and pericardium were pale; her both portion of heart were empty; her peritoneum was pale; her teeth was 16/16; in her stomach, 200 ml. semi digested food was present; in her small intestine, digested food and gas was present; in her large intestine, faecal matter and gases were present; her liver was pale and was 1100 gm; her gall bladder was half full; her pancreas, spleen and both the kidneys were pale; and her urinary bladder was empty. He further deposed that injuries of deceased Smt. Santoshi could be attributable on 24.04.2009 at 06:30 a.m. by sharp edged weapon. He proved ante-mortem injuries of Smt. Santoshi as Ext. Ka. 6.

P.W.6 had further deposed that on external examination of the deceased Ravi, he found that his physique was average; rigor mortis was present over his whole body; his eyes were closed; and his mouth was half opened. On internal examination of the deceased Ravi, he found

that his brain membrane was pale; his outer membrane of lungs was pale; his both the lungs were also pale; his pericardium was also pale; his both the chambers of heart were empty; his teeth was 6/6; in his stomach, 50 ml. fluid was present; his liver and both the kidneys were pale; and his urinary bladder was empty. He proved the post-mortem report of Ravi as Ext. Ka. 7.

In cross-examination, P.W.6 had deposed that he conducted the post-mortem examination of deceased in the light of Petromax Gas. All the injuries of the deceased have been sustained about the same time. He further deposed that it was not possible to ascertain that the injuries inflicted by sharp edged weapon was attributable by same weapon or by different weapons. He further deposed that he conducted the post-mortem examination of the deceased Ramroop, Ravi and Smt. Santoshi. At the time of post-mortem, Dr. Ravi Awasthi was also along with him. He found three ante-mortem injuries on the dead body of the deceased Ravi. He deposed that injury no.1 caused to the deceased Ravi was attributable by sharp edged weapon; and injury no.1 of the deceased Ravi could be caused by banka or hasiya or from falling upon sharp edged iron. He reiterated the same opinion in respect of injury no.2 caused to the deceased Ravi. However, injury no.3 caused to the deceased Ravi could be attributable by blunt object like danda. All three injuries caused to the deceased Ravi were lethal.

P.W.6, in his cross-examination, had further deposed that he found six ante-mortem injuries on the dead body of the deceased Santoshi. He deposed that injury no.1 caused to the deceased Santoshi could be attributable by a blunt object like lathi, danda and her injury no.2 could be attributable by a sharp edged weapon like hasiya, banka etc. He reiterated the same opinion in respect of other injuries caused to the deceased Santoshi. He further deposed that he found three injuries on the body of the deceased Ramroop. He deposed that injury no.1 caused to the deceased Ramroop could be attributable due to friction against any hard surface, whereas injuries no. 2 and 3 could be attributable by sharp edged weapon like hasiya and banka etc. The Investigating Officer did not record his statement with regard to post-mortem examination of the deceased.

18. The post-mortem examination of the dead-bodies of the deceased Sumiran and Smt. Madhuri was conducted on 25.04.2009 at 08:30 p.m. and 09:00 p.m., respectively, in T.B. Hospital, Thakurganj, Luckow by Dr. Rajesh Awasthi (P.W.9), who found the ante-mortem injuries on their person enumerated hereinafter :-

"(I) Ante-mortem injury of Sumiran daughter of Sarvan aged about 4 years

Lacerated wound in the back of neck trachea, larynx, vessels, oesophagus lacerated.

The cause of death spelt out in the autopsy report of the deceased Sumiran was due to shock and haemorrhage as a result of ante-mortem injuries.

(II) Ante-mortem injury of Smt. Madhuri, wife of Kolai aged about 50 years

1. Lacerated wound 6 x 3 cm on the frontal and occipital region on exploration underneath bone fracture. haematoma in brain, margins lacerated and haematoma present.

2. Lacerated Rt. eye 6 x 2 cm into bone deep underneath orbit bone fracture. Brain membranes lacerated;

3. Lacerated wound 7 x 3 Rt. cheek bone underneath bone fracture;

4. Lt. ear lacerated;

5. Lacerated wound Rt. wrist joint."

The cause of death spelt out in the autopsy report of the deceased Smt. Madhuri was due to shock and hemorrhage as a result of ante-mortem injury no. 4.

19. It is significant to mention here that P.W.9-Dr. Rajesh Awasthi had reiterated the aforesaid cause of death of the deceased Sumiran and Smt. Madhuri before the trial Court and had further deposed, in his examination-in-chief, before the trial Court that on 25.04.2009, he was posted as Medical Officer in T.B. Hospital. On that date, on the direction of the District Magistrate, he conducted the post-mortem examination of the dead bodies of deceased Sumiran d/o Sarvan aged about 04 years and deceased Smt. Madhuri, w/o Kolai, which were brought by C.P. 1301 Mohd. Shamim and C.P. 129 Braj Kishore Patel of police station Mohanlalganj. He deposed that on external examination of deceased Sumiran, he found that rigor mortis was present over her upper and lower parts of the body; and the deceased Sumiran died on account of ante-mortem injuries caused to her. He deposed that the deceased Sumiran could have died before 6-12 hours of the post-mortem. He proved the post-mortem report of the deceased Sumiran and Smt. Madhuri as Ext. Ka. 11 and Ext. Ka. 12, respectively.

In cross-examination, P.W.9 had deposed that ante-mortem injury caused to deceased Sumiran could be attributable by sharp edged weapon and she could have died before six hours of the post-mortem. He further deposed that injury no.1 caused to the deceased Madhuri could be attributable by sharp edged weapon; injury no.1 could also be attributable by blunt object; injury no.2 could be attributable by any weapon, however, injury was lacerated; injuries no. 3, 4 and 5 could be attributable by blunt object. The injuries caused to the deceased Madhuri could be attributable before 12 hours of the post-mortem.

20. It is pertinent to mention that during the incident, son of the informant (P.W.1), namely, Rajendra, also sustained injuries in the incident. On the date of the incident, Rajendra was admitted in Trauma Centre, Lucknow by the police. During his treatment, Rajendra aged about 10 years died on 03.05.2009 in the night. After the death of Rajendra, informant (P.W.1) gave information about the death of his son Rajendra to the police on 06.05.2009 (Ext. Ka.2).

21 . The evidence of P.W.11-Sri Pramhans Prasad shows that on 04.05.2009, he was posted as Sub-Inspector at Medical College Chowki of police station Chowk. On the information of S/A Monu Kumar, he and Constable Chandrika Prasad reached Medical College Mortuary along with requisite papers at 09:40 O'clock. The dead-body of the deceased Rajendra aged about 10 years was in mortuary, wherein the family members of the deceased Rajendra were also present. The *"panchayatnama'* of the dead body of the deceased Rajendra was prepared by him.

In cross-examination, P.W.11 had deposed that he only conducted the *"panchayatnama'* of the dead body of the deceased Rajendra, which started at 09:40 a.m. and ended it at 10:10 a.m.. The family members of the deceased Rajendra, who

were present there, had put their signature in the *"panchayatnama'*, which was written on spot.

22. P.W.7-Guddu, who is the real brother of the deceased Rajendra, in his examination-in-chief, had deposed that deceased Rajendra was aged about 10 years. The *"panchayatnama'* of the dead body of the deceased Rajendra was conducted by the Inspector at Medical College Mortuary in his presence on 04.05.2009 at 10:00 a.m. The *panchayatnama* was written in his presence and it was read over to him by the Inspector and after that he put his signature thereon.

In cross-examination, P.W.7-Guddu had deposed that on 04.05.2009, *"panchayatnama'* was made and at that time, he (Guddu), Inspector, Sangeeta (injured), Ram Naresh and Adesh were present. In the *panchayatnama*, he put his signature and four persons also affixed their thumb impression. He further deposed that there were about 6-7 injuries on the head of the deceased Rajendra.

23. The post-mortem examination of the dead body of the deceased Rajendra was conducted on 04.05.2009 at 01:00 p.m. in Balrampur Hospital, Lucknow by Dr. U.K. Prasad (P.W.5), who found the ante-mortem injuries on his person enumerated hereinafter :-

"Ante-mortem injuries of deceased Rajendra, son of Kolai

1. Contusion 8.0 cm x 5.0 cm present on forehead 2.0 cm above root of nose.

2. Contusion 10.0 cm x 8.0 cm present on back of head over occipital region.

3. Contusion 5.0 cm x 4.0 cm present on Rt. temporal region 2.0 cm above Rt. ear. On opening echchymosis present underneath above mentioned injuries. Fracture of Rt. temporal, Rt. parietal bones present and subdural haematoma present all over the brain underneath the fracture brain meninges lacerated & extra dural haematoma present.

The cause of death spelt out in the autopsy report of the deceased Rajendra was coma as a result of ante-mortem head injuries.

24. It is significant to mention here that P.W.5-Dr. U.K. Prasad, in his examination-in-chief, had reiterated the aforesaid cause of death of the deceased Rajendra before the trial Court and had further deposed that on 04.05.2009, he was posted as Senior Surgeon at Balrampur Hospital, Lucknow. On the same date, at about 01:00 p.m., he conducted the post-mortem of the unsealed body of the deceased Rajendra aged about 10 years, which was brought and identified by C.P. 2666 Chandrika Prasad of Police Station Chowk, Lucknow. The deceased Rajendra died at Gandhi Memorial & Associated Hospital on 03.05.2009 at 08:40 p.m. He further deposed that on external examination of the dead body of the deceased Rajendra, he found that his physique was average; rigor mortis was present all over his body; P.M. staining was present on his back; tracheotomy tube was present in his neck; I.V. cannula was present on his right wrist joint; ryles tube was present on his right nostril; eyes were closed; and mouth was half open. On internal examination, he found that brain membrane was torn; pleura, both lungs and pericardium were congested; left chamber of heart was empty; right chamber of heart was empty; in the stomach, 60 ml fluid was present; in the small intestine, digested food and gas were present; in the large

intestine, faecal matter and gases were present; liver was 850 gms and was congested; his gall bladder was half full; his pancreas was congested; his spleen was 90 gms and was congested; both the kidneys were 125 gms and was congested; urinary bladder was empty; and the organ of generation was normal. He further deposed that it was difficult to say how old are the injuries but injuries could be attributable from back of the "axe'. He proved the post-mortem report (Ext. Ka. 4).

In cross-examination, P.W.5 had deposed that injuries could be attributable from back of the "axe'.

25. The case was committed to the Court of Sessions in usual manner where the convicts/appellants were charged for the offence punishable under Sections 302, 323, 201 I.P.C.. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

26. During trial, the prosecution, in order to prove its case, had examined thirteen witnesses viz. P.W.1-Kolai (informant); P.W.2-Sangeeta (injured), daughter of the informant and deceased Madhuri; P.W.3-Ram Naresh, son-in-law of the informant (P.W.1); P.W.4-Dr. Shailendra Kumar Dwivedi, who conducted the medical examination of injured Sangeeta (P.W.2); P.W.5-Dr. U.K. Prasad, who conducted the post-mortem of the deceased Rajendra; P.W.6-Dr. G.P. Tiwari, who conducted the post-mortem of the deceased Ramroop, Smt. Santoshi, Ravi; P.W.7-Guddu, who is the witness of conducting *panchayatnama* of the dead body of the deceased Rajendra; P.W.8-S.I. Anand Kumar Pandey, who registered the chik F.I.R. on the basis of the written report of informant (P.W.1); P.W.9-Dr. Rajesh Awasthi, who conducted the post-mortem of the dead body of the deceased Sumiran and Smt. Madhuri; P.W.10-Bal Krishna Singh, who is witness of *"panchayatnama'* of the dead bodies of the deceased Ramroop, Smt. Santoshi, Ravi, Sumiran and Smt. Madhuri; P.W.11-S.I. Pramhans Prasad, who conducted the *"panchayatnama'* of the dead body of the deceased Rajendra; P.W.12-S.I. Ram Vishal "Suman', who accompanied the Investigating Officer Ashok Kumar Shukla while conducting the investigation of the case and prepared the *panchayatnama* of the deadbodies of the deceased Ramroop, Santoshi, Ravi, Sumiran and Madhuri; and P.W.13-Dharam Pal Singh, who also accompanied the Investigating Officer Ashok Kumar Shukla while conducting the investigation of the case. The trial Court had also examined Constable C.P. 840 Sri Satish Kumar Kushwaha as C.W.1 in order to prove the fact that the Investigating Officer of the case, namely, Ashok Kumar Shukla died on 29.05.2014.

27. P.W.1-Kolai, informant, in his examination-in-chief, had deposed before the trial Court that Sarvan (convict/appellant) was residing in front of his house in the village. A gossip/talk spread in the village that Sarvan (convict/appellant) had an illicit relationship with his *bhabhi* (sister-in-law), which was objected by the wife of Sarvan and on this issue, sometimes altercation took place between them and sometimes scuffle took place between them. When scuffle took place between them, his wife Madhuri used to go for pacifying the issue, upon which Sarvan (convict/ appellant) used to remain angry with (informant's wife) Madhuri.

P.W.1 had deposed that he did not know the date of the incident, however, it was the incident of six months ago and it

was the fourth month of the year and the time was about 06:30 a.m. When he was standing in front of the house of Rajaram which was adjoining the house of Sarvan, a noise ''बचाओ बचाओ' (help-help) came from the house of Sarvan. Thereafter, his wife (deceased Madhuri) came out of the house for rescue at kharanja (dirt road). After some time, Sarvan armed with "axe' came out of his house and told his wife (deceased Madhuri) that ''अपनी बीबी और बच्चो को काट कर लाइन से लगा दिया है तुम बचाने दौडती है तुम्हे भी लाइन से लगा दूंगा।' *(after cutting his wife and children, he has put them on the line, you often run to save, you will also be put in the line).* After saying this, Sarvan started assaulting his wife (deceased Madhuri) with "axe'. In the said "axe', bamboo stick of about the length of two-hand was attached. He further deposed that when Sarvan came out from his house with "axe', blood was dripping from the "axe'. He saw Sarvan swing 3-4 blows of "axe' upon his wife (deceased Madhuri) and immediately thereafter, his wife (deceased Madhuri) fell down on *kharanja* (dirt road) and after that she did not get up again and died.

P.W.1 had further deposed that when Sarvan assaulted his wife (deceased Madhuri), then, his son Rajendra (deceased) and his daughter Sangeeta (injured P.W.2), who were standing at the door, ran to save their mother (deceased Madhuri). After that Sarvan also assaulted them with the same "axe'. Sarvan hit with "axe' on the head of Rajendra and thereafter he assaulted Sangeeta (injured) inside the house with the "axe'. After that both his children became unconscious and fell down. When he screamed, 2-4 villagers came and on seeing them, Sarvan fled away with the "axe'. He deposed that at the time of the incident, fear had arisen in the village; none of the children went to school; the doors of the people got locked; the road traffic was closed; villagers even did not go to their barn due to fear. At that time, the age of the wife of Sarvan was 35 years and their children were 6, 5 and 1½ years, whereas age of his wife (deceased Madhuri) was 50 years and his son (Rajendra) was 6 years. He saw the incident from a distance of 10 steps.

P.W.1 had also deposed that when Sarvan assaulted his wife (deceased Madhuri), his bhabhi (sister-in-law) was standing at the door of Sarvan and told that "वह बार बार बचाव बचाव कहती है इसलिए इसे मरा दिया तो ठीक किया' *(she always asked to save-save, therefore, he killed her, he did right*). He got scribed written report from one person, namely, Sewak, who after scribing read it over to him and then he affixed his thumb impression on it and lodged it in the police station. He proved the written report (Ext. Ka. 1). He further deposed that he brought his son along with police to the Medical College; his son died during treatment; and after the death of his son, he got scribed the information regarding the death of his son and after affixing thumb impression on it, he lodged it (Ext. Ka. 2) in the police station on 9th day of the incident. The Inspector took his statement regarding the incident at his house. He had shown the place of occurrence to the Inspector. At the time of the incident, his relative Ram Naresh (P.W.3) was also present and saw the incident.

In cross-examination, P.W.1-Kolai had deposed that people used to say that Sarvan and his bhabhi (sister-in-law) Suman had illicit relationship. He did not ever intervene in the altercations that occurred between Sarvan and his wife. His wife intervened between them in his presence. No quarrel had happened between accused Suman and his family members. Before the incident, his family members were at talking terms with the

accused Suman. His house was at a distance of 50 steps from the house of Suman and in between their houses, there was one house. The house of Suman was situated in western direction from his house and the house of Sarvan was at a distance of ten steps from his house. There was a gap of two houses between the house of Suman and the house of Sarvan. Out of the said two houses, one house was of Baijnath and the other was of Kandha. A handpump, which was installed near the house of Suman two years ago, was in running condition and also visible from his house. He and his wife never went to fetch water in front of Suman's door. He and his wife filled water from the handpump installed in front of the door of Sitaram. The house of Sarvan was at a distance of 5-6 houses from the house of Sitaram. In the middle of his house and the house of Suman, there was house of Changa. The houses were in seriatum, therefore, could be seen clearly. Accused Sarvan ran with blood stained "axe' passing through his house towards the house of Pawan. After that he did not know where Sarvan had gone. He further deposed that they did not go to search for Sarvan instead they went to police station. A bamboo stick was attached with the "axe'. He further deposed that on 09.02.2008, an altercation took place between Suman and his daughter-in-law, for which both sides have lodged report, however, either of the side did not sustain any injury.

P.W.1 had further deposed that the name of the elder brother of Sarvan was Pawan Kumar. There was dispute between Sarvan and Pawan Kumar. Earlier he was at talking terms with Pawan but after lodging the report of the instant case, he was not at talking term with Pawan as he supported his brother. Sarvan and Pawan were residing in different houses. The house of Sarvan was at a distance of 50 steps from the house of Pawan. The house of Sarvan was at a distance of 8-10 steps from his house.

P.W.1 had further deposed that on the date of the incident, he was at the door of Rajaram along with Rajaram, Bablu and sister-in-law of Sukhlal. All of them tried to catch Sarvan but he fled away. He did not sustain any injury.

28. P.W.2-Sangeeta, who is the daughter of informant Kolai (P.W.1), in her examination-in-chief, had deposed that the said incident was of 25.04.2009 at about 06:00 a.m. The quarrel between Sarvan and his wife took place in the house of Sarvan. When Sarvan was assaulting his wife, then, voice "बचाओ–बचाओ' came from inside the house. At that moment, her mother (deceased Madhuri), on listening the voice, came out from the house at *Kharanja* (dirt road), whereas she and his brother Rajendra (deceased) were standing at the door. Sarvan armed with blood stained "axe' came out from his house and told that "तुम श्रीमती बहुत बचाती थी अब तुमको भी मार डालेगे' *(you Srimati used to protect a lot, now you will also be killed').* After that Sarvan swung 5-6 blows of "axe' on her mother, as a consequence of which, her mother fell down. Thereafter she and Rajendra (deceased) ran to save their mother, then, Sarvan had assaulted Rajendra (deceased) with "axe'. After that Rajendra (deceased) fell down and thereafter Sarvan had also hit on her head with the "axe'. She deposed that at the time of the incident, first of all, Sarvan came out from his house with the "axe' and behind him, his sister-in-law came out and stood at the door. She further deposed that when her mother was being assaulted by Sarvan, then, Suman instigated Sarvan that *"kill her as she used to intervene a lot'*. She deposed that this incident was witnessed by Rajaram, Bablu,

Nanhku, Baijnath apart from her. Rajaram, Bablu, Baijnath and her husband ran to save and no one else was there. After the incident, her father (P.W.1) went to lodge the report. The inspector took her statement. After the incident, fear was spread in the village; on account of fear, people entered into their respective houses; some of the villagers left the village; she had also sustained injuries in the incident; she sustained injuries on two places of her hands; these injuries were caused by the assault of Sarvan; a woman and a woman Constable took her for treatment. In the said incident, four persons got injured from the side of Sarvan and three persons got injured from her side. All these persons got injured on account of assault of Sarvan.

In cross-examination, P.W.2-Sangeeta had deposed that the incident was of Saturday. On that day, she woke up at 06:00 a.m. The house of Sarvan and her house was opposite to each other. There was no drain flowing in front of her house. A drain was beside the house of Sarvan. The water of her house was flowing in the drain constructed with kharanja and the said kharanja was in the mid of her house and the house of Sarvan. She denied the suggestion that there was quarrel between her family and Sarvan with regard to flow of drainage water. Her father had not lodged any report with regard to quarrel of drain. She also denied the suggestion that Sarvan or his family members had lodged any report upon her father Kolai or her family members. She also denied the suggestion that she had knowledge that F.I.R. was lodged against her father. She also denied that any complaint was ever submitted against her family. She also denied the suggestions that Nanha (brother of P.W.2) went to meet Santoshi to the house of Sarvan on the date of the incident; Nanha frequently went to the house of Sarvan to meet Santoshi; her father Kolai, her mother, her brother Rajendra had entered inside the house of Sarvan on the date of the incident; before two days of the incident, scuffle took place between her father and Sarvan regarding the drain water and in this scuffle, her father threatened Sarvan that he would kill his family. She further deposed that there was no "axe' in her house nor ever had "axe' in her house. She denied the suggestion that when Sarvan was not in the house, then, his father Kolai, Nanha, Rajendra, his mother and she herself, on getting a chance, entered into the house of Sarvan with "axe' and killed the wife and children of Sarvan and in the meanwhile Sarvan came and scuffle took place. She also denied the suggestion that there was no scuffle between Sarvan and her mother and her brothers. She also denied the suggestion that her father raised an "axe' to kill Sarvan but it hit her mother. She deposed that on that date, her father was at the door of Rajaram. On hearing screaming, her father came outside the house and at that time Sarvan was assaulting her mother. Upon reaching the spot, her father tried to save her mother. However, no injury was caused to him. She further denied the suggestion that her father was assaulting Sarvan, therefore, no injury was caused to him. She also denied the suggestion that the "axe' used in the incident was of her house. She further submitted that after the incident, Sarvan ran from the village.

P.W.2-Sangeeta had further deposed that no quarrel took place between accused Suman and her family members. Before the incident, they were on talking terms with the family of Suman, however, she had no good talking terms with Sarvan and before the incident, she did not visit to the house of Sarvan. Sarvan had not come to her house. They also did not visit the

house of Pawan before the incident. Before the incident, her mother did not go to the house of Sarvan and there was no enmity between them. At the time of scuffle, she was cooking in her house. At the time of the scuffle, firstly Sarvan came out from the house and after that Suman came out from the house. She has seen Suman going to the house of Sarvan in the night sometimes. When Suman came out from the house of Sarvan, her mother and her brother were standing at their door in front of kharanja. After the incident, Suman went towards her house and at that time, Suman did not carry anything in her arm. At the time of the incident, her brother-in-law was returning from call of nature. She denied the suggestion that on account of enmity with Suman, report was lodged against Suman. She further deposed that she had no enmity with the family of Suman and Pawan. She denied the suggestion that Suman had no relation with the present incident.

29. P.W.3-Ram Naresh, who is son-in-law of the informant, had deposed in his examination-in-chief before the trial Court that a day before the incident, he went to his in-law's house. The incident was of 25th at 06:30 a.m. When he and Sangeeta, while standing at the door of his in-law's house, were talking, a noise "बचाओ बचाओ' came out from the house of Sarvan. After that his mother-in-law (deceased Madhuri) and Rajendra (deceased) ran. Then, Sarvan armed with "axe' came out from other side and told them that he had put aside his wife and children, he would also put aside three of them (brother-in-law, sister-in-law and mother-in-law). He deposed that "axe' was stained with blood. Sarvan, by assaulting his mother-in-law (deceased Madhuri), put her down on *kharanja*. When his brother-in-law Rajendra and Sangeeta ran, then, he also assaulted them. All of them were assaulted with "axe'. They were assaulted by back of "axe' as well as front of the "axe'. At that time, accused Suman, while standing at her door, was instigating Sarvan. On the information of the incident, the police had reached the spot. The police brought Sangeeta and Rajendra to Trauma Centre Hospital, where the treatment of Sangeeta and Rajendra was conducted. During treatment, Rajendra died after eight days of the incident on account of injuries caused to him in the incident. The police had recorded his statement.

In cross-examination, P.W.3-Ram Naresh had deposed that Suman was living along with her husband Pawan in a separate house. On listening the noise, he did not go inside the house of Sarvan nor went to intervene in the scuffle on account of fear neither did he go to call any one for intervention, but he only made hue and cry. Accused ran in front of him but he did not try to catch him due to fear. At the time of the incident, his wife was at her parents' home. He was standing at a distance of 25 steps from Suman. After the incident, Sarvan fled with the axe. Suman also ran behind Sarvan. On account of fear, he did not go to save his sister-in-law, mother-in-law and brother-in-law. The police had recorded his statement on the date of the incident at the place of occurrence. When his father-in-law went to lodge the report, then, the police came there.

30. The statements of the convicts/appellants, Sarvan and Suman, were recorded under Section 313 Cr.P.C. The convict/appellant Sarvan, in his statement recorded under Section 313 Cr.P.C., has accepted the statements of the prosecution witnesses that he and his *bhabhi* (sister-in-law) Smt. Suman had an illicit relationship, which was objected by

his wife Smt. Santoshi and on this issue, quarrel and fight used to take place between him and his wife (Smt. Santoshi) and the wife of the informant (P.W.1-Kolai), Madhuri, came to intervene between them, upon which he used to be angry with her. The convict/appellant Sarvan had also admitted the statements of the prosecution witnesses that on the date, time and place of the incident, informant P.W.1-Kolai was standing in front of the house of Raja Ram adjacent to his house and a sound of "save-save' was coming from his house; he came out with an "axe' from his house and told the informant's wife, Smt. Madhuri that *"he has put his wife and children on line, you run to save, then you will also be put in the line'* and by saying this, he assaulted the informant's wife, Smt. Madhuri, with "axe', as a consequence of which, informant's wife Smt. Madhuri fell down on khadanja and died. Convict/appellant Sarvan had also admitted the statements of the prosecution witnesses that on the date, time and place, when he came out from his house with "axe', blood was dripping from his "axe'. Convict/appellant, however, had stated that first of all, informant and his family members had killed his (Sarvan's) family members and thereafter, he had also killed the family members of the informant. Convict/appellant had also admitted that on the date, time and place of the incident, on the hue and cry of P.W.1-Kolai, 2-4 persons came and thereafter he fled away with the "axe'. Convict/appellant had also admitted the statement of P.W.1-Kolai that on 25.04.2009 informant Kolai (P.W.1) got the FIR scribed by Ram Sewak son of Hari Prasad, who after scribing read it over to him and thereafter, he affixed his thumb impression on it and then proceeded to Police Station Mohanlalganj and lodged it. Convict/appellant Sarvan had also admitted the statements of injured Sangeeta (P.W.2) that on 05.07.2009, at about 06:00 a.m., a scuffle was going on between Sarvan and his wife Santoshi and when Sarvan was beating his wife Santoshi, then, a noise "save-save' came out from his house. On listening this noise, her mother (Smt. Madhuri) came out near the *khadanja* and at that time, she and Rajendra were standing at the door. Sarvan came outside his house with blood stained "axe' and told her mother Smt. Madhuri that she protected his wife Smt. Santoshi a lot and now he would also kill her and thereafter, Sarvan started to assault her mother Smt. Madhuri with "axe'. 4-5 blows of "axe' were made upon her mother, as a consequence of which, her mother fell down. Thereafter, when she and Rajendra ran to save her mother Madhuri, then, Sarvan had assaulted Rajendra with "axe', as a consequence of which, Rajendra fell down. Sarvan had also assaulted on her head with "axe'. Convict/appellant had also stated that informant and his family members had killed his wife and children and, therefore, he had also killed their family members because of which case was lodged.

31. Convict/appellant Suman, in her statement recorded under Section 313 Cr.P.C., had denied the allegations levelled against her and claimed to be innocent and further stated that she has been falsely implicated in the case on account of enmity because she belongs to the family of Sarvan. She further stated that on 25.04.2002, at 06:30 a.m., she did not see Sarvan assaulting but she, on hue and cry, went at the place of the incident along with family. She denied the allegation of the prosecution that she had an illicit relationship with Sarvan. She also denied that she saw Sarvan killing his wife, his children and informant's wife by assaulting

them with "axe'. She also denied the fact that she saw Sarvan assault the informant's son Rajendra and his daughter Sangeeta with "axe'. However, she admitted the fact that informant Kolai (P.W.1) got scribed the report from Ram Sevak son of Hari Prasad and after scribing it Ram Sevak read it over to him and thereafter Kolai (P.W.1) affixed his thumb impression on it and lodged it at Police Station Mohanlalganj, Lucknow.

32. In defense, three witnesses, namely, D.W.1, Pawan Kumar, real brother of convict/appellant Sarvan, D.W.2-Banshi Lal and D.W.3-Kanhaiya Lal were produced.

33. D.W.1-Pawan Kumar, real brother of convict/appellant Sarvan, had deposed in his examination-in-chief before the trial Court that incident was of 25.04.2009 between 6-7 a.m. One day before the incident, he went to attend Tilak ceremony of Dinesh at Ahimakheda. On account of work of *rajmistri* (masonry), he returned to his house at village Gaura by bicycle on the next day at about 06:45 a.m. His wife was cleaning utensils. He put his bicycle on stand. At that moment, on hue and cry coming from the village, he ran and reached there and behind him, his wife also reached there and saw that his brother Sarvan was shouting that Kolai after cutting his wife and children fled away. After that, he asked his brother (Sarvan) that *"where were you'*, then, Sarvan told him that he went to get salt and on returning home, he saw his wife and children were lying cut off. He further deposed that when he went inside the house of Sarvan, he saw that the vegetable pot was overturned inside the house and deadbodies of three children and his brother's wife were lying. He, thereafter, came out from the house and called the police. After some time, the police came on a Jeep and after loading four dead-bodies on a Jeep, took away him and his brother (Sarvan) to the police station. Thereafter, the police again brought them to home. After that the police brought "axe' from the house of Kolai (P.W.1) and a stick from his house and fixed it on the "axe' in front of them. Thereafter, the police dripped the "axe' in blood, which was lying on soil and took them away to police station again along with blood stained "axe' through a Jeep. He asked the police to lodge the report but no report was written by the police. He further deposed that he had old enmity with Kolai as Kolai had usurped his one bigha of land. The whole village was afraid of Kolai. After the incident, Kolai had attacked upon him and his father, on account of which, his father had lost his life, whose case was going on. He also deposed that Kolai did not allow him to do *pairvi* of the case and threatened to kill him. After the incident, rumour was in the village that Kolai had killed Sarvan's children.

In cross-examination, D.W.1-Pawan Kumar had deposed that he was doing the work of rajmistri (masonry). The distance between Mohanlalganj to his village Gaura was 3 Kms. After getting off work at 05:00 p.m., 30-45 minutes were taken to wash hands, feet and his articles and after that, he went to home. It took fifteen minutes by bicycle to cover the distance of 3 Kms. He reached home at 06:00 p.m. On 24.04.2009, he went along with 4-5 persons to attend tilak ceremony of Dinesh at Ahimakheda by bicycle at about 07:30 p.m. and on 25.04.2009, he returned to his house from tilak at 06:45 a.m. The distance of Ahimakheda from his village was 6 Kms. He reached near the deadbodies of his brother's son and wife at

the place of occurrence in the morning at about 06:45 a.m. He further deposed that he did not come to give evidence from the side of the deceased because no one had asked him to give evidence but on the instance of Sri Kamlesh, Advocate, he came to give evidence. He knew Kolai as well as his wife Madhuri. He denied that he had falsely deposed in order to save Suman. He also deposed that summon had not gone from the Court to him.

34. D.W.2-Banshi Lal, in his examination-in-chief, had deposed before the trial Court that the incident was of 25.04.2009 at about 06:10 a.m. On the date of the incident, he was in his village. The house of Sarvan and Kolai were opposite to each other. His house was at a distance of 1 kms. from the house of both Sarvan and Kolai. On the date of the incident, he had gone for his work. After 2-2½ hours of the incident, he got information about the big incident. On getting the information, he left his work and reached to the place of the incident and saw that villagers and police personnel were present at the place of the incident. The police took away all the deadbodies and no *panchayatnama* was made. He knew the informant Kolai. No one was present at the house of Kolai and his wife locked the door and was trying to flee from there. When Sarvan came back after buying groceries, then, he saw such a big incident occurred at his house and the wife of Kolai was running away. On the dictate of police personnel, all the deadbodies were carried out and loaded in a police Jeep by Sarvan himself. Thereafter, Sarvan and his sister-in-law were brought by the police. When the police personnel reached at the place of the incident, none of the family members of Kolai were present there. The information about the incident spread in the village that families of both sides had killed each other. The police did not recover any weapon in his presence. After the incident, Sarvan was present. The police was informed by Chowkidar and villagers. Sarvan was living in his old house, whereas the house of his sister-in-law was away from Sarvan's house.

In cross-examination, D.W.2 had stated that he did work of construction, labour and farming. He further deposed that it is correct to say that on the date of the incident, he was not present at the place of the incident as he was 2-2½ kms. away from his house in relation of work. He did not see anyone killing. He did not even see who challenged whom. It is true that he only knew the factum of the incident from the villagers. It is also true that when he got information after 2-2½ hours of the incident, then, he reached there but the police did not make him witness in respect of the incident. The police collected the blood from the place where it was present. He denied that he falsely deposed in order to save the accused.

35. D.W.3-Kanhaiya Lal, in his examination, had deposed that the incident was of 25.04.2009 between 06:00-07:00 a.m. His house was far from the house of Kolai on eastern side. The house of Sarvan and Kolai were opposite and in between their house, there was *khadanja*. On the date of the incident, he was in his house and there was *katha* at his house. He had gone to call the gardner. The house of gardener was at a short distance from the house of Sarvan. He went to call the gardener at 06:00-07:00 a.m. It was the month of *chait*. Two sons of Kolai armed with "axe' jumped from the ruined house and ran away and blood was on their clothes. He could not tell their names but he recognized them. When he reached near to the house of Sarvan, then, he saw that

Kolai and his sons were armed with *Banka* and his daughter was armed with *hasiya*, that were blood stained. Sarvan was not there nor any member of his family was there.

In cross-examination, D.W.3 had stated that he did not know that when he went to call gardener, it was 6 O'clock or 7 O'clock. However, the gardener met with him. He reached to the house of gardener and he talked to him for about one minute. He further deposed that incident occurred earlier and thereafter he met with gardener. Even after seeing the incident, he went to the house of gardener. After that he went to the house through other pathway due to fear. He further deposed that even after the occurrence of the incident, *katha* happened in his house. He further deposed that it is correct to say that he went to call gardener from his house at 07:00 a.m. and before that incident had happened.

36. The learned trial Court, upon appreciation of oral and documentary evidence, by its impugned judgment dated 29.08.2017, convicted and sentenced the appellants, **Sarvan** and **Suman**, in the manner stated hereinabove in paragraph-2.

37. Feeling dissatisfied and aggrieved by the judgment of conviction recorded and sentence awarded, appellants, Smt. Suman and Sarvan have preferred Criminal Appeal Nos. 1540 of 2017 and 1552 of 2017, respectively, under Section 374 (2) of the Cr.P.C. before this Court. However, the learned trial Court in accordance with the provisions contained in Section 366 (1) of the Cr.P.C. made reference to this Court for confirmation of sentence of death of convict/appellant Sarvan.

38. Heard Ms. Manjusha Kapil, learned Counsel for the convicts/appellants, Mr. Vimal Srivastava, learned Government Advocate assisted by Mr. Pankaj Tewari, learned Additional Government Advocate for the State and perused the material brought on record.

(C) **ARGUMENTS ON BEHALF OF APPELLANTS**

39. Challenging the impugned judgment dated 29.08.2017 passed by the trial Court, Ms. Manjusha Kapil, learned Counsel for the convicts/appellants has argued that :-

I. the entire case against the convicts/appellants is fabricated one and has been framed at the instance of Kolai (PW-1).

II. the convict/appellant Sarvan, in his statement recorded under Section 313 Cr.P.C., in clear terms has stated that informant Kolai (P.W.1) and his family members had killed his wife and children, because of which in retaliation, he got angry and killed the wife of the informant (P.W.1) and his son.

III. She stated that it is settled law that if the prosecution admits the statement under Section 313 Cr.P.C. then it has to be considered as a whole and it is not permissible under law to accept only one part of this statement, which supports the prosecution and to exclude the remaining part. In the instant case, the trial Court has only considered one part of this statement but erred in not considering the whole statement of convict/appellant Sarvan recorded under Section 313 Cr.P.C.

IV. the dispute amongst the informant Kolai (P.W.1) and the convict/appellant Sarvan was due to flow of drainage from the house of informant (P.W.1) to the house of the convict/appellant Sarvan. She argued that

the entire case as presented by the prosecution is concocted and false as actual facts are that on the date of the incident, convict/appellant Sarvan went to purchase salt and upon returning therefrom, he saw that informant Kolai (P.W.1), his sons Guddu, Nanha as well as his wife and his daughter were running from his (Sarvan's) house with hasiya, axe etc. Immediately thereafter, Sarvan entered into his house and saw that his wife and children were lying dead on the floor, upon which he got angry and in retaliation, convict/appellant Sarvan came out from his house and killed the informant's wife and son. Therefore, the offence committed by the convict/ appellant will not fall within the penal provision of Section 302 I.P.C. but at the most, it would fall within First Part of Section 304 I.P.C. as the convict/appellant had killed the informant's wife and informant's son in revenge as the informant and his family members had killed the wife and children of convict/appellant Sarvan. Thus, the trial Court erred in convicting and sentencing the convict/appellant under Section 302 I.P.C.

V. the convict/appellant Sarvan has no motive to commit the murder of his wife and children. She argued that even if for the sake of argument it is presumed that on account of illicit relationship with his sister-in-law, the convict/ appellant Sarvan had killed his wife, even then, there is no motive for him to commit the murder of his own minor children as the convict/appellant Sarvan was not mental nor did the trial Court find the same. Thus, the findings of the trial Court in this regard is perverse and is liable to be rejected.

VI. the prosecution, in order to prove its case, has failed to produce any independent witness. P.W.1, P.W.2 and P.W.3 are interested and partisan witnesses. Therefore, their testimonies cannot be said to be trustworthy. The trial Court erred in believing the testimonies of interested and partisan witnesses.

VII. as per the prosecution, "axe' was used as a weapon for committing the murder of five persons, namely, Rajendra, Ramroop, Smt. Santoshi, Ravi, Sumiran, Smt. Madhuri and causing injury to Sangeeta by convict/appellant Sarvan but perusal of the ante-mortem injuries caused on their persons reveals that size of all the injuries are different, which itself clarifies that these injuries could be caused from different weapons. Thus, the case of prosecution that "axe' was used in commission of murder of the aforesaid persons, is doubtful and it cannot be said that the deceased was murdered by the assault of "axe'.

VIII. the "axe' in question was handed over by Kolai (P.W.1) himself to the police and thereafter police went on the spot; dripped the "axe' in blood at the place of occurrence; sealed it; and prepared the forged recovery memo. This fact has been proved from the testimonies of D.W.1-Pawan Kumar and D.W.2-Banshi Lal. But the trial Court erred in disbelieving the testimonies of D.W.1 and D.W.2.

IX. the "axe' was allegedly stated to be found from the heap of straw on the pointing out of convict/appellant Suman. If that being so, some straw ought to have strick on it, but nowhere in the police report, description of straw has been mentioned by the police. This itself shows the prosecution case with regard to recovery of "axe' on the pointing out of convict/appellant Suman, is doubtful and not believable.

X. D.W.3-Kanahaiya Lal, in his examination-in-chief, had deposed before the trial Court that two sons of Kolai (P.W.1) armed with "axe' jumped over the boundary wall of the convict/appellant

Sarvan and blood was present on their clothes and when he reached to the house of convict/appellant Sarvan, he saw that Kolai (P.W.1) was there armed with blood stained banka; his sons were there armed with blood stained "banka' and his daughter was also there armed with blood stained "hasiya' and none of the family members of Sarvan (convict/appellant) and Sarvan himself were present there. But the trial Court has erroneously not believed the testimonies of defense witnesses while passing the impugned order.

XI. learned trial Court has committed grave legal error in holding that the present case falls within the category of *''rarest of rare'* case as the learned trail Court has failed to record special reasons for sentencing the convict/ appellant Sarvan to death as required under Section 354 (3) of the Cr.P.C.

XII. the prosecution has miserably failed to connect the convicts/appellants with the crime in question either by direct, medical or circumstantial evidence and therefore the convicts/appellants be acquitted from the charge and the criminal appeals be allowed and the reference be rejected.

XIII. the extreme penalty of death awarded to the convict/appellant Sarvan by the trial Court is too harsh and excessive in nature and alternate penalty of the punishment of imprisonment for life would meet the ends of justice.

(D) **ARGUMENTS ON BEHALF OF THE STATE**

40. Shri Vimal Srivastava, learned Government Advocate, ably assisted by Shri Pankaj Tiwari, learned Additional Government Advocate for the State has opposed the submissions advanced by the learned Counsel for the convicts/appellants and argued that :-

I. the prosecution has brought sufficient material in shape of ocular, medical and documentary evidence to justify conviction of the convicts/appellants for the above-stated offence.

II. the convict/appellant Sarvan had illicit relationship with his sister-in-law, which was objected by the wife of Sarvan, upon which some quarrel took place between Sarvan (convict/appellant) and his wife (deceased Smt. Santoshi) and sometimes Sarvan (convict/appellant) had also assaulted his wife (deceased Smt. Santoshi). The wife of informant Kolai (P.W.1), Madhuri, used to intervene and settle the issue but Sarvan disliked it. These facts have been proved by the prosecution. Therefore, the defense taken by the convict/appellant Sarvan that he had killed the wife and son of the informant in retaliation as the informant and his sons had killed his wife and children while he had gone to purchase salt, has rightly been discarded by the trial Court.

III. P.W.1, P.W.2 and P.W.3 have fully supported the version of the prosecution.

IV. Thus, the trial Court, after appreciating the evidence on record, rightly came to the conclusion that the convicts/appellants were responsible for committing the murder of all six persons and had also rightly convicted them for the offences under Sections 302, 323, 201 I.P.C.

V. the seizure of blood stained "axe' at the instance of the convicts/appellants Sarvan and Suman itself is a substantial piece of evidence and also itself proves the guilt of the convicts/appellants in committing the murder of six persons.

VI. the prosecution has established the motive of the convicts/appellants to commit the murder of the six deceased persons.

VII. the medical evidence has fully supported the prosecution case.

VIII. in view of the aforesaid evidence available on record, the criminal appeals preferred by the convicts/appellants deserves to be dismissed and the death sentence awarded to convict/appellant (Sarvan) deserves to be confirmed.

IX. this is a case of "rarest of rare' case where the convict/ appellant Sarvan has murdered his own wife and his own three growing/minor children aged about 1½ years, 4 years and 6 years as well as wife of informant Madhuri and son of informant Rajendra and also injured Sangeeta, daughter of informant, by assaulting them with "axe' and absconded from the scene of occurrence which will fall within the meaning of rarest of rare case as indicated by their Lordships of the Supreme Court in **Bachan Singh Vs. State of Punjab** : AIR 1980 SC 898. He argued that the manner in which murder of his own wife and three growing/minor children as well as wife and son of the informant has been committed by the convict/appellant Sarvan brutally by assaulting them with "axe', it can be said to be a "rarest of rare' case and there is no chance of reformation of the convict/appellant Sarvan and he is a burden to the society, therefore, imprisonment for life or other sentence is completely inadequate, only the sentence of death would be appropriate and adequate punishment which has rightly been awarded to him by the trial Court.

(E) **ANALYSIS**

41. This Court has examined the submissions advanced by the learned Counsel for the parties and perused the statements of the prosecution witnesses and defense witnesses, the material exhibits tendered and proved by the prosecution, the statements of the appellants recorded under Section 313 I.P.C. and the impugned judgment.

E.1. **F.I.R.**

42. The prosecution case commenced with the First Information Report lodged by PW-1-Kolai on a written report (Ext.Ka.1) given by him after approximately one hour of the incident at police station Mohanlalganj, district Lucknow, wherein it was stated that five deceased persons, namely, Ramroop, Smt. Santoshi, Ravi, Sumiran and Smt. Madhuri, were brutally murdered and two persons, namely, Rajendra and Sangeeta, got injured by the convict/appellant Sarvan. The convict/appellant Sarvan was named in the First Information Report with the details of the weapon i.e. "axe' which he was carrying. The murder weapon i.e. "axe', which the convict/ appellant Sarvan was carrying, as per the description in the First Information Report and the depositions of the eye-witnesses PW-1, PW-2 and PW-3, are tallying with the injuries sustained by the six deceased persons and injured Sangeeta (P.W.2) as is clear from the Medico-legal reports. S.I. Anand Kumar Pandey (P.W.8) has proved the factum of lodging the F.I.R. on the basis of the written report (Ext. Ka.1) submitted by the informant Kolai (P.W.1).

E.2. **MOTIVE**

43. Learned Counsel for the convicts/appellants had contended that there was no motive on the part of the convict/appellant Sarvan to commit the

murder of his own wife and children but on account of enmity between the convict/appellant Sarvan and informant Kolai regarding flow of drain water, the informant and his family members had killed his wife and three children when he went to buy salt outside his house and in retaliation, the convict/appellant Sarvan had inflicted injuries to the informant's wife and son.

44. Refuting the aforesaid submissions, learned Government Advocate has stated that as the informant's wife Madhuri being the neighbour always used to intervene in the altercations which took place between convict/appellant Sarvan and his wife Santoshi (deceased) on account of illicit relationship of convict/appellant Sarvan with his *bhabhi* (sister-in-law), convict/ appellant Sarvan remained annoyed with the informant's wife. Further, the wife of convict/appellant, Santoshi, always had quarrel with convict/ appellant Sarvan on the issue of his illicit relationship with his *bhabhi* (sister-in-law), hence convict/appellant Sarvan had committed the murder of his wife and children on account of illicit relationship with his *bhabhi* (sister-in-law).

45. In **Bipin Kumar Mondal Vs. State of West Bengal** : (2010) 12 SCC 91], the Apex Court has held that :-

"18. In fact, motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited him to commit a particular crime. In **Shivji Genu Mohite Vs. State of Maharashtra**, AIR 1973 SC 55, this Court held that in case the prosecution is not able to discover an impelling motive, that could not reflect upon the credibility of a witness proved to be a reliable eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye-witnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if motive is not established, the evidence of an eye-witness is rendered untrustworthy.

19. It is settled legal proposition that even if the absence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. (Vide **Hari Shankar Vs. State of U.P.**, (1996) 9 SCC 40; **Bikau Pandey & Ors. Vs. State of Bihar,** (2003) 12 SCC 616; and **Abu Thakir & Ors. Vs. State of Tamil Nadu**, (2010) 5 SCC 91)."

46. In the present case, P.W.1, P.W.2 and P.W.3, in their statements recorded before the trial Court, establish the facts that on account of illicit relationship of convict/appellant Sarvan with his bhabhi (sister-in-law), the convict/appellant Sarvan had murdered his wife and three minor children and when Madhuri (informant's wife) being the neighbour tried to intervene,

convict/appellant Sarvan became annoyed with informant's wife Madhuri and also murdered her and when Rajendra tried to save his mother (Madhuri), convict/appellant Sarvan had also assaulted Rajendra with "axe' and during treatment, Rajendra (informant's son) also died. From the side of the convicts/appellants, three witnesses, D.W.1, D.W.2 and D.W.3 have been produced and all the defense witnesses have stated different motive on different occasions in order to substantiate their claim that informant Kolai and his family members had committed the murder of wife of convict/ appellant Sarvan and his three children and convict/appellant Sarvan, in retaliation, had murdered informant's wife and his son. The convict/appellant Sarvan, in his statement recorded under Section 313 Cr.P.C., had admitted the fact that he had illicit relationship with his *bhabhi* (sister-in-law) and his wife Santoshi (deceased) always confronted with him regarding his illicit relationship with his *bhabhi* and informant's wife Madhuri always used to intervene in their confrontation, upon which convict/appellant remained annoyed with informant's wife. Thus, the Trial Court has rightly come to the conclusion that the convict/appellant Sarvan had a strong motive and had the opportunity of committing the act. If the convict/appellant Sarvan is to be excluded, there should have been a reasonable possibility of anyone else being the real culprit under the facts and circumstances of the case, as such the chain of evidence can be considered to be complete as to show that in all probabilities the crime has been committed by the convict/appellant Sarvan.

E.3. **PROSECUTION WITNESSES**

47. It appears from the evidence on record, more particularly the evidence of the informant P.W.1-Kolai that the house of convict/appellant Sarvan was opposite to his house. P.W.1, in his deposition, had deposed that a rumour was spread in the village that convict/appellant Sarvan had an illicit relationship with his *bhabhi* (sister-in-law), which was objected by Smt. Santoshi (deceased-the wife of convict/appellant). On this issue, sometimes scuffle and verbal fight took place between them and Smt. Madhuri (deceased, wife of the informant P.W.1) being the neighbour always used to intervene, upon which convict/appellant used to remain annoyed with Smt. Madhuri (deceased). P.W.1, in his deposition, thereafter, has talked about the fight that ensued at 06:30 a.m. on 25.04.2009 between convict/appellant Sarvan and his wife Smt. Santoshi (deceased) on the issue of illicit relationship between convict/appellant Sarvan and his *bhabhi* (sister-in-law). After that, an alarm "save-save' came out from the house of convict/appellant Sarvan, when he (P.W.1-Kolai) was standing in front of the house of Rajaram which was adjacent to the house of convict/appellant Sarvan. At the same time, wife of P.W.1, Smt. Madhuri (deceased), on hearing the alarm "save-save', also came out from her house for rescue, the convict/appellant Sarvan armed with blood stained "axe' came out from his house and told the wife of the informant (P.W.1), Madhuri that *"after cutting his wife and children, he has put them on the line, you often run to save, you will also be put in the line'*. After saying this, convict/appellant Sarvan assaulted the wife of P.W.1 (Smt. Madhuri) with "axe', as a consequence of which, the wife of P.W.1 (Smt. Madhuri) fell down on kharanja and succumbed to her injuries. P.W.1 had also deposed that Rajendra (son of the informant and deceased Madhuri) and

P.W.2-Sangeeta (daughter of the informant and deceased Madhuri), who were standing at their door, ran to save their mother Madhuri (deceased) but they were also assaulted by the convict/appellant Sarvan with "axe'. P.W.1 had also deposed that when Sarvan was assaulting his wife Madhuri, Suman, sister-in-law of the convict/appellant Sarvan, was standing at his door and instigated the convict/appellant Sarvan to kill Madhuri as she always intervened. After the assault was over, P.W.1 and other villagers tried to catch convict/appellant Sarvan but he fled away with blood stained "axe' and behind him, Suman also fled away. Thereafter, P.W.1 along with his daughter Sangeeta (injured) went to the police station and lodged the report.

48. P.W.2-Sangeeta, injured eye-witness, had supported the deposition of the informant P.W.1 and had deposed that on the date of the incident i.e. on 25.04.2009 at about 06:00 a.m., a quarrel took place between Sarvan (convict/appellant) and his wife (deceased-Santoshi) and after that a noise "save-save' came out from their house. At that time, her father, informant P.W.1-Kolai, was standing at the door of Rajaram. On listening the noise "save-save', her mother, Madhuri (deceased) came out from her house. At that moment, she (P.W.2) and her brother Rajendra (deceased) were standing at the door. After sometime, Sarvan (convict/appellant) armed with blood stained "axe' came out from his house and told her mother Madhuri that *''you Srimati protected a lot, now you will also be killed'*. On saying this, Sarvan (convict/appellant) had assaulted her mother with "axe', as a consequence of which, her mother Madhuri fell down and succumbed to her injuries. P.W.2 had also stated that she and her brother Rajendra (deceased) also tried to save their mother but Sarvan (convict/appellant) had firstly assaulted her brother Rajendra with "axe', as a consequence of which, he fell down and after that Sarvan had also assaulted on her head with "axe'. She also deposed that when the convict/appellant Sarvan came out from his house with blood stained "axe', his sister-in-law Suman also came out behind him and stood at the door of convict/appellant Sarvan and instigated convict/ appellant Sarvan to kill Smt. Madhuri as she always used to intervene. She further deposed that her father Kolai (P.W.1) tried to save her mother Madhuri (deceased) and also tried to catch convict/appellant Sarvan but convict/appellant fled away with blood stained "axe' and behind him, his sister-in-law Suman also fled away. Thereafter, she along with his father P.W.1 went to the police station, where her father after getting the scribed report, lodged it at police station Mohanlalganj, district Lucknow.

49. P.W.3-Ram Naresh, who is the son-in-law of the deceased Madhuri and informant Kolai (P.W.1), had also supported the testimonies of the informant P.W.1-Kolai and injured P.W.2-Sangeeta and had deposed that before one day of the incident, he came to his in-law's house (the house of informant Kolai). On the date of the incident i.e. on 25.04.2009 at about 06:30 a.m., when he was talking with Sangeeta (injured) while standing at the door of his in-law's house, a noise "save-save' came out from the house of convict/appellant Sarvan and on listening this noise, his mother-in-law Madhuri (deceased) came out from her house. At that moment, Sarvan (convict/appellant) armed with blood stained "axe' came out from his house and told her mother-in-law (deceased Madhuri) that *''he had put aside*

his wife and children, he would also put aside three of them'. On saying this, Sarvan (convict/appellant) assaulted her mother-in-law with "axe', as a consequence of which, her mother-in-law fell down on *kharanja* and died. He further stated that his brother-in-law Rajendra and Sangeeta (P.W.2) tried to save his mother-in-law but they were also assaulted by the convict/appellant Sarvan with "axe'. At that time, sister-in-law of the convict/appellant Sarvan (Suman), while standing at the door of convict/appellant, was instigating him to kill them. He further stated that on account of fear, he did not try to save his mother-in-law (Madhuri), brother-in-law (Rajendra) and Sangeeta but he only raised hue and cry.

50. From the aforesaid evidences of P.W.1, P.W.2 and P.W.3, it transpires that nothing improbable in their examination-in-chief is found more particularly considering a very scant and deficient cross-examination. This Court takes notice of the fact that except a minor contradiction in the form of an omission, nothing substantial could be elicited from the cross-examination of P.W.1, P.W.2 and P.W.3 so as to render their entire evidence doubtful.

E.4. **DEFENSE WITNESSES**

51. The presence of the convicts/appellants at the scene of occurrence has not been disputed by the learned Counsel for the appellants nor can it be doubted in any manner. Her argument, however, is that convict/appellant Sarvan can be pinpointed during the commission of murder of his wife Smt. Santoshi and their three children, Ramroop, Ravi and Sumiran, in as much as, at that time, convict/appellant Sarvan went to purchase salt and after returning back from there, he saw his wife and three children lying dead and in counterblast, convict/appellant Sarvan came out from his house and assaulted the wife of the informant Kolai (Madhuri), his son Rajendra and his daughter Sangeeta. Her contention is that any action on the part of the convict/appellant Sarvan, therefore, was only in reaction and he cannot be convicted of the offence of committing homicidal death of his wife Santoshi and three children, Ramroop, Ravi and Sumiran.

52. To appreciate the said argument, this Court has to assess the probabilities of the defence version sought to be established by production of three defence witnesses (DW-1, DW-2 and DW-3). Therefore, this Court would also be required to examine the prosecution evidence to ascertain as to whether the probabilities of the defence version would make the prosecution story doubtful.

53. It transpires from the evidence of P.W.2-Sangeeta that a suggestion was put to her from the side of the convicts/appellants that informant Kolai (P.W.1) had also entered into the house of the convict/appellant Sarvan, whereas at the same time it transpires from the cross-examination of P.W.1-Kolai that a suggestion was put to him from the side of the convicts/appellants that Kolai (P.W.1) and Rajaram were not present at the place of the occurrence. This shows that from the side of the convicts/appellants, contradictory stand was taken with regard to the presence of the informant Kolai (P.W.1) at the place of the occurrence as on one hand convicts/appellants took stand that informant and his family members entered into the house of convict/appellant and killed the wife of convict/ appellant and his children and on the other hand,

stand was taken from the side of the convicts/appellants that informant Kolai and Rajaram were not present at the place of the occurrence. Therefore, it is not established from the aforesaid stand of the convicts/appellants that informant and his family members entered into the house of convict/appellant Sarvan and killed the wife of convict/appellant Sarvan and his children.

54. Learned Counsel for the convicts/appellants has also contended that there was dispute between convict/appellant Sarvan and informant Kolai with regard to flow of drainage water and on account of this, the informant Kolai (P.W.1) and his family members entered the house of the convict/appellant Sarvan and killed his wife and children when convict/appellant Sarvan had gone to buy salt. In our view, this contention of the learned Counsel for the convict/appellant has no substance looking to the facts that at the time of the incident, deceased Rajendra, who was the son of informant Kolai (P.W.1), was aged about 10 years; injured Sangeeta was aged about 16 years; the presence of Nanha was also shown at the place of the occurrence, therefore, it is quite probable that if there was any dispute of flow of drainage water, then, elder members of the informant's family would involve to pacify the issue or do anything in this regard, but under the given facts and circumstances, it is quite unnatural and unbelievable that all the family members including Rajendra aged about 10 years and Sangeeta aged about 16 years went into the house of the convict/appellant Sarvan on the date of the incident when convict/appellant had allegedly went to buy salt. Moreso, there is no evidence produced from the side of convict/appellant that on the date and time of the incident, convict/appellant Sarvan went to buy salt.

55. In the statement of the convict/appellant Sarvan recorded under Section 313 Cr.P.C., convict/appellant Sarvan had admitted the facts that on the date, time and place, informant Kolai (P.W.1) was standing at the door of Rajaram; a noise of "save-save' was coming from his house; at that time, he came out from his house with "axe' and told Madhuri (informant's wife) that *"he had put his wife and children on the line and you (Madhuri) often run to save, you (Madhuri) will also be put in the line'*; on saying this, he had assaulted informant's wife with "axe'; and immediately thereafter informant's wife Madhuri fell down on kharanja and died. Convict/appellant Sarvan had also admitted the testimonies of P.W.2-Injured Sangeeta. Therefore, it transpires from the whole statement of convict/appellant Sarvan recorded under Section 313 Cr.P.C. that he had supported the case of the prosecution.

56. From the side of convicts/appellants, three witnesses, namely, D.W.1-Pawan Kumar, D.W.2-Banshi Lal and D.W.3-Kanhaiya Lal were examined. D.W.1-Pawan Kumar is the real brother of the convict/appellant Sarvan. His evidence shows that on hue and cry of his brother Sarvan that informant Kolai, after killing his wife and children, fled away, he went to the house of convict/appellant Sarvan. This itself shows that D.W.1-Pawan Kumar is not an eye-witness as he reached at the place of occurrence after the incident. D.W.1-Pawan Kumar, in his examination-in-chief, did not depose anything regarding the dispute of flow of drainage water between his brother Sarvan (convict/appellant) and informant Kolai (P.W.1) but he had stated a new story that informant Kolai had captured one bigha of land and the informant Kolai had attacked upon his father, upon which his father died

and a case in this regard is going on. It transpires that there is no evidence on record, which establishes the aforesaid facts of D.W.1. Later on, D.W.1 in his deposition had stated that rumour was spread in the village that informant Kolai had killed the wife of Sarvan and his children, which establishes the fact that D.W.1 has stated before the Court on the basis of the rumour, therefore, his statement cannot be reliable and it appears that the facts of capturing one bigha land and the killing of his father by the informant Kolai, is imaginary and cannot be believed.

57. D.W.2-Banshi Lal was produced from the side of convict/appellant Sarvan, claiming to be an eye-witness of the incident but it transpires from his evidence that D.W.2 is not an eye-witness as D.W.2 in his deposition has stated in clear terms that on the date of the incident, he had gone for work and after 2-2½ hours of the incident, when he reached at the place of the incident, he saw that the police took out the deadbodies of the deceased and informant's wife died. D.W.2 had also stated that the police was informed by Chaukidar and villagers about the incident through phone, whereas it transpires from the statement D.W.1-Pawan Kumar, who is the real brother of the convict/appellant Sarvan that on his telephonic call, the police reached at the place of occurrence. This contradictory statement itself shows that D.W.2 had no actual knowledge about the incident. Moreso, D.W.2 had not stated about the fact that there was any dispute between Sarvan (convict/appellant) and informant Kolai regarding the flow of drain water. Thus, the statement of D.W.2 is also not trustworthy.

58. D.W.3-Kanhaiya Lal was produced from the side of convicts/appellants as eye-witness. His evidence shows that on the date of the incident, there was a "katha' in his house and he went to call the gardner, whose house was situated at a short distance from his house. D.W.3 had further deposed that he saw that two sons of Kolai (P.W.1-Informant) armed with "axe' jumped from the ruined house and ran away and blood was on their clothes. This version of D.W.3 is belied from his own cross-examination made before the trial Court where he himself had stated that he went from his house to call the gardner at 07:00 p.m. and when he came out of his house, incident had already occurred. Thus, it is clear that D.W.3 is not an eye-witness. Furthermore, D.W.3 had stated that even after the incident, "katha' had happened in his house. Hence, the evidence of D.W.3 is also not believable.

E.5. **INJURED WITNESS**

59. Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain, protect the real culprit. We need not discuss more elaborately the weightage that should be attached by the Court to the testimony of an injured witness. In fact, this aspect of criminal jurisprudence is no more *res integra*, as has been consistently stated by the Apex Court in uniform language.

60. In **Abdul Sayeed v. State of Madhya Pradesh** :(2010) 10 SCC 259, the Apex Court has held as under :-

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.

"Convincing evidence is required to discredit an injured witness." [Vide Ramlagan Singh v. State of Bihar, Malkhan Singh v. State of U.P., Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat, Bonkya v. State of Maharashtra, Bhag Singh, Mohar v. State of U.P. (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan, Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P. and Balraje v. State of Maharashtra.]

29. While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28. Darshan Singh (PW 4) was an injured witness.

He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In State of U.P. v. Kishan Chand a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy.

The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

61. In the instant case, P.W.2-Sangeeta is an injured witness. She had fully supported the prosecution case and stood firm as a rock of Gibraltar. She had stated that on the date and time of the incident, a noise "save-save' came from inside the house of convict/appellant Sarvan. On listening this noise, her mother Madhuri came out from her house and behind her, she and her brother Rajendra

came and were standing at their door. After sometime, Sarvan (convict/appellant) armed with blood stained "axe' came out from his house and told her mother that *"you Srimati protected a lot, now you (Madhuri) will also be killed'* and by saying this, Sarvan swung 4-5 blows of "axe' upon her mother, as a consequence of which, her mother fell down on *''kharanja'*. Thereafter, she and Rajendra (deceased) ran to save their mother Madhuri but Sarvan (convict/appellant) had also assaulted her brother Rajendra and thereafter her with "axe', as a consequence of which, she sustained injuries. After that convict/appellant Sarvan fled away and behind him Suman also fled away from there. Immediately thereafter, she along with her father (P.W.1) went to the police station Mohanlalganj, where her father (P.W.1) lodged the report. After lodging the report, she was sent for medical examination along with the Constable.

62. From the evidence of P.W.2-Sangeeta, it is established that the presence of P.W.2-Sangeeta at the place of occurrence is natural and also injuries on her person were caused by the convict/appellant Saravan.

E.6. **RECOVERY OF WEAPON OF ASSAULT ''AXE'**

63. It transpires from the recovery memo Ext. Ka. 39 that the weapon of assault "axe' was recovered on the next day of the incident i.e. on 26.04.2009 on the pointing out of convicts/appellants Sarvan and Suman. At the time of recovery of weapon of assault, blood was found on it. In order to prove the recovery of weapon of assault, S.I. Shri Dharam Pal was examined as P.W.13, who, in his deposition, had proved the recovery of weapon of assault on the pointing out of convicts/appellants Sarvan and Suman from the straw and also proved the arrest of convict/appellant Suman on the same day i.e. 26.04.2009 from her house. P.W.13 had also proved the site-plan of the recovery of weapon of assault as Ext. Ka. 40. Thus, the prosecution has fully established the recovery of weapon "axe' on the pointing out of convicts/appellants Sarvan and Suman.

E.7. **INTERESTED AND PARTISAN WITNESSES**

64. The contention of the learned Counsel for the convicts/ appellants is that P.W.1, P.W.2 and P.W.3 are interested and partisan witnesses as P.W.2 and P.W.3 are the daughter and son-in-law of the informant P.W.1, therefore, their testimonies cannot be believed.

65. In **Namdeo v. State of Maharashtra** : (2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773] , the Apex Court after observing previous precedents has summarized the law in the following manner :-

"38. it is clear that a close relative cannot be characterised as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

66. The Apex Court has reiterated the aforesaid principle in **Gulam Sarbar v. State of Bihar** : (2014) 3 SCC 401 as under :-

"19. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more witnesses does not carry any weight.

Thus, conviction can even be based on the testimony of a sole eyewitness, if the same inspires confidence. (Vide Vadivelu Thevar v. State of Madras [AIR 1957 SC 614: 1957 Cri LJ 1000] , Kunju v. State of T.N. [(2008) 2 SCC 151: (2008) 1 SCC (Cri) 331] , Bipin Kumar Mondal v. State of W.B. [(2010) 12 SCC 91: (2011) 2 SCC (Cri) 150 : AIR 2010 SC 3638] , Mahesh v. State of M.P. [(2011) 9 SCC 626 : (2011) 3 SCC (Cri) 783], Prithipal Singh v. State of Punjab [(2012) 1 SCC 10 : (2012) 1 SCC (Cri) 1] and Kishan Chand v. State of Haryana [(2013) 2 SCC 502 : (2013) 2 SCC (Cri) 807: JT (2013) 1 SC 222].)"

67. Keeping in mind the aforesaid propositions of law, it transpires from the record that there are three eye-witnesses examined by the prosecution i.e. P.W.1, P.W.2 and P.W.3 and they have not contradicted amongst themselves being the eye-witnesses. Merely because they are related witnesses, in the absence of any material to hold that they are interested, their testimonies cannot be rejected.

E.8. **MEDICAL EVIDENCE**

68. So far as medical evidence adduced by prosecution in this case is concerned, four persons, namely, Ramroop, Smt. Santoshi, Ravi and Sumiran were done to death on 25.04.2009 in the house of convict/appellant Sarvan; one person, Smt. Madhuri was done to death on 25.04.2009 outside the house of convict/appellant Sarvan; two persons, namely, Rajendra and Sangeeta got injured on 25.04.2009; and Rajendra died during treatment at Trauma Centre, King George's Medical College, Lucknow on 03.05.2009 at 08:40 p.m.

69. The post-mortems of deceased Ramroop, Smt. Santoshi and Ravi were conducted on 25.04.2009 at 08:30 p.m., 08:00 p.m. and 09:30 p.m., respectively, at T.B. Hospital, Thakurganj, Lucknow by P.W.6-Dr. G.P. Tiwari. In all postmortem reports, time of death of deceased persons were shown as 25.04.2009 at 06:30 a.m. Injuries found on deadbodies of deceased persons Ramroop, Smt. Santoshi and Ravi are incised and abraded wounds and P.W.6-Dr. G.P. Tiwari opined that deceased Ramroop, Smt. Santoshi and Ravi died due to shock and haemorrhage as a result of ante-mortem injuries. P.W.6 had also stated that all the ante-mortem injuries could be attributable by a sharp edged weapon.

70. The postmortem report of deceased Ramroop aged about 6 years reveals that first injury is abraded contusion 6 x 5 cm on right side of face just below right eye; second injury is abrasion 3 x 1 cm on right side of forehead 1 cm above right eyebrow; and third injury was incised wound 5 x 3 cm muscle deep on the side of neck 3 cm below right ear. A perusal of post-mortem report of deceased Santoshi aged about 35 years, it reveals that abraded contusion 8 x 6 cm was found on her right side of face 1 cm below right eye; incised wound 8 x 3 cm muscle deep was found on her top of right shoulder; incised wound 3 x 1 cm muscle deep was found on front of neck 2 cm above top of sternum; incised wound 4 x 2 cm muscle deep was found on her front of neck 2 cm above injury no. 3; incised wound 7 x 3 cm muscle deep was found on her front of neck 2 cm above injury no.4; and incised wound 3 x 2 cm was found on top of left shoulder. The post-mortem report of Ravi aged about 1½ years shows that incised wound 3 x 1 cm muscle deep was found on back of neck 2 cm below occipital; incised wound 1 x 1 cm was found on mid of chest; and abraded contusion 6 x 4 cm was found on forehead 2 cm above root of nose. P.W.6-Dr. G.P. Tiwari found on the persons of deceased Ramroop, Smt. Santoshi and Ravi that margins were clear cut, sharp, well defined and on opening, echymosis was present underneath all the injuries; and soft tissues and large blood vessels laryns tracea were found cut.

71. The post-mortem examination of deceased Sarvan aged about 4 years and Smt. Madhuri aged about 50 years were conducted on 25.04.2009 at 08:30 p.m. and 09:00 p.m., respectively, in T.B. Hospital, Thakurganj, Lucknow by P.W.9-Dr. Rajesh Awasthi, who found one injury i.e. lacertated wound in the back of neck and trachea, laryns, vessels, oesophagus were lacerated, on the dead body of Sumiran, whereas on the dead-body of the deceased Madhuri, P.W.9 found five injuries i.e. (i) lacerated wound 6 x 3 cm on the frontal and occipital region on exploration underneath bone fracture, haematoma in brain, margins lacerated and haematoma present; (ii) lacerated right eye 6 x 2 cm into bone deep underneath orbit bone fracture and brain membranes lacerated; (iii) lacerated wound 7 x 3 cm right cheek bone underneath bone fracture; (iv) left ear lacerated; and (v) lacerated wound right wrist joint. P.W.9 had stated before the trial Court that injury no.1 caused to the deceased could be attributable by sharp edged weapon; injury no.1 could also be attributable by blunt object; injury no.2 could be attributable by any weapon, however, injury was lacerated; injuries no. 3, 4 and 5 could be attributable by blunt object. He further stated that injury caused to the deceased Sumiran could be attributable by sharp edged weapon.

72. It is pertinent to mention that after the incident, deceased Rajendra was admitted to Trauma Centre, Lucknow, where he succumbed to injuries on 03.05.2009. The post-mortem of Rajendra was conducted on 04.05.2009 at 01:00 p.m. by Dr. U.K. Prasad (P.W.5), who found three ante-mortem injuries on his person. The first injury was contusion 8.0 cm x 5.0 cm on forehead 2.0 cm above root of nose; second injury was contusion 10.0 cm x 8.0 cm on back of head over occipital region; and third injury was contusion 5.0 cm x 4.0 cm on right temporal region 2.0 cm above right ear. P.W.5 had also found that on opening, echymosis was present underneath the injuries; fracture of right temporal and right parietal bones were found; subdural

haematoma was present all over the brain underneath the fracture brain meninges lacerated and extra dural haematoma present. As per the opinion of P.W.5, the deceased Rajendra died due to coma as a result of ante-mortem injuries.

73. The injury of injured Sangeeta (P.W.2) was examined by P.W.4- Dr. S.K. Trivedi on 25.04.2009 at 2:20 p.m. at Community Health Centre, Mohanlalganj, Lucknow, who found incised wound 1.5 cm x 0.25 cm x skin deep left side of arm anterior aspect, 1.5 cm. above left elbow joint and clotted blood seen, on her person. P.W.4-Dr. S.K. Trivedi opined that injury is simple in nature and could be caused by hard and blunt object and it was 1/2 day old.

74. If statements of P.W.4, P.W.5, P.W.6 and P.W.9 is compared in light of statement of other prosecution witnesses examined in the matter, it is clear that all deceased persons were done to death on 25.04.2009 at 06:30 a.m. The convict/appellant Sarvan used same weapon in committing murder of all deceased persons. It is also evident from record that injuries found on body of deceased persons can be caused with the weapon "axe" said to have been recovered on the pointing out of convicts/appellants. Thus, the prosecution was able to prove the manner in which deceased were done to death and has connected the weapon "axe" used by convict/appellant Sarvan in committing the offence. Thus, finding recorded by Trial Court in the impugned judgment and order on point of medical evidence, in our considered opinion, is also in accordance with facts and evidence which needs no interference by this Court. It may also safely be held in this matter that medical evidence is not contrary to oral version of prosecution.

E.9. **CONVICTION**

75. From the discussion of the prosecution evidence as above, this Court finds that :-

(i) The first information report is prompt having been lodged within one hour of the incident-in-question;

(ii) PW-1 lodged the First Information Report by giving a written report, which was proved by him as 'Exhibit Ka- 1'. The said report contains a graphic description of the convict/ appellant Sarvan with weapon in his hand and the manner in which the six deceased were murdered and one got injured as also the place of occurrence.

(iii) PW-1, P.W.2 and P.W.3 stood firm as a rock of Gibraltar by supporting the case of the prosecution.

(iv) There is no inconsistency in the oral testimony of PW-1 P.W.2 and P.W.3, the medical evidence and the testimony of the P.W.7, P.W.8, P.W.10, P.W.11, P.W.12, P.W.13 and C.W.1 and the reports such as inquest, site plan with regard to the injuries of the deceased and the place of occurrence.

(v) The medical evidence fully corroborates with the evidence of eye witnesses P.W.1, P.W.2 and P.W.3 with regard to the ante-mortem injuries sustained by six deceased persons.

(vi) The defence evidences i.e. D.W.1, D.W.2 and D.W.3 are not reliable."

76. Having carefully appreciated all the arguments made by the learned Counsel for the convicts/appellants, learned Government Advocate, the prosecution evidence, defense evidence, medical

evidence and other materials on record, this Court finds that the prosecution has proved its version beyond all reasonable doubts. The convicts/appellants, on the other hand, though took a plea that their act to assault informant's wife and his son was in retaliation but has utterly failed to discharge the initial burden laid on it to probalise its story or create dent or doubt on the prosecution story. The presence of convicts/appellants at the scene of occurrence is neither disputed nor can be doubted from any of the circumstances brought before the Court. It is proved by the prosecution that convict/appellant Sarvan in a pre-meditated manner armed with "axe' caused death of six persons and got injured one person by inflicting fatal injuries in a manner that the deceased could not escape the attack. The prosecution has also proved the fact that it was convict/appellant Suman who, with an intention of saving the convict/appellant Sarvan from legal punishment, concealed the weapon of assault "axe' and on the pointing out of both the convicts/appellants, Sarvan and Suman, weapon of assault "axe' was recovered. Thus, their conviction for the offences as mentioned in paragraph-2 hereinabove are fully justified and the convicts/appellants Sarvan and Suman have been rightly convicted by the trial Court by means of the impugned order for the offences as indicated in paragraph-2 hereinabove. In this regard, no infirmity is, therefore, found in the decision of the trial court. The conviction of each of the convicts/appellants is hereby upheld.

E.10. **SENTENCE**

77. As far as sentence awarded to convicts/appellants is concerned, the Trial Court in its wisdom has imposed death punishment finding the present case in the category of "rarest of rare" cases. Six persons were done to death and one got injured. Convict/appellant Sarvan is the husband of deceased Smt. Santoshi aged about 35 years and father of Ramroop aged about 6 years, Ravi aged about 1½ years, Sumiran aged about 4 years and also neighbour of deceased Smt. Madhuri aged about 50 years, deceased Rajendra aged about 10 years and injured Sangeeta aged about 16 years.

78. Aggravating and mitigating circumstances in the present matter can be summarized as under :-

"Aggravating Circumstances :-

(a) Offence in the present case was committed by the convict/appellant Sarvan in an extremely brutal, grotesque, diabolical, revolting and dastardly manner so as to arouse intense and extreme indignation of society as has been evident from the F.I.R. as well as the evidences of P.W.1, P.W.2 and P.W.3;

(b) Offence was also committed by the convict/ appellant Sarvan in preordained manner demonstrating exceptional depravity and extreme brutality;

(c) Extreme misery inflicted by convict/appellant Sarvan upon his own wife, three minor children and his one neighbour, who came to save his wife and children;

(d) Helpless children were done to death;

(e) Brutality and premeditated plan of convict/ appellant Sarvan also finds support from his act as he ensured the death of all deceased by assaulting them on the vital part of deceased persons;

(f) The act of convict/appellant Sarvan is shocking not only to the judicial

conscience but also to the Society as he has eliminated his wife and three children only on account of illicit relationship with his *bhabhi* (sister-in-law) which had always been objected by his wife and also eliminated his neighbour Madhuri (informant's wife) on account of the fact that she always used to intervene between them;

(g) Act and conduct of convict/appellant Sarvan itself shows that there is no chance of reformation and he is menace to the Society; and

(h) It is a cold-blooded murder of six persons without provocation.

79. On the other hand, Mitigating Circumstances, as emerged, are (a) age of the convict/appellant Sarvan was 48 years at the time of filing Criminal Appeal No. 1552 of 2017 and now he appears to be aged about approximately 52 years; (b) he belongs to village background and offence was committed because the convict/appellant Sarvan had illicit relationship with his bhabhi; and (c) chance for reformation and rehabilitation.

80. Now, the question before this Court is whether death penalty in the present case is justified. Before looking to the facts of present case on the question of sentence, it would be appropriate to advert to judicial authorities on the matter throwing light and laying down principles for imposing penalty, in a case, particularly death penalty.

81. In the case of **Bachan Singh v. State of Punjab** : (1980) 2 SCC 684, the Apex Court, in para-164, observed that normal rule is that for the offence of murder, accused shall be punished with the sentence of life imprisonment. Court can depart from that rule and impose sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing death sentence. While considering question of sentence to be imposed for the offence of murder under Section 302 IPC, Court must have regard to every relevant circumstance relating to crime as well as criminal. If Court finds that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, Court may impose death sentence.

82. Relying on the authority in **Furman v. Georgia,** (1972) SCC On-Line US SC 171, the Apex Court noted the suggestion given by learned counsel about aggravating and mitigating circumstances in para 202 of the judgement in **Bachan Singh (supra)** which reads as under :-

"202. ... 'Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of

murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

83. Thereafter in para 203, the Apex Court observed that broadly there can be no objection to the acceptance of these indicators noted above but Court would not fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other. Thereafter in para 206 of judgment in **Bachan Singh (supra),** the Apex Court also suggested certain mitigating circumstances as under :-

"206. ... 'Mitigating circumstances.--In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

84. Again in para 207 in **Bachan Singh (supra),** the Apex Court further said that mitigating circumstances referred in para 206 are relevant and must be given great weight in determination of sentence. Thereafter referring to the words caution and care, in **Bachan Singh (supra)**, the Apex Court observed that it is imperative to voice the concern that Courts, aided by the broad illustrative guidelines, will discharge onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

85. In **Machhi Singh v. State of Punjab**, (1983) 3 SCC 470, stress was laid on certain aspects namely, manner of commission of murder, motive thereof, antisocial or socially abhorrent nature of the crime, magnitude of crime and personality of victim of murder. Court culled out certain propositions emerging from **Bachan Singh (supra),** in para 38 and said as under :-

"The following propositions emerge from Bachan Singh case:(i) The

extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

86. The Apex Court in **Machhi Singh (supra)** further observed that following questions must be answered in order to apply the guidelines :-

"(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence"

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?" (Emphasis added)

87. In **Haresh Mohandas Rajput v. State of Maharashtra** : (2011) 12 SCC 56, after referring to **Bachan Singh (supra)** and **Machhi Singh (supra),** the Apex Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in Bachan Singh (supra) to cases where the "collective conscience" of community is so shocked that it will expect the holders of judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. Court, however, underlined that full weightage must be accorded to the mitigating circumstances of the case and a just balance had to be struck between the aggravating and the mitigating circumstances.

88. In para 20 of the judgment in **Haresh Mohandas Rajput (supra),** the Apex Court observed that the rarest of the rare case comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of society. The crime may be heinous or brutal but may not be in the category of *"the rarest of the rare case"*. There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur of the momentary provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death

sentence may be warranted where victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society, death sentence should be awarded.

89. The issue again came up before Hon'ble Apex Court in **Ramnaresh & others v. State of Chhattisgarh** reported in (2012) 4 SCC 257, wherein the Hon'ble Supreme Court reiterated 13 aggravating and 7 mitigating circumstances as laid down in the case of **Bachan Singh (supra)** required to be taken into consideration while applying the doctrine of "rarest of rare" case. Relevant para of the same reads thus:-

"76. The law enunciated by this Court in its recent judgements, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh (supra) and thereafter, in the case of Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments - one being the "aggravating circumstances" while the other being the "mitigating circumstances". The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354 (3) of Cr.P.C.

Aggravating Circumstances:

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece

staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused."

90. In the case of **Dharam Deo Yadav vs. State of UP** reported in (2014) 5 SCC 509, the Hon'ble Supreme Court has held thus:-

"36. We may now consider whether the case falls under the category of rarest of the rare case so as to award death sentence for which, as already held, in Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546 this Court laid down three tests, namely, Crime Test, Criminal Test and RR Test. So far as the present case is concerned, both the Crime Test and Criminal Test have been satisfied as against the accused. Learned counsel appearing for the accused, however, submitted that he had no previous criminal records and that apart from the circumstantial evidence, there is no eye-witness in the above case, and hence, the manner in which the crime was committed is not in evidence. Consequently, it was pointed out that it would not be possible for this Court to come to the conclusion that the crime was committed in a barbaric manner and, hence the instant case would not fall under the category of rarest of rare. We find some force in that contention.

Taking in consideration all aspects of the matter, we are of the view that, due to lack of any evidence with regard to the manner in which the crime was committed, the case will not fall under the category of rarest of rare case.

Consequently, we are inclined to commute the death sentence to life and

award 20 years of rigorous imprisonment, over and above the period already undergone by the accused, without any remission, which, in our view, would meet the ends of justice."

91. In **Kalu Khan v. State of Rajasthan** reported in (2015) 16 SCC 492, the Hon'ble Supreme Court has held that:-

"30. In Mahesh Dhanaji Shinde v. State of Maharashtra, the conviction of the appellant-accused was upheld keeping in view that the circumstantial evidence pointed only in the direction of their guilt given that the modus operandi of the crime, homicidal death, identity of 9 of 10 victims, last seen theory and other incriminating circumstances were proved.

However, the Court has thought it fit to commute the sentence of death to imprisonment for life considering the age, socio-economic conditions, custodial behaviour of the appellant-accused persons and that the case was entirely based on circumstantial evidence. This Court has placed reliance on the observations in Sunil Dutt Sharma v. State (Govt. of NCT of Delhi) as follows: (Mahesh Dhanaji case, SCC p. 314, para 35)

"35. In a recent pronouncement in Sunil Dutt Sharma v. State (Govt. of NCT of Delhi), it has been observed by this Court that the principles of sentencing in our country are fairly well settled -- the difficulty is not in identifying such principles but lies in the application thereof. Such application, we may respectfully add, is a matter of judicial expertise and experience where judicial wisdom must search for an answer to the vexed question -- Whether the option of life sentence is unquestionably foreclosed? The unbiased and trained judicial mind free from all prejudices and notions is the only asset which would guide the Judge to reach the "truth'."

92. Applying the exposition of law as discussed above, in the facts of the present case, we have examined the available "aggravating' and "mitigating' circumstances in the case in hand.

93. The convict/appellant was 48 years of age at the time of filing Criminal Appeal No. 1552 of 2017 and now he is aged about 52 years.

94. Coming to the aggravating circumstances, we also find that convict/appellant Sarvan had committed murder of not only his wife but also his three minor children and two of his neighours. Postmortem reports disclose brutal, grotesque, diabolical murder, which clearly reflects the mindset of convict/appellant Sarvan.

95. The present incident was committed when convict/appellant Sarvan had illicit relationship with his bhabhi (sister-in-law). The manner in which offence was committed and also the magnitude of crime, in our view, places the present matter in the category of anti-social or socially abhorrent nature of crime. We concur with the finding of Trial Court that six persons were murdered by convict/appellant Sarvan in most brutal, grotesque, diabolical and dastardly manner arousing indignation and abhorrence of society which calls for an exemplary punishment. Three minor children including their mother and two of his neighbours have been murdered by convict/appellant Sarvan when they were helpless and nothing is on record to show that they aggravated the situation so as to arise sudden and grave passion on the part

of convict/appellant Sarvan to commit such dastardly crime. Convict/ appellant Sarvan has also not shown any remorse or repentance at any point of time, inasmuch as, he attempted to hide the weapon in the house of his *bhabhi* (co-appellant Suman). In the statement recorded under Section 313 Cr.P.C. also, we find no remorse on the part of convict/appellant Sarvan rather he admitted his guilt that he had an illicit relationship with his *bhabhi* (sister-in-law) and his wife objected to this, on account of which, scuffle often took place between them and his neighbour Madhuri used to intervene between them, upon which he remained unhappy with her. The above conduct, attitude and manner in which murder of four persons of his family and two persons of his neighbours was committed by convict/appellant Sarvan shows that convict/appellant Sarvan is a menace to the Society and if he is not awarded death penalty, others members of the Society may not be safe. He slayed six lives to quench his thirst. The entire incident is extremely revolting and shocks the collective conscience of the community. Murders were committed in gruesome, merciless and brutal manner.

96. Balancing mitigating and aggravating factors and looking to the fact that convict/appellant Sarvan had committed crime in a really shocking manner showing depravity of mind and learned Government Advocate has also stated that there is no report regarding any chance of rehabilitation received from the Jail Authorities, in our view, the aggravating circumstances outweigh the mitigating circumstances by all canons of logic and punishment of life imprisonment would neither serve the ends of justice nor will be an appropriate punishment. Here is a case which can be said to be in the category of "rarest of rare" case and justify award of death punishment to convict/appellant Sarvan. We are also clearly of the view that convict/appellant Sarvan is a menace to the society and there is no chance of his rehabilitation or reformation and no leniency in imposing punishment is called for.

97. In the circumstances, we are of the view that death punishment imposed upon convict/appellant Sarvan for the offence under Sections 302, 323 and 201 IPC is liable to be confirmed. Capital Case No. 03 of 2017 is liable to be allowed and accepted to the extent of confirmation of death penalty.

E. 11. **CONCLUSION**

98. In the result :-

(A) Capital Case No. 3 of 2017

The reference made by the trial Court under Section 366 (1) Cr.P.C. for confirmation of death punishment awarded to convict/appellant, **Sarvan**, for the offence under Section 302 I.P.C. is hereby accepted and death punishment awarded to convict/appellant **Sarvan** in the present case is hereby confirmed.

(B) Criminal Appeal No. 1540 of 2017

This criminal appeal filed by convict/appellant Suman is dismissed.

It transpires that the convict/appellant Suman was on bail granted by a Co-ordinate Bench of this Court vide order dated dated 20.12.2017.

The convict/appellant Suman shall be taken into custody forthwith and sent to jail. She shall serve out the sentence as ordered by the trial Court vide impugned order dated 29.08.2017.

(C) Criminal Appeal No. 1552 of 2017

This Criminal Appeal preferred by convict/appellant Sarvan is dismissed.

Convict/appellant Sarvan is in jail. He shall serve out the sentence as ordered by the trial Court vide impugned order dated 29.08.2017.

99. However, as provided under Section 415 Cr.P.C. execution of sentence of death shall stand postponed until the period allowed for preferring such appeal has expired and if an appeal is preferred within that period, until such appeal is disposed of. It is also clarified that death punishment shall only be executed in accordance with law complying with all guidelines laid down by Hon'ble Supreme Court time and again.

100. Let a copy of this judgment along with Trial Court record be sent to Court concerned for compliance and two copies of judgment as well as printed paper book be sent to State Government, as required under Chapter XVIII Rule 45 of Allahabad High Court Rules, 1952, forthwith.

101. A copy of the judgment be also sent to convicts/appellants **Sarvan** and **Suman** through Jail Superintendent concerned for intimation forthwith. Compliance report be also sent to this Court.

(2022) 9 ILRA 1117
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.09.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 583 of 1987

Rudra Pal Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Pankaj Nath, Amar Nath Dubey, G.C. Verma

Counsel for the Respondent:
Government Advocate, Shiv Shanker Singh

Criminal Law - Indian Penal Code 1860 - Sections 302 & 34 - Evidence Act,1872 - Section 3 - Murder - Proof - Minor Contradictions - Evidence of the witnesses can not be discarded only for the reason that there are minor contradictions in the statements of witnesses - It is natural for minor contradictions to arise when witness testimonies are recorded after a considerable period of time - Human memory fades over time - Minor variations should not be given undue significance when evaluating the credibility of witness testimony (Para 35, 37)

The convict-appellants attacked Bajrang Bahadur Singh with a lathi and ballam, with the intention to cause his death, resulting in his demise due to the injuries inflicted - no material contradictions pointed out - convict-appellant had no specific defence as to why they have falsely been implicated in the case - prosecution proved its case beyond reasonable doubt against the appellant - all the convicts-appellants convicted u/s 302 readwith section 34 I.P.C. - conviction and sentence fully justified - Appeal dismissed. (43, 44, 45)

Dismissed. (E-5)

List of Cases cited:

1. Suresh Yadav @ Guddu Vs St. of Chhattisgargh 2022 SCC Online SC 236

2. Sachin Kumar Singhraha Vs St. of M.P. (2019) 8 Supreme Court Cases,371

3. Takhaji Hiraji Vs Thakore Kubersingh Chamansing, 2001(6) SCC,145

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. Present Criminal Appeal under section 374(2) Cr.P.C. has been filed against the judgment and order dated 02-09-1987 passed by Sri Mukteshwar Prasad, the then Ist Additional Sessions Judge, Sultanpur in Sessions Trial No. 113 of 1986, convicting all the appellants under sections 302/34 I.P.C. and sentencing them to undergo to life imprisonment to each convict-appellants under sections 302/34 I.P.C. The convict-appellants, Rudra Pal Singh, Sita Ram Singh and Sri Ram Singh had died during pendency of the present appeal and case against them has been abated vide order dated 05-12-2016. Thus, the present appeal survives on behalf of the appellant, Rajendra Pratap Singh.

2. Wrapping the facts of the case in brief that the complainant, Vijay Bahadur Singh, son of late Vishwanath Singh stated in the F.I.R. that his brother, Bajrang Bahadur and Ram Sahay Tewari, S/o Sri Ram Hit and Salikram Murai, S/o Ramjeevan, R/o of Kharagpur Ayodhya Nagar, were returning to their home on 03-09-1984 at about 1.30 P.M. When they reached Bibi Tali Talab, the convict-appellants, Rudra Pal Singh, Sita Ram Singh and Sri Ram Singh, sons of Fateh Bahadur Singh and Rajendra Pratap Singh @ Mithu, son of Rudra Pal Singh attacked his brother, Bajrang Bahadur Singh with Lathi and Ballam. When his brother, Bajrang Bahadur Singh raised alarm, Ram Sewak Tewari and Salikram Murai rushed towards the place of the incident and tried to save the brother of the complainant, Bajrang Bahadur Singh. The convict-appellants threatened them not to come forward to save Bajrang Bahadur Singh else they will bear the consequences.

3. Hearing noise at the place of occurrence, the complainant and Surya Narain Tewari, S/o Gayadin Tewari and Ram Lakhan Upadhyay, S/o Ram Dular and other villagers arrived at the place of incident and challenged the assailants. Then, the convict-accused ran away treating his brother half dead towards the south. The brother of the informant was badly injured and unconscious. He brought his brother on a cot to the police station with the help of Somai, Hari Ram Lal, Krishan Surya Narayan. When they reached near a temple at Peeparpur Road, his brother died on the way. The complainant went to the police station with dead body of his brother and lodged an F.I.R. in writing.

4. The contents of the aforesaid information were taken down in the concerned Chik F.I.R. as Case Crime No. 161 of 1984, under sections 302/34 I.P.C., Police Station-Peeparpur, Sub. District-Amethi, district-Sultanpur on 03-09-1984 at about 3.15 P.M.

5. On the basis of the entries so made in the Chik F.I.R., a case was registered against the convict-appellants. The investigation of the case was entrusted upon to the Station Officer, Satish Chandra Tripathi, P.W.-7 and the autopsy of the dead body of the deceased was conducted on the very same day i.e. 03-09-1984 at 17.30 hours in the presence of Surya Narain Singh, Dwarika Singh, Girija Shanker Singh, Ram Narain Shukla and Ganga Prasad Singh. The Investigating Officer prepared the inquest report of the dead body of the deceased, which is on record.

6. The witnesses of the inquest concurred with the Investigating Officer that the dead body of the deceased be sent for post-mortem in order to ascertain the real cause of death. The dead body of the deceased was sent for post-mortem with all necessary papers i.e. Chik Report, Challan Lash, Photo Lash, Report of the Chief

Medical Officer and the Report of the R.I. etc. in the form of Challan with letters to the Chief Medical Officer and R.I.

7. The post-mortem of the deceased, Bajrang Bahadur was conducted. The post-mortem report is Exhibit Ka-2, which is annexed with the file. The following ante-mortem injuries were found on the body of the deceased:-

Ante-mortem Injuries .

(1) Punctured wound 2 cm. x 1 cm. x bone deep over front of left leg. 9 cm. below paletts.

(2) Punctured wound 2.5 c.m. x 1 cm. x bone deep 7 c.m. below injury No. one.

(3) Punctured wound 1 cm. x .5 cm. x bone deep over medial malleolus.

(4) Traumatic swelling over medial part of right ankle joint in an area of 6 cm. x 4 cm. x diffused swelling around the joint also.

(5) Incised wounds over the back of proximal inter phalangeal joints of index, ring and middle finger. All linear and skin deep.

(6) Traumatic swelling over whole of the upper 1/2 of the right forearm 15 cm. x entire girth with deformity with fracture of both underlying bones(Radius & ulna).

(7) Multiple abrasion over back & top of right shoulder over bony prominence in area of 9 cm. x 5 cm.

(8) Contusion over right side back in scapular & infra scapular region measuring 12 cm. X 3 cm. oblique & vertical in direction.

(9) Contusion over left side back 13 cm. x 3 cm. vertical & oblique in direction below inferior angle of Scapula.

(10) Incised wd. 4 cm. x 1 cm. x bone deep over left side top of scalp 9 cm. above left ear.

Cause of death is disclosed as Shock & Hemorrhage due to ante-mortem injuries.

8. The Investigating Officer visited place of occurrence and prepared site plan (Exhibit Ka-12). The Investigating Officer collected blood stained cot from the possession of the complainant and released in his favour with the condition to produce the same at the time of the evidence. He also collected the blood stained and plain earth from the place of occurrence and prepared sample and sent it to Forensic Laboratory. The report of the Forensic Laboratory is on record.

9. After conducting investigation, the Investigating Officer filed the chargesheet against all the four convict-appellants, Rudra Pal Singh, Sita Ram Singh, Sri Ram Singh and Rajendra Pratap Singh under sections 302/34 I.P.C. The Magistrate concerned took the cognizance and committed the case for trial to the court of sessions.

10. The trial court framed charges against all the four convict-appellants under sections 302/34 I.P.C., which were read over and explained to them in Hindi. The convict-appellants abjured with a charge and claimed to be tried. In furtherance to prove their case, the prosecution examined the following witnesses :-

(1) Sri Vijay Bahadur Singh, P.W.-1, Complainant of the case. He claimed himself to be an eye witness.

(2) Sri Surya Narayan Tewari, P.W.-2, who also claims himself to be an eye witness of the case.

(3) Sri Ram Sewak, P.W.-3 also claims to be an eye witness of the case.

(4) Dr. V.K.Verma, P.W.-4, Medical Officer, who conducted the autopsy of the dead body of the deceased, Bajrang Bahadur S/o Vishwanath Singh and found ten injuries on the dead body of the deceased.

(5) CP Vijay Bahadur Mishra, P.W.-5, who registered the F.I.R. of the incident and made entry of the same in the Chik Report and General Diary.

(6) CP Ram Achal Singh, P.W.-6, who carried papers at the time of the inquest report for the purpose of autopsy coupled with dead body of the deceased for autopsy.

(7) Satish Chandra Tripathi, P.W.-7, Station Officer, who conducted the investigation of the case.

11. Apart from above oral evidences, necessary relevant documents were also proved by the prosecution which are as under :-

1. Written Report(Exhibit Ka-1)
2. Post Mortem Report(Exhibit Ka-2)
3. First Information Report(Exhibit Ka-3)
4. Inquest Report(Exhibit Ka-5)
5. Recovery Memo(Exhibit Ka-11)
6. Sita Plan (Exhibit Ka-12)
7. Recovery Memo(Exhibit Ka-13)

12. After completion of the evidence of the prosecution, the statements of the convict-appellants were recorded under section 313 Cr.P.C.

13. The convict-appellant, Rajendra Pratap Singh, S/o Sri Rudra Pal Singh denied the allegations levelled against him and merely stated that he has falsely been implicated in the present case due to enmity in village. He has also refused to adduce any defence evidence in his favour. No witness was produced by him though the opportunity of the same was given to him by the trial court. No documentary evidence was ever produced in the trial court regarding enmity.

14. Learned trial court heard arguments from both the sides and after analysing the evidence available on record, concluded that there is no reason to disbelieve the prosecution version. The presence of P.W.-2,Surya Narayan Tewari is doubted on the spot by the convict-appellants, but, P.W.-2, Surya Narayan Tewari, denied the suggestions of the defence and affirmed that he saw the incident. The trial court found nothing in the cross-examination to conclude that P.W.-2 is not an eye witness and minor contradictions were discarded. The trial court concluded that prosecution has proved by reliable evidence that deceased, Bajrang Bahadur died on account of injuries caused to him by all the four convicts-appellants in furtherance of their common intention in the manner and at the place as identified. The trial court convicted all the convicts-appellants under section 302 readwith section 34 I.P.C. and sentenced them to suffer imprisonment for life.

15. Feeling aggrieved by the order of conviction and sentence, the convicts-appellants have filed the present criminal appeal.

16. Sri Amar Nath Dubey, learned counsel for the convict-appellants argued that the learned trial court erred in convicting and sentencing the convict-appellant as there was no evidence found

against him. The First Information Report is ante-time document. The statements of the prosecution witnesses were highly contradictory. The trial court arrived at the conclusion from those contradictory statements. The investigation suffers from infirmities because there is inconsistency between the medical evidence and ocular evidence. The trial court did not look into the infirmities and contradictions in the case.

17. Learned counsel for the convict-appellants pleaded that present convict-appellant, Rajendra Pratap Singh, is shown to have Lathi in his hands and the infliction of injuries by Lathi is not corroborated with the post-mortem report. Three injures of punctured wounds were found on the body of the deceased. However, the deceased is not said to have any punctured wounds on the palms of his hands. He further submits that all the witnesses are the relatives of the deceased, therefore, this appeal should be allowed and the impugned judgment and order should be set aside.

18. In support of his contentions, leaned counsel for the convict-appellants has relied upon the Judgment of the Hon'ble Supreme Court in the case of ***Takhaji Hiraji Vs. Thakore Kubersingh Chamansing***, reported in ***2001(6) SCC,145***.

19. On the contrary, Sri Prabhat Adhaulia, learned Additional Government Advocate appearing on behalf of the State-respondent argued that P.W.- 1 to P.W.-3, are the eye witnesses and they have proved the prosecution case and submitted to uphold the order of trial court.

20. When accused were beating deceased, Bajrang Bahadur Singh, then complainant, Vijay Bahadur Singh, P.W.-1 and the witnesses, Surya Narayan Tiwari, P.W.-2 and Ram Sewak, P.W.-3, reached at the spot, where the convict-appellants, Rudra Pal Singh, Sri Ram Singh and Rejendra Pratap Singh were beating the deceased by Lathi and Sitaram by Ballam. When the deceased in order to save his life ran towards south of the Chak Road and reached the field of Beni Madho, the accused followed him and started beating the deceased. Due to injuries caused to him, the deceased fell down on the ground and became unconscious.

21. P.W.-1, Vijay Bahadur Singh, has testified in unequivocal words that on the fateful day of incident i.e. 03-09-1984 at about 01.30 P.M., when he was going to Ayodhya Nagar through Chak Road, P.W.-2,Surya Narayan Tiwari and Ram Lakhan Upahdyaya met him on the way. They were at the distance of about fifty steps from the scene of incident. When they heard alarm raised by the the deceased Bajrang Bahadur Singh and Ram Sewak, they rushed towards the place of occurrence and saw that the accused Rudra Pal Singh, Sita Ram Singh and Sri Ram Singh were assaulting the deceased Bajrang Singh by Lathi. Convict-appellant, Rajendra Pratap Singh was assaulting the deceased Bajrang Bahadur Singh by Ballam. In order to save his life, the deceased Bajrang Bahadur Singh ran towards Chak Road in the field of Beni Madho, but, after sustaining injuries, he could not run very far and fell down in the field of Beni Madho and became unconscious .

22. P.W.-2, Surya Narayan Tewari, who is an eye witness, stated on oath that he had accompanied Vijay Bahadur and Ram Lakhan also. When he heard the alarm raised by Salik Murai, Ram Sewak Tiwari

and Bajrang Singh, he reached the field of Beni Madaho and saw that accused,Rudra Pal, Rajendra and Sri Ram were assaulting deceased by Lathi and Sita Ram was assaulting the deceased by Ballam. The deceased Bajrang Bahadur Singh sustained injuries and he fell down in the field of Beni Madho. When they challenged the accused, the accused ran away. They carried the deceased Bajrang Bahadur Singh on a cot to Peeparpur. P.W.-2 reduced in writing the written F.I.R. on the dictation of Vijay Bahadur Singh. The written F.I.R.(Exhibit Ka-1) is proved by this witness.

23. P.W.-3, Ram Sewak, who is also an eye witness, stated on oath that on the fateful day of the incident at about 01.30 P.M., he was coming from Ayodhya Nagar through his village by Chak Road. He met with Bajrang Bahadur and Salik Murai on the way. He was 7-8 steps behind Bajrang Bahadur. When they reached near the field of Beni Madho, accused, Rudra Pal, Sri Ram and Rajendra Pratap Singh suddenly assaulted Bajrang Bahadur by Lathi and Sita Ram by Ballam. Bajrang Bahadur ran towards the south in order to save his life, but, accused followed him. Bajrang Bahadur fell down in the field of Beni Madho due to the injuries sustained by him during the assault caused by the accused. When, they raised alarm, Vijay Bahadur and Surya Narayan Tewari also arrived at the spot. Bajrang Bahadur was in an unconscious state due to Hemorrhage. It is stated that he did not accompany Vijay Bahadur and returned to his home. Later on, he came to know that Bajrang Bahadur had expired due to injuries sustained by him.

24. P.W.-4, Dr. V.K. Verma, Medical Officer, District Hospital, Sultanpur, appeared before the court and stated on oath that he attended the deceased Bajrang Bahadur Singh, S/o Vishwanath Singh, who was identified by Constable, Ram Achal Singh. P.W.-4, prepared the post-mortem report of the deceased Bajrang Bahadur. The deceased died due to Shock and Hemorrhage due to the ante-mortem injuries sustained to him. The post-mortem report of the deceased is Exhibit Ka-2. In the Chief Examination itself, P.W.-4, stated that six injuries were caused to the deceased by pointed weapons as Spear & Ballam and rest of the injuries were caused by hard and blunt objects i.e. Lathi.

25. P.W.-5, Vijay Bahadur Mishra, appeared in the court and proved the Chik F.I.R. on the basis of written report and G.D. No. 17 time 15.15 P.M. as Exhibit Nos. Ka-3 & Ka-4 respectively.

26. P.W.-6, Ram Achal Singh, Constable 343. C.P., Police Station-Kadipur, district-Sultanpur proved all the papers regarding post-mortem and C-Map, which were handed over to him by the Chief Medical Officer.

27. P.W.-7, Satish Chandra Tripathi, Station House Officer, Police Station-Jami, district-Sultanpur investigated the case and prepared Challan Lash, Photo Lash, Namoona Mohar and letters to C.M.O. and R.I.(Exhibit Ka-06 to Exhibit Ka-10) and recovery memo of cot (Exhibit Ka-11). This witness prepared the site plan(Exhibit Ka-12), recovery memo of the plain and blood stained earth in the separate containers. Recovery Memo is Exhibit Ka-14.

28. Learned counsel for the convict-appellants vehemently argued that death of the deceased is caused by Shock and

Hemorrhage due to ante-mortem injuries. Hemorrhage is possible only by Ballam and the convict-appellant is not assigned any role to assault the deceased Bajrang Bahadur Singh by Ballam. The convict-appellant is said to have assaulted the deceased Bajrang Bahadur by Lathi, by which no such injuries may result in death of the deceased, can be caused.

29. Perusal of the post-mortem report of the deceased transpires that three punctured wounds were found on the dead body of the deceased. Two incised wounds at serial nos. 5 & 10 are indicated by the Doctors in the post-mortem report of the deceased. Rest of the injuries are found to be caused to the deceased by hard and blunt objects. Injury no. 4 is Traumatic swelling over medial part of Rt. Ankle joint in an area of 6 cm x 4 cm. X diffused swelling around the joint also. Injury no. 6 is Traumatic swelling over whole of the upper 1/2 of the Rt. Forearm 15 cm x entire girth with deformity with fracture of both underlying bones (Radius & Ulna). Injury no. 7 is Multiple abrasion over back & top of Rt. Shoulder over bony prominence in an area of 9 cm x 5 cm. Injury No. 8 is Contusion over Rt. Side back in scapular & intra scapular region measuring 12 cm x 3 cm oblique & vertical in direction. Injury No. 9 is Contusion over Lt. Side back 13 cm x 3 cm., vertical & oblique in direction inferior angle of Scapula.

30. Doctor, V.K.Verma, P.W.-4, in his statement before the court stated that all these injuries are possible to be caused by hard and blunt objects i.e. Lathi. Dr. V.K. Verma proved all these injuries to be caused by hard and blunt objects.

31. During external examination, it is found that Abdomen of the deceased was distended, greenish discoloration over both Iliac fossa present.

32. Learned counsel for the convict-appellants submitted that the convict-appellant did not choose to any dangerous weapon during assault, which may result in the death of the deceased.

33. From perusal of the record, it is clear that all the four accused assaulted the deceased in furtherance of common intention to kill him and due to injuries sustained during this assault, the deceased, Bajrang Bahadur died when he was being carried to the police station concerned, therefore, it cannot be said that convict-appellant, Rajendra Pratap Singh can be given any benefit to the effect that he did not use any dangerous weapon.

34. Learned counsel for the convict-appellant submitted that there are many contradictions in the statements of the witnesses. However, no such material contradictions have been pointed out from the evidence of three eye witnesses. P.W-1 to P.W.-3 are the ocular witnesses, who were present on the spot and the occurrence happened in their presence and they witnessed the incident.

35. Hon'ble Apex Court in the case of ***Suresh Yadav alias Guddu Vs. State of Chhattisgargh,*** reported in ***2022 SCC Online SC 236***, held that evidence of the witnesses can not be discarded only for the reason that there are minor contradictions in the statements of witnesses. For convenience, para no. 9 of the said Judgment is reproduced as under :-

9. "Even otherwise, we do not find the present one to be a case of manifest illegality so as to call for interference. The

evidence of PW-1, being the eye-witness to the incident, remains unimpeachable and has been believed by the two Courts. His 3 evidence cannot be discarded only for the reason that he allegedly did not raise any alarm or did not try to intervene when the deceased was being ferociously assaulted and stabbed. Excessive number of injuries do not ipso facto lead to an inference about involvement of more than one person; rather the nature of injuries and similarity of their size/dimension would only lead to the inference that she was mercilessly and repeatedly stabbed by the same weapon and by the same person."

36. It is submitted by learned A.G.A. that all the witnesses are rustic witnesses of the village. Therefore, minor contradictions are bound to take place and the evidence of witnesses is recorded after two and half years of the incident. The human memory faints day by day. Therefore, minor contradictions, if any, may be found in the statements witnesses and they are negligible and they do not wash away the entire evidence of prosecution case.

37. Hon'ble Apex Court in the case of ***Sachin Kumar Singhraha Vs. State of Madhya Pradesh,*** reported in (2019) ***8 Supreme Court Cases,371***, held that minor variation should not be taken into consideration while assessing reliability of witness testimony and consistency of prosecution version as a whole regarding deposition of villagers. For convenience, para no. 12 of the said Judgment is reproduced as under :-

"12. The court will have to evaluate the evidence before it keeping in mind that rustic nature of the depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole. In this view of the matter, in our considered opinion, the evidence of PW 5 fully supports the evidence of PW 4 and the case of the prosecution."

38. So far as the place of occurrence is concerned, there is no dispute regarding the same. The occurrence happened in the field of Beni Madho, which is adjacent to the Chak Road and the witnesses reiterated in so many words that the deceased fell down in the field of Beni Madho due to the ante-mortem injuries.

39. The Investigating Officer sent the blood stained and plain earth to the Laboratory for examination. The analysis report is annexed as Exhibit Ka-15 with the file. Items no. 1 to 6 are found to be blood stained and disintegrated. During trial, papers are admitted by the learned counsel for the convict-appellant, therefore, there is no possibility that the blood stained and plain earth collected from the place of occurrence were not stained by the blood of the deceased. Therefore, in view of the overwhelming evidence on record, learned trial court reached to the conclusion that the deceased expired due to the anti-mortem injuries caused by the convict-appellant.

40. Learned counsel for the convict-appellant submitted that the post-mortem report is anti-time and when the inquest report was prepared, no crime number was allotted to the incident, therefore, it can be

said that after preparation of the inquest report, the F.I.R. in question was lodged. But, we are not convinced with the argument advanced by learned counsel for the convict-appellants.

41. We have perused the inquest report and found that Crime No. 161 of 1984 under section 302 I.P.C. on a paper book, Sultanpur is indicated to have been lodged on 03-09-1984 at 15.15 P.M. Therefore, the said submission advanced by the learned counsel for the convict-appellants is rejected. It is found that the inquest report was prepared only after F.I.R. is lodged at the police station.

42. During the statement recorded under section 313 Cr.P.C., the convict-appellant, Rajendra Pratap Singh denied the evidence of prosecution witnesses but he did not disclose the genesis of dispute that what was reason of his false implication in the case. By answering question no. 9, the convict-appellant, Rajendra Pratap Singh stated that there was no animosity, however, the complainant had an enmity due to civil cases pending between the parties. The convict-appellant had no specific defence as to why they have falsely been implicated in the case. They did not adduce any defence evidence. However, the convict-appellant was given opportunity for the same.

43. No other material or circumstance has been alleged by the learned counsel for the convict-appellant and no major contradiction is mentioned in the statements of the witnesses.

44. In view of the aforesaid, we reach to the conclusion that the convict-appellant has failed to show that there was any major contradictions in the statements of the witnesses by which the convict-appellants can be benefited.

45. In view of the foregoing discussions, this court is of the opinion that the prosecution has proved its case beyond reasonable doubt against the appellant. The conviction and sentence of the appellant by the trial court for the offence in question is fully justified. Therefore, the impugned judgment and order passed by the trial court convicting and sentencing the appellant under section 302/34 I.P.C. for imprisonment for life is hereby upheld.

46. This appeal is liable to be dismissed and is ***dismissed*** accordingly.

47. The appellant, Rajendra Pratap Singh is in jail. He shall serve out the sentence awarded by the trial court.

48. Let the certified copy of the judgment be sent to the trial court concerned for necessary action and forwarding it to the concerned Jail Superintendent where the accused appellant, Rajendra Pratap Singh is detained.

49. Let the Lower Court Record be sent back to the Trial Court concerned forthwith.

(2022) 9 ILRA 1125
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2022

BEFORE

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

Criminal Appeal No. 1751 of 2015

Baddan Singh ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Kameshwar Singh, Ms. Mary Puncha (Sheeb Jose), Sri Mohd. Kalim

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Indian Penal Code,1860 - Sections 300 & 201 - Evidence Act, 1872 - Section 3 - Murder - Circumstantial Evidence - Motive - Normally, there is a motive behind every criminal act and that is why investigating agency as well as the Court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question - In a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance - the investigating agency as well as the court should ascertain as far as possible as to what was the immediate impelling motive on the part of the accused which led him to commit the crime in question - Benefit of reasonable doubt - in the case of circumstantial evidence, if two views are possible on the face of record, one pointing to the guilt of the accused and the other his innocence - the accused is indeed entitled to have the benefit of one which is favourable to him - Suspicion - an accused ''must be' and not merely ''may be' guilty before a court can convict - no one can be convicted on the basis of mere suspicion, however, strong it may be - Suspicion alone is not sufficient to bring home the charge (Para 24, 37, 38)

Criminal Law - Evidence Act 1872 -Section 27 - what is important is discovery of the material object at the disclosure of the accused, but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused - thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence - what is admissible under Section 27 is the information leading to discovery and not any opinion formed on it by the prosecution - Under Section 27 of the Evidence Act, mere recovery of the assault weapon cannot be construed as providing acceptable proof for the murder without there being any substantive evidence. (Para 25, 30)

Prosecution case that the Baddan Singh took Hiran Singh along with him and while hunting pigeons, Hiran fell down in the well, thereafter, Baddan Singh slit the throat of Hiran Singh and killed him - Held - PW-1 & PW-2 St.d that the accused appellant had a cordial relationship with the deceased, indicating no motive for committing the offense - no evidence to prove that the accused remained in the company of the deceased until his murder - no person witnessed them together near the well, or saw them fetching the rope/cot or carrying the body of the deceased wrapped in hay on the motorcycle - multiple contradictory probabilities in the prosecution's case, which have not been explained - conviction solely relies on the confessional St.ment of the appellant recorded after his arrest, which cannot be used against him - alleged assault weapon is not connected to the offense, and no human blood was found on the gandasa - proved incriminating circumstances, such as the appellant taking the deceased with him, are merely based on suspicion - however strong the suspicion may be, it is not sufficient to prove the offense - prosecution failed to prove the incriminating circumstances beyond reasonable doubt - chain of evidence connecting the appellant to the crime is incomplete - conviction and sentence set aside.

Allowed. (E-5)

List of Cases cited:

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

2. Shivaji Sahabrao Bobade Vs St. of Mah.

3. Shahjaha @ Shahjahan Ismail Mohd. Shaikh Vs St. of Mah. 2022 Live Law (SC) 596

4. Pulukuri Kotayya Vs Emperor AIR 1947 PC 67

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

6. Mustkeem @ Sirajudin Vs St. of Raj. AIR 2011 SC 2769

7. Jeeva Vs St. of Raj. D.B. Criminal Appeal No. 296 of 2019

8. Chandrakant Ganpat Sovitkar Vs St. Of Mah. (1975) 3 SCC 16

9. Tarseem Kumar Vs Delhi Administration (1994) Supp 3 SCC 367

10. Miller Vs Minister of Pensions (1947) 2 AII ER 373

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

1. Heard Ms. Mary Puncha (Sheeb Jose), learned counsel assisted by Mohd. Kalim, learned counsel for the appellant, Shri Om Prakash Mishra, learned Additional Government Advocate and perused the lower court record with the assistance of the learned counsel for the parties.

2. The instant appeal has been filed against the judgment and order dated 21.04.2015 and conviction order dated 24.04.2015, passed by the learned Sessions Judge, Banda in Session Trial No. 84 of 2011, whereby, appellant has been convicted under Section 302 IPC and sentenced to life imprisonment with a fine of Rs. 10,000/-. In case of the default of payment, the appellant will have to undergo further 2 years simple imprisonment; appellant has been further convicted under Section 201 IPC and sentenced to 3 years rigorous imprisonment with a fine of Rs. 3000/-. In case of the default of payment, the appellant will have to undergo further 1 month simple imprisonment.

3. As per the prosecution version, around 12.00 noon on 15.06.2011, appellant came to the house of complainant, Shatrughan Singh (PW-2), and took his son Hiran Singh (deceased), to the house of his sister on a motorcycle. On 17.06.2011, at about 6.00 morning, appellant went to the house of the complainant with his bahnoi (brother-in-law). Complainant asked about his son Hiran, he stated that he does not know where has he gone. He suspected that appellant had abducted his son. On 16.06.2011, Braj Mohan Singh, Gram Pradhan, Mau, Police Station Marka (Banda), (PW-1), saw a beheaded corpse in the field of Ram Pratap Kushwaha, thereafter, he gave a written information to the police station. On the information, Thana Incharge reached the spot, collected blood-stained earth and plain-earth, thereafter, sealed and stamped it. One amulet (tabeez) and black thread was found near the dead body. The police official prepared the recovery memo in presence of the witnesses. The inquest report of the unknown beheaded corpse was prepared and sent for postmortem. Again on 18.06.2011, Braj Mohan Singh, (PW-1), was informed of a human head lying in the field of Buchh Raj Yadav, he gave a written information to the police station. Thana Incharge reached the spot, prepared the inquest report of the human head and sent it for postmortem. At the time of preparing the inquest report, on the basis of the structure of teeth, underwear and amulet recovered near the beheaded corpse, complainant, father of the deceased, identified the dead body that it was of his son Hiran. During investigation, name of co-accused, Karan Singh, surfaced.

4. After arrest, appellant confessed commission of the crime and on his pointing out, assault weapon (gandasa) for cutting grass was recovered from his house.

The appellant and co-accused Karan Singh together slit the throat of the deceased and murdered him. The recovery memo of the assault weapon was prepared. Co-accused Karan Singh and appellant in their confession/disclosure statement stated that while hunting pigeons, deceased Hiran Singh fell down in the well. On being pulled out, he was slightly breathing and the bone of his thigh had fractured. On apprehension of being caught for the death of Hiran, appellant in collaboration with co-accused Karan Singh slit the throat of deceased with a *gandasa* (battle-axe). He wrapped the head of the deceased in the shirt of the deceased and threw it at some place and the torso of the deceased was disposed of at a separate place so that evidence could be destroyed. On the basis of oral evidence and the evidences on record, the Investigating Officer filed the charge sheet against the appellant, Baddan Singh, and co-accused Karan Singh under Sections 302, 201 IPC.

5. The Chief Judicial Magistrate committed the case to the Sessions court on 15.9.2011. The appellant and co-accused Karan Singh were charged and examined for offence under Section 302 read with 34 IPC and Section 201 IPC. Appellant pleaded not guilty and claimed to be tried.

6. Braj Mohan Singh (PW-1), complainant Shatrughan (PW-2), Mrs. Mamta (PW-3), Dr. Ramesh Chandra Arun (PW-4), Dr. Rakesh Babu (PW-5), constable *muharrir* Prem Chandra (PW-6) and Rakesh Kumar Mishra (PW-7) were produced and examined on behalf of the prosecution.

7. The following documents were exhibited:

1.	F.I.R.	16.06.2011	Ex. Ka. 6
2.	Written Report	16.06.2011	Ex. Ka. 1
3.	Application	18.06.2011	Ex. Ka. 2
4.	Application	19.06.2011	Ex. Ka. 3
5.	Recovery Memo of Blood Stained & Plain Earth	16.06.2011	Ex. Ka. 7
6.	Recovery memo of tabeej, nearby dead body	16.06.2011	Ex. Ka. 17
7.	Arrest memo of accused & Recovery of assault weapon "gandasa'	23.06.2011	Ex. Ka. 24
8.	P.M. Report	17.06.2011	Ex. Ka. 5
9.	P.M. Report	19.06.2011	Ex. Ka. 4
10.	Panchayatnama	16.06.2011	Ex. Ka.10
11.	Panchayatnama	18.06.2011	Ex. Ka.19
12.	Chargesheet	31.07.2011	Ex. Ka. 25
13.	Site Plan with Index	23.06.2011	Ex. Ka. 26
14.	Site Plan with Index	16.06.2011	Ex. Ka. 18

8. In the statement recorded under Section 313 CrPC, appellant claimed that the prosecution version to be false and stated that the deceased has falsely been identified, forged recovery of the assault weapon was

shown and they have been implicated falsely out of enmity. As per accused Baddan Singh he did not take Hiran on his motorcycle from the house of Shatrughan. On 17.06.2011, he and his brother-in-law did not visit the house of Shatrughan, nor, did any communication had taken place. He alleged that the police conspired to show recovery of the battle-axe and appellant did not confess the commission of the crime. He further stated that police under the influence of his opponents implicated him falsely.

9. The trial court found sufficient evidence against appellant and convicted him, whereas, co-accused Karan Singh was held not guilty, accordingly, acquitted. Hence, the present appeal. The State has not filed appeal against co-accused Karan Singh.

10. Learned counsel for the appellant submits that the prosecution case rests on circumstantial evidence; the chain of events is grossly incomplete; prosecution failed to prove the incriminating circumstances beyond reasonable doubt; conviction of the appellant rests on the confessional statement of the appellant; co-accused Karan Singh on the same evidence was acquitted; the impugned judgment and order of the trial court is *per se* perverse and liable to be set aside.

11. As per prosecution case PW-1, Braj Mohan, Gaon Pradhan, of the village, on 16.06.2011, submitted a written report to the police station that beheaded corpse of a person aged about 25 years was found wearing an underwear; there is injury on the left thigh; body cannot be identified. On the report, F.I.R. came to be lodged at 12:45 pm.

12. On the information of PW-1, Station Officer visited the place of occurrence and collected blood smeared soil and plain soil which was sealed in presence of an independent witnesses, including, PW-1. From the spot, a black amulet (tabeez) and black thread was found which was duly sealed. Recovery memo (Ex.-ka 16 & 17) was drawn in presence of independent witnesses. PW-1 again on 18.06.2011, submitted another report with the police station that at about 2:00 pm he received information from the grazers that a human head (human skull) is lying in the field of Bachhraj Yadav. While preparing the inquest of the head, complainant (PW-2), father of the deceased, identified the skull by looking at the structure of the teeth; claiming that the skull recovered is of his missing son, Hiran.

13. PW-2, complainant, submitted a written report (tehrir) on 19.06.2011, at police station-Marka, District-Banda, wherein, it is alleged that on 15.06.2011, at about 12:00 noon, appellant who is resident of his village had visited his house and in presence of his wife (PW-3), appellant had taken his son, Hiran, on a motorcycle to the house of his sister at village Atarhat; on 17.06.2011, appellant along with his brother-in-law had again come to his house, but on inquiry by PW-2, about his son, appellant replied that he is not aware; PW-2 further alleged that he identified the beheaded corpse being that of his son and the amulet (tabeez) found near the corpse was that of his son.

14. Appellant came to be arrested on 23.06.2011, and on confessional/disclosure statement co-accused Karan Singh was arrested on 26.06.2011. After arrest, on the disclosure statement of the appellant, assault weapon (gandasa) was recovered on the pointing out of the appellant from his house. Appellant confessed commission of the offence; in the confessional statement,

appellant stated that on 15.06.2011, at about 12:00 noon he had taken the deceased along with him on the consent and approval of the parents of the deceased to visit a relative, thereafter, on the way they decided to hunt pigeons from the well. Appellant along with the deceased and co-accused Karan Singh reached the well at about 7:30 pm. The deceased, however, fell down inside the well while hunting in torch light for the pigeons sitting in the wall holes. Co-accused Karan Singh went to the village to fetch a rope, appellant with the assistance of the rope climbed down the well and saw that deceased has suffered injury on the left thigh. Consequently, deceased was lifted out from the well with the help of a rope; deceased, thereafter, was carried on a cot to the house of co-accused Karan Singh; apprehending that the deceased was unconscious and might have died; out of fear of the aftermath of the incident, accused agreed to dispose off the body of the deceased. The body was wrapped in bundle of hay and carried by the appellant on a motor cycle alongwith co-accused, Karan Singh, and on the way laying the deceased on the ground; appellant removed the head of the deceased by gandasa blow; head and torso of the deceased was thrown at different places; assault weapon was recovered on the pointing out of the appellant from his house on the day of arrest.

15. PW-5, Dr. Rakesh Babu, Deputy Chief Medical Officer (Dy. CMO), Jhansi, deposed that on 17.6.2011 at 3.15 p.m. conducted postmortem of the body (torso) of an unknown person aged 25 years. Head and neck of the body was not present.

16. Following ante mortem injuries were found on his body.

1- Incised wound all around the neck, measuring around 18 x 12 cm. Veins of the neck oseohegus, trachea and hyde bone were completely slit.

2- A clearly visible insized wound was present on the left of the shoulder measuring around 8 cm x 3 cm, the margins were clearly slit.

3- Abraded contusion 10 cm x 6 cm on the right joint was present.

4- Abraded contusion 4 cm x 3 cm on the left side of the chest 12 cm below the left nipple was present.

5- Abraded contusion 10 cm x 8 cm on the back side of the right elbow was present.

6- Abraded contusion 10 cm x 2 cm on the right side of the waist just above the bone of hip was present.

7- Abraded contusion 14 cm x 5 cm on the left side of waist 3 cm below the bone hip was present.

17. In the internal examination, it was found that the brain was not present. Base was not present, fifth bone of the neck was completely slit. Swelling in the lungs and trachea was present. Heart was empty. Esophagus was slit.

18. In the opinion of the doctor, cause of the death was hemorrhage and shock due to excessive bleeding. This witness has verified the postmortem report ExtKa5.

19. Trial Court noted in the impugned judgment that the prosecution case is based on circumstantial evidence and on scrutiny of the testimony of PW-2 (complainant/father of the deceased) and PW-3 (Mamta, mother of the deceased), it is proved that deceased was taken by the appellant before them from their house on 15.06.2011 at 12:00 noon on his motorcycle. PW-1 and PW-2 asked about the whereabouts of their son Hiran, when appellant along with his brother-in-law

returned on 17.06.2011, but appellant expressed ignorance. The trail court, further, relied on the confessional statement of the appellant that the accused persons along with the deceased had gone for hunting pigeons form an old well, deceased incurred injury by falling into the well and left thigh bone got fractured. The accused fearing that in the event of deceased succumbing to the injuries, accused could be trapped; under such an apprehension, accused/appellant slit the throat and separated the head from the body in order to conceal the evidence, in furtherance thereof, disposed of the body (torso) and the head at different places.

20. The finding reached by the trial court is extracted:

"In view of the contentions of both the parties, and in view of the perusal of the evidences on record, it appears that Baddan Singh on 15.06.2011 at 2.00 noon, took Hiran Singh with him on a motorcycle to his relative's house. It is evident from the statement of PW2 Shatrughan Singh and PW3 Mrs. Mamta, from the inquest report, the testimony of the witnesses, and the recovery of the weapon of murder, accused Baddan Singh taking Hiran Singh along with him and while hunting pigeons, Hiran falling down in the well, thereafter, Baddan Singh slit the throat of Hiran Singh with a battle-axe and killed him, and to destroy the evidence, he threw his head and the trunk at different places, so that nobody could doubt that the accused Baddan has murdered Hiran Singh. The weapon of murder i.e. the battle-axe was recovered from the accused Baddan Singh in presence of the witnesses, which is evident from the recovery memo ExtKa24. In this way, from perusal of all the evidences, it transpires that the accused Baddan Singh took Hiran Singh to his relative's house and he murdered Hiran Singh and then he hid the weapon of murder with which he murdered Hiran, which was later recovered from Baddan Singh on being pointed out by him."

xxx xxx xxx

"In the instant case, the prosecution, on the basis of the principle laid down by the Hon'ble Supreme Court in **Devendra Singh Vs State of UP1 and in Narendra Singh and others Vs State of M.P.,** has to necessarily prove all the circumstances beyond reasonable any doubt. In the instant case, from perusal of all the evidences, it transpires that the accused Baddan Singh took the deceased Hiran from his house and lastly, after killing him, tried to hide his dead body. Role of the co-accused appears to be of such extent that though at the time of committing the crime, he was present with Baddan Singh, however, he was neither seen going with accused Baddan Singh, nor, has any recovery been made from him. In such circumstances, in view of the evidences, it is justified to hold Baddan Singh guilty u/s 302, 201 IPC, however giving the benefit of doubt to accused Karan Singh, it will be justified to acquit him from the charge u/s 302, 201 IPC."

(English translation provided by the Court)

21. The question that arises for consideration is as to whether the prosecution was able to prove the incriminating circumstances connecting the appellant in commission of the crime beyond reasonable doubt.

22. The prosecution case rests on circumstantial evidence. PW-1 and PW-2, witnesses of fact, proved the circumstance that their deceased son was taken by the

appellant on 15.06.2011 at 12:00 noon on his motorcycle, thereafter, the appellant again visited PW-1 and PW-2 on 17.06.2011. On enquiring the whereabouts of their son, appellant expressed his ignorance. The conduct of the appellant created suspicion in the mind of PW-1 and PW-2.

23. The other circumstance proved by the prosecution that the torso and the head was identified by PW-1 from the structure of the teeth; the amulet and underwear on the beheaded corpse. The prosecution case, thereafter, rests on disclosure statement of the appellant purportly made under Section 27 of Evidence Act. The trial court taking into consideration the confessional statement of the appellant and the consequent recovery of the assault weapon on the pointing out of the appellant from his house, has recorded guilt and conviction.

24. We are constrained to record that the trial court has miserably failed to correctly apply the conditions, laid down by the Supreme Court, that must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established. Supreme Court in an early decision rendered in **Sharad Birdhichand Sarda Vs. State of Maharashtra,** indicated the primary principle that an accused "must be' and not merely **"may be'** guilty before a court can convict. The relevant paragraphs reads thus:

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in **Shivaji Sahabrao Bobadev. State of Maharashtra** where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

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

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

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

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

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

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

25. With regard to Section 27 of the Evidence Act, what is important is discovery of the material object at the disclosure of the accused, but such disclosure alone would not automatically lead to the conclusion that the offence was

also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under Section 27 is the information leading to discovery and not any opinion formed on it by the prosecution.

26. The various requirements of Section 27, can be summed up as follows:

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

(2) The fact must have been discovered.

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

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

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

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

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

(vide: **Shahjaha @ Shahjahan Ismail Mohd. Shaikh Vs. State of Maharashtra.**)

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

28. In the given facts, the confessional statement of the appellant alone spells out the entire episode leading to the offence. The appellant after picking up the deceased from his house on motorcycle, desired to hunt pigeons from an old well after sunset. While hunting pigeons, deceased accidentally fell into the well, rope and a cot was fetched by the accused persons from the village. The accused apprehending that the unconscious deceased might have died, the accused persons to escape the accusation of having murdered the deceased, decided to do away with the deceased, accordingly, in furtherance of their common intention, deceased was beheaded; torso and head was subsequently disposed off at different places. On the accused-appellant being arrested, he confessed of committing the crime and on his pointing out, the assault weapon was discovered. As noted earlier that taking of the deceased by the accused has been proved by the prosecution. The other incriminating circumstance proved by the prosecution is the discovery of alleged assault weapon. In between the two circumstance, the long gap remains a mystery, unexplained by the prosecution. The story setup in the confessional/disclosure statement of the appellant cannot be read against the accused as it precedes the commission of the offence. The statement of the accused

that he employed the *gandasa* in committing the offence also cannot be read against him. The only incriminating circumstance that may be held against the accused is the discovery of *gandasa* and the place where it was hidden, but, that is not sufficient to record the guilt against the accused. The prosecution has to link the assault weapon with the commission of the offence.

29. The recovery of the crime weapon in the facts of the case in hand was made after eight days from the date of the incident (15.06.2011) and on the date of arrest (23.06.2011), but, the crime weapon has not been linked with the commission of the offence. The recovery of the weapon is one link in the chain of proof and other links must be forged in the manner allowed by law. Blood stains was not found on the gandasa.

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

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

31. The prosecution has failed to prove the incriminating circumstances after the deceased was taken by him. PW-1 and PW-2 have clearly stated that accused appellant was having cordial relation with the deceased i.e. there is no motive of committing the offence. Further, no evidence has been led to prove that accused continued in the company of the deceased until his murder. No person has seen them together near the well, or fetching the rope/cot, and/or, carrying the body of the deceased wrapped in hay on the motorcycle. It is also not proved by the prosecution as to whether the deceased was alive at the time he was beheaded by the accused or was dead and thereafter, beheaded. There are multiple contradictory probabilities in the prosecution case which has not been explained. In other words, there are several possible hypothesis which the prosecution has failed to exclude. The conviction rests solely on the confessional statement of the appellant recorded after arrest, which cannot be read against him. Further, the alleged assault weapon has also not been connected with the offence. No human blood was found on the gandasa. In the given proved incriminating circumstances i.e. appellant taking the deceased along with him, is a case of mere suspicion, however strong the suspicion may be it is not sufficient to prove the offence. The prosecution has failed to prove the incriminating circumstances beyond reasonable doubt. The chain of evidence connecting the appellant with the crime is incomplete. The trial court

committed serious error in convicting the appellant. It is a case of no evidence. Suspicion alone is not sufficient to bring home the charge.

32. In **Chandrakant Ganpat Sovitkar Vs. State Of Maharashtra** helds as follows:

"It is well settled that no one can be convicted on the basis of mere suspicion, however, strong it may be. It also cannot be disputed that when we take into account the conduct of an accused, his conduct must be looked at in its entirety....."

33. Section 3 of the Evidence Act, while explaining the meaning of the words "**proved**", "**disproved**" and "**not proved**" lays down the standard of proof, namely, about the existence or non-existence of the circumstances form the point of view of a prudent man. The Section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist" and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. The Act while adopting the requirement of the prudent man as an appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It is this degree of certainty to be arrived where the circumstances before a fact can be said to be proved. A fact is said to be disproved when the Court believes that it does not exist or consider its non-existence so probable in the view of a prudent man, and now coming to third stage where in the view of a prudent man the fact is not proved i.e. neither proved nor disproved. It is this doubt which occurs to a reasonable man, has legal recognition in the field of criminal disputes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by "a prudent man'.

34. **Lord Denning, J. in Miller V. Minister of Pensions**, while examining the degree of proof required in criminal cases stated:

"that degree is well settled. It need not reach certainty but it must reach a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful probabilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course, it is possible but not in the least probable", the case is proved beyond reasonable doubt....."

35. Regarding the concept of benefit of reasonable doubt Lord Du Paraq, in another context observed thus:

"All that the principle enjoins is a reasonable scepticism, not an obdurate persistence in disbelief. It does not demand from the Judge a resolute and impenetrable incredulity. He is never required to close his mind to the truth."

36. In the given facts, applying the test of a prudent man as a standard to measure proof, we are unable to persuade

ourselves, that the existence of the circumstances relied upon by the prosecution are so probable in view of a prudent man. Further, as per the statement of PW-1 and PW-2, there is no motive attached to the crime. The witnesses stated that appellant is of their village and they have cordial relation with him. In a case based on circumstantial evidence, motive for committing the crime assumes greater importance. The accused can be convicted, in absence of motive, only if each of the circumstances has been proved by the prosecution. As we have, upon scrutiny of the evidence, noted that prosecution has not been able to prove the circumstances connecting the appellant with the commission of the crime, motive becomes a relevant consideration.

37. The Supreme Court in **Tarseem Kumar v. Delhi Administration** held as follows:

"Normally, there is a motive behind every criminal act and that is why investigating agency as well as the Court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. It has been repeatedly pointed out by this Court that where the case of the prosecution has been proved beyond all reasonable doubts on basis of the materials produced before the Court, the motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the Court for purpose of recording a finding that it was the accused who committed the crime in question, even in absence of proof of a motive for commission of such a crime, the accused can be convicted. But the investigating agency as well as the court should ascertain as far as possible as to what was the immediate impelling motive on the part of the accused which led him to commit the crime in question....."

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

39. Having regard to the facts and circumstances of the case and upon scrutiny of the prosecution evidence, the conviction and life sentence imposed on the accused is totally unsustainable in law, therefore, appeal is liable to be allowed and the impugned judgment and order of conviction and sentence is liable to be set aside.

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

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

42. Let the lower court record be sent back to court below along with a copy of

this judgment, for ascertaining necessary compliance.

(2022) 9 ILRA 1137
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2022

BEFORE

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

Criminal Appeal No. 3603 of 2018

Anurag Sharma ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Anil Mullick, Sri Dinesh Kumar Shukla, Sri Narendra Mohan, Rekha Pundir, Sri Sunil Vashisth

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law - Indian Penal Code 1860 - Section 302 - Evidence Act,1872 - Section 154 - testimony of hostile witness - maxim 'falsus in uno falsus in omnibus' is not applied in criminal law in India - the evidence of hostile witness can still be relied upon to the extent to which it supports the prosecution version - evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence - Such evidence remains admissible in the trial and there is no legal prohibition against basing a conviction on the testimony of a hostile witness if it is corroborated by other reliable evidence - However, the testimony of hostile witnesses should be scrutinized meticulously and and approached with great caution (Para 17, 18, 21)

B. Criminal Law - Evidence Act, 1872 - Section 106 - Burden of proving fact especially within knowledge - burden of proving things which are within the special knowledge of an individual is on that individual - Section 106 does not absolve the prosecution from its burden to establish the guilt of an accused but it applies to cases where chain of events has been successfully established by the prosecution, from which a reasonable inference is made out against the accused - when an individual has done an act, with an intention other than that which the circumstances indicate, the onus of proving that specific intention falls onto the individual and not on the prosecution (Para 25)

In the instant case only the accused & his father were left at home when the complainant went outside to deposit tax - there was none at the house - Accused took a stand that his father was murdered during the robbery or dacoity in his house - but there was no evidence on record regarding any robbery and dacoity in the house - appellant failed to discharge his burden u/s 106 of the Indian Evidence Act.

C. Criminal Law - Evidence Act, 1872 - Section 27 - How much of information received from accused may be proved - if an accused person gives a St.ment that relates to the discovery of a fact in consequence of information received from him is admissible - rest part of the St.ment has to be treated as inadmissible - Recovery - If the place of hiding the weapon is exclusively within the knowledge of accused and that place cannot be or is not in the knowledge of any other person and the weapon is recovered from the same place, such type of recovery is absolutely reliable and it cannot be doubted or it cannot be presumed that weapon is planted (Para 28, 29)

The Investigating Officer made recovery of hammer used for commission of the crime on the pointing out of the accused-appellant from a very specific i.e. from inside the box, kept in the

adjacent room of kitchen of the house of the accused and such place was only in his knowledge - the place of hiding the hammer was only, within the exclusive knowledge of the accused & it was not known to any other person - the recovery made at the instance of the accused-appellant rightly accepted by the trial Court (Para 29)

Dismissed. (E-5)

List of Cases cited:

1. Koli Lakhmanbhai Chandabhai Vs St. of Guj. 1999 (8) SCC 624

2. Ramesh Harijan Vs St. of U.P. 2012 (5) SCC 777

3.St. of U.P. Vs Ramesh Prasad Misra and another 1996 AIR (Supreme Court) 2766

4. Sabitri Samantaray Vs St. of Odisha, AIR 2022 SC 2591

5. Criminal Appeal No.2135 of 2013

6. Anwar Ali & anr. Vs St. of H.P., (2020) 10 SCC 166

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

1. This appeal is preferred against the judgment and order dated 27.6.2018, passed by Additional Sessions Judge, Court NO.11, Meerut, in Sessions Trial No.553 of 2015 (State vs. Anurag Sharma) arising out of Case Crime No.64 of 2015 under Section 302 IPC, Police Station-Kotwali, Meerut by which the accused appellant was convicted under Section 302 IPC and sentenced with life imprisonment and fine of Rs.25,000/- with one year additional imprisonment in case of default of fine.

2. The brief facts of the case as culled out from the record are that a Written-report (Ex.ka1) was submitted by the complainant, namely, Shail Kumari Sharma (mother of the accused and wife of the deceased) to the Police Station-Kotwali, Meerut on 12.3.2015 with the averments that on that date at about 12:30 p.m., she had gone to the house of her brother at Devpuri and from there she went to Nagar Palika with her nephew, namely, Shivanshu Sharma s/o Promod Kumar Sharma to deposit the house-tax. She had left her husband Prem Kishan Sharma aged about 70 years and her son Anurag Sharma at home. After depositing the house-tax in Nagar Palika at about 2:30 p.m., she returned to her house with her nephew and saw there that her husband was lying in dead condition in the corridor of first-floor of the house and there was pool of blood in corridor and inside the room and her son Anurag, who was drug addict and used to demand the money for it from his father, was absent from the house. It is also averred that her husband was retired from the post of clerk in Electricity department in the year 2005. His dead-body is lying. He has murdered by inflicting injuries on the head.

3. On the basis of aforesaid written report, a first information report (Ex.ka3) was registered at Police Station-Kotwali under Section 302 IPC and investigation was taken up by S.I. Mukesh Kumar. During the course of investigation, Investigating Officer visited the spot and collected the plain and blood-stained earth from the place of occurrence and prepared the recovery memo with bed-sheet and towel.

4. The accused-appellant was arrested on the same day of the occurrence and I.O. Recovered the hammer on the pointing out of the accused from inside the box, which was in the room, adjacent to the kitchen of the house. The hammer was having blood

on it, which was used for the commission of the crime. Investigating Officer also took the clothes of the accused in his possession, which were having blood-stains and inquest report was prepared. The postmortem of the body of the deceased was conducted and postmortem report was prepared. Recovered articles from the place of occurrence, clothes of deceased including the recovered hammer were sent to Forensic Science Laboratory, Agra for Chemical examination. On all above articles, blood-stains were found and on pant and shirt of the accused and on bed-sheet and towel, human blood was found. After completion of the investigation, charge-sheet was submitted against accused-appellant Anurag Sharma.

5. The case being triable exclusively by the court of session, it was committed to the Sessions Judge for trial. Trial court framed charge against the accused under Section 302 IPC. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charges, examined 8 witnesses, namely:-

1.	Shail Kumari Sharma	PW1
2.	Rakesh Kumar Sharma	PW2
3.	Shivanshu	PW3
4.	Sanjeev Kumar	PW4
5.	Aman Pal Singh	PW5
6.	Vijay Kumar	PW6
7.	Ravi Prakash	PW7
8.	Mukes Prakash	PW8

6. The accused was examined under Section 313 of Cr.P.C. by putting evidence against him. Accused denied the evidence against him and stated that his father was murdered in order to rob his house or committing dacoity and police had falsely implicated him to suppress the said heinous offence. It is also stated by the accused that he was handicapped to the tune of 60%, he was never drug addict. He was under depression due to disability, hence the doctors used to administer him sleeping medicines. In his defence the accused examined three witnesses, namely, Rajhans Singh (DW1), Aruna Bhargava (DW2) and R.M. Gupta (DW3).

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:-

1.	FIR	Ext. Ka-3
2.	Written-report	Ext. Ka-1
3.	Recovery Memo of 'Ala-katl' 'hathoda'	Ext. Ka-9
4.	Recovery Memo of accused's clothes	Ext. Ka-13
5.	Recovery Memo of plain & blood-stained concrete, bedsheet and towel	Ext. Ka-12
6.	Postmortem Report	Ext. Ka-10
7.	Report of FSL	Ext. Ka-17
8.	Report of FSL	Ext. Ka-16
9.	Panchayatnama	Ext. Ka-2
10.	Charge sheet	Ext. Ka-15

8. Heard Shri Sunil Vashishta, learned counsel for the appellant and Shri N.K. Srivastava, learned AGA for the State as well as perused the record.

9. Learned counsel for the appellant submitted that first information report of the occurrence is based on suspicion. There is no eye witness of the occurrence. Learned counsel submitted that the

complainant is mother of the appellant, but she had to name the appellant in FIR under the pressure of police because she and her nephew were picked up by the police and kept in the lock-up and she was pressurized to sign the written-report (Ex.ka1), which was written by some unknown person. Learned counsel invited our attention towards the statement of complainant (PW1) in which she has stated that Ex.ka1 has her signature, but she does not know who has written it. She was pressurized to put her signature on Ex.ka1 under the threat of putting her and her nephew in the lock up. Learned counsel preferred the statement of PW1 that police had kept her at police station whole night and released thereafter. Learned counsel also submitted that PW3 is nephew of the complainant, who has also supported the aforesaid facts in his evidence and deposed in his testimony that they had told the police that dacoity is committed in the house of complainat and her house is robbed, but police did not lodge the FIR. Police kept complainant and accused in the lock up and released me. On the basis of aforesaid statement of PW1 and PW3, the learned counsel for the appellant submitted that FIR of the case was lodged by the complainant in which her son accused was named under the pressure of the police.

10. Learned counsel for the appellant further submitted that as per prosecution case, the clothes of the accused were blood-stained, but the blood came on the clothes of the accused when he lifted the body of the deceased-father.

11. Learned counsel for the appellant next submitted that recovery of hammer, which is said to be used in the commission of the crime, is said to be on the pointing out of the accused, but in fact, the recovery is planted. A fake recovery memo is prepared by the police. Learned counsel made submission that no reliance can be placed on such type of recovery because there is no independent witness of the recovery. Section 27 of Arms Act cannot be made applicable because as per the statement of Investigating Officer, the accused had told him that he had hide out the hammer in the box, which is lying in the room adjacent to the kitchen of the house. Learned counsel argued when a particular place is disclosed by the accused then in that case weapon could be recovered by I.O. himself. There was no need to take the accused to that box and make the recovery on his pointing out. It is further submitted that no finger-prints were taken from the hammer.

12. Learned counsel for the appellant next submitted that as per prosecution story, the arrest of the case was made at the platform of the railway station by chauki in-charge of Government Railway Police and its entry was made in G.D. But neither the chauki in-charge was examined by the prosecution nor aforesaid GD was proved. Hence, prosecution has failed to prove the factum of place of arrest of the accused. Learned counsel submitted that in fact the accused was not in his house at the time of occurrence and had gone out, he came to his house after returning her mother.

13. Learned counsel for the appellant also submitted that learned trial court has wrongly invoked the provision of Section 106 of Indian Evidence Act,1872 because the burden to prove the case lies on the shoulders of prosecution, this burden cannot be shifted on the accused.

14. Lastly, learned counsel for the appellant submitted that there is no eye-

witness of the occurrence of this case and it is a case of circumstantial evidence and chain of circumstances is not complete by the evidence led by the prosecution. There was no motive with the accused-appellant to commit the murder of his father. Recovery, as alleged, is also not proved and there was no recovery of any hammer on the pointing out of the accused rather PW3 has categorically stated in his evidence that he had seen the hammer near the dead-body. Place of arrest of the accused is also not proved. Hence, entire case rests upon suspicion and trial court has wrongly convicted and sentenced the accused.

15. Learned AGA submitted that the first information report was voluntarily lodged by the mother of the accused-appellant naming him. There was no pressure on complainant because FIR is very prompt. It was lodged on the same day just after one and half hour when the murder of her husband came into her knowledge. Hence, in such a prompt FIR, there was no occasion or reason with the complainant to falsely implicate her own son. Learned AGA further submitted that only the accused and his father were left at home when the complainant went to Nagar Palika for depositing the house tax. There was none other at the house, hence the burden shifts on the appellant to prove his innocence, but he could not discharge the burden under Section 106 of Indian Evidence Act,1872. Learned AGA also submitted that there is no cross-examination from the hostile witnesses that accused was not at home when his mother went out. Learned AGA next submitted that the recovery of hammer, which is used for commission of the crime was made on the pointing out of the accused-appellant because it was recovered from inside the house of the appellant and no other could know where the hammer lies. It is next submitted that the report of FSL also substantiates the fact that offence is committed by the appellant because human blood was found on the clothes of the appellant and on the recovered bed-sheet of the bed on which the body of the deceased was found.

16. *Per contra*, learned counsel for the appellant submitted that there was no such fact, which was in the special knowledge of the appellant, hence there is no applicability of Section 106 of the Indian Evidence Act and learned trial court had wrongly taken the recourse of said provision of law of evidence.

17. Accused-appellant is named in FIR. Although, the complainant, mother of the accused, has turned hostile, but the testimony of hostile witness cannot be appreciated only on the ground of hostility. That part of testimony of a hostile witness can be accepted, which supports the prosecution and that part can be relied upon. The maxim 'falsus in uno falsus in omnibus' is not applied in criminal law in India. The grain has be separated from the chaff. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

18. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat*** *[1999 (8) SCC 624]*, as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the

record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

19. In ***Ramesh Harijan vs. State of U.P.*** *[2012 (5) SCC 777],* the Hon'ble Apex Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

20. In ***State of U.P. vs. Ramesh Prasad Misra and another*** *[1996 AIR (Supreme Court) 2766],* the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

21. It is stated by PW1, mother of the accused, that she was kept by police in police station through out the night and forcibly took her signature on written-report on the basis of which FIR was lodged. We are unable to rely on the aforesaid statement of the complainant because there is no evidence on record that she had ever made any complaint to higher authorities of police if her signature was taken forcibly on written-report. Moreover, there is also no evidence on record that her house was burgled and it cannot also be believed that to hide the offence of dacoity, police falsely implicated the accused through his mother. It is also pertinent to mention that the first information report was lodged very promptly as it was lodged just after one and half hour when the complainant first saw the dead-body of her husband. Hence, there was no opportunity or any reason with her to falsely implicate her son.

22. The complainant (PW1) although turned hostile, but in her examination-in-chief, she has corroborated the version of FIR to the extent that on the day of occurrence, she had gone to deposit the house-tax in Municipal Corporation and when she returned at about 2:50 p.m., the occurrence had already taken place. It is also admitted by her in cross-examination when she returned home, the accused was not at home. He came later on. It also indicates that after committing the offence, accused fled away. Hence, the version of FIR cannot be doubted even though the author has turned hostile.

23. It is admitted case that when the mother of the accused left home for Municipal Corporation, she left her husband and accused son at home. In examination-in-chief, the complainant (PW1) has specifically deposed as under:

"..... जब मैं हाऊस टैक्स भरने नगर निगम गई थी तो मैं अपने पति प्रेम किशन शर्मा व हाजिर अदालत मुल्जिम अनुराग को घर छोड़ कर गई थी।"

In her cross-examination also, she has accepted the suggestion of the public prosecutor when she was examined by him after being hostile. The relevant portion of it is quoted as under:

"..... यह कहना सही है कि मैं प्रेम किशन शर्मा व अनुराग शर्मा को घर पर घटना वाले दिन छोड़कर गयी थी क्योंकि अनुराग शर्मा का ईलाज चल रहा था।"

Hence, the mother of the deceased PW1 confirms the version of FIR

that she had left deceased and accused at home and no one else was present there. It means that when the deceased was murdered, it was accused only, who was in the house with the deceased. Hence, Section 106 of the Indian Evidence Act comes into application.

24. Section 106 of the Indian Evidence Act,1872 reads as follows:

***106**. Burden of proving fact especially within knowledge.--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations*

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

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

25. The Apex Court in ***Sabitri Samantaray vs. State of Odisha, AIR 2022 SC 2591*** has also observed as under:

"18. Section 106 of the Evidence Act postulates that the burden of proving things which are within the special knowledge of an individual is on that individual. Although the Section in no way exonerates the prosecution from discharging its burden of proof beyond reasonable doubt, it merely prescribes that when an individual has done an act, with an intention other than that which the circumstances indicate, the onus of proving that specific intention falls onto the individual and not on the prosecution. If the accused had a different intention than the facts are specially within his knowledge which he must prove.

19. Thus, although Section 106 is in no way aimed at relieving the prosecution from its burden to establish the guilt of an accused, it applies to cases where chain of events has been successfully established by the prosecution, from which a reasonable inference is made out against the accused. Moreover, in a case based on circumstantial evidence, whenever an incriminating question is posed to the accused and he or she either evades response, or offers a response which is not true, then such a response in itself becomes an additional link in the chain of events. [See Trimukh Maroti Kirkan Vs. State of Maharashtra, (2006) 10 SCC 681]"

26. The accused has not discharged his burden under Section 106 of the Indian Evidence Act. In his statement under Section 313 Cr.P.C., he has taken a stand that his father was murdered during the robbery or dacoity in his house and police falsely implicated him to suppress this heinous crime, but no iota of evidence is on record regarding any robbery and dacoity in the house hence the appellant has failed to discharge his burden.

27. The recovery of hammer used for commission of the crime is made on the pointing out of the accused-appellant from a very specific and such place which was only in his knowledge. Recovery of hammer was made by Investigating Officer from the box, kept in the adjacent room of kitchen of the house of the accused. He had told to I.O. that he had hide out the hammer inside the box, which is kept in the adjacent room of the kitchen. Learned counsel for the appellant has submitted that as per prosecution version, the appellant had already told to the I.O., the specific place where he had hid the hammer, therefore, in such a situation this discovery cannot be

turned as discovery under Section 27 of Indian Evidence Act.

28. Recently, while upholding the conviction, the Division Bench of this Court in Criminal Appeal No.2135 of 2013 has held in paragraph Nos.16, 17 & 27 as follows:

16. In the present case, the events complete the chain and, therefore, we are satisfied that the conviction of the accused-appellant requires to be upheld. Reference to the decision penned by His Lordship Justice M.R. Shah (as he then was) in the case of ***Nayan alias Yogesh Sevantibhai Soni Vs. State of Gujarat in Criminal Appeal No.37 of 2010*** *decided on 1.9.2015 where similar situation had arisen, reliance can be easily placed.*

17. Reliance can be placed on the decision of the Apex Court in ***Raja @ Rajinder Vs. State of Haryana, JT 2015 (4) SC 57****. Relevant paragraph of the aforesaid judgment is as under :*

"14. Thus, if an accused person gives a statement that relates to the discovery of a fact in consequence of information received from him is admissible. The rest part of the statement has to be treated as inadmissible. In view of the same, the recovery made at the instance of the accused-appellant has been rightly accepted by the trial Court as well as by the High Court, and we perceive no flaw in it.

15. Another circumstance which has been taken note of by the High Court is that the blood-stained clothes and the weapon, the knife, were sent to the Forensic Science Laboratory. The report obtained from the Laboratory clearly shows that blood stains were found on the clothes and the knife. True it is, there has been no matching of the blood group. However, that would not make a difference in the facts of the present case. The accused has not offered any explanation how the human blood was found on the clothes and the knife. In this regard, a passage from ***John Pandian v. State [7]*** *is worth reproducing:*

"The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This is apart [pic]from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case."

In view of the aforesaid, there is no substantial reason not to accept the recovery of the weapon used in the crime. It is also apt to note here that Dr. N.K. Mittal, PW-1, has clearly opined that the injuries on the person of the deceased could be caused by the knife and the said opinion has gone unrebutted."

27. From the depositions of P.W.1, the prosecution is successful in establishing and proving that it was the accused who had moved with the deceased and that the dead body was that of the deceased whose missing report was filed.

29. We are unable to accept the submission of appellant because the place of hiding the hammer was only, only and only within the knowledge of the accused. It was not known to any other person. We are giving emphasis on the word 'only' as we interpret that place is only in the exclusive knowledge of the accused ruling out the possibility of anyone else knowledge. If the place of hiding the

weapon is exclusively within the knowledge of accused and that place cannot be or is not in the knowledge of any other person and the weapon is recovered from the same place, such type of recovery is absolutely reliable and it cannot be doubted or it cannot be presumed that weapon is planted. In this case at hand, the hammer was recovered by IO after getting the knowledge from the appellant and at the time of the recovery IO took the appellant with him and appellant entrusted the hammer to the IO after taking out it from the box himself. The Investigating Officer (PW6) has also proved the factum of recovery in his testimony before the learned trial court. It is also pertinent to mention that the hammer was blood-stained. It was sent to FSL for chemical examination and the report of laboratory (Ex.ka11) also goes against the appellant because as per aforesaid report, the blood was found on the hammer.

30. Accused-appellant has tried to establish the fact that he was disabled to the tune of 60%. His disability is in one hand and one leg. This statement is made by appellant in his statement under Section 313 Cr.P.C. and to substantiate this fact a defence witness, namely, Dr.R.M. Gupta (DW3) is examined by accused. This witness was one of the signatories of disability certificate of the accused, but in his cross-examination by public prosecutor his testimony also goes against the accused-appellant, which is quoted as under:

"..... दायें हाथ से अभियुक्त लगभग 10 से 15 किलो वजन उठा सकता है। बायां हाथ ठीक है। दोनो हाथो को मिलाकर अभि० अनुराग 20 से 25 किलो वजन उठा सकता है। बांये हाथ से अभियुक्त सामान्य व्यक्ति की तरह वजन उठा सकता है तथा सामान्य व्यक्ति की तरह काम कर सकता है। अभियुक्त अपनी पे आ जाये, भारी तनाव व गुस्से में हठ इच्छा शक्ति के साथ हथौड़े से शरीर पर वार करके गम्भीर चोटें पहुँचा सकता है। अभियुक्त हथौड़ा उठाकर उसका इस्तेमाल करने में सक्षम है।"

31. Hence, learned trial court has rightly concluded that the accused was in a position to use the hammer so forcibly that the ante-mortem injuries mentioned in postmortem report could be inflicted.

32. Perusal of postmortem report shows that following ante-mortem injuries were found on the body of the deceased:

(i) A lacerated wound 6.0 cm x 5.0 cm on front of forehead, bone deep x muscle deep.

(ii) A lacerated would size 8.0 cm x 3.0 cm on right side of head 5.0 cm above on right ear

(iii) A lacerated wound size 4.0 cm x 1.0 cm right side of head just 9.0 cm above right ear.

(iv) A lacerated wound 4.0 cm x 1.0 cm on right side of head back to right ear.

33. Aforesaid ante-mortem injuries were such, which could be the result of use of hammer recovered on the pointing out of the accused. The doctor conducting the postmortem of the body has examined as PW7 and corroborated the fact that such kind of injuries could be inflicted with the help of a object like hammer. Hence, the medical evidence also corroborates the prosecution case.

34. The appellant had motive also to commit the crime as it is on record that the appellant was drug addict. In first information report, his mother has stated that he was drug addict and used to quarrel with his father to extract the money for the

purpose. In her testimony, although she has retracted this statement, but she has admitted the suggestion of prosecution that for some time he had remained admitted in de-addiction centre.

35. Although the witnesses of fact PW1 and PW3 had turned hostile, their testimony supporting the prosecution case is there, which is rightly accepted by learned trial court. Moreover, nature of circumstantial evidence in this case is also before us.

36. In ***Anwar Ali and another vs. State of Himanchal Pradesh,*** (2020) 10 SCC 166, it was held by the Supreme Court that in case of circumstantial evidence, circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the cirme was committed by the accused and by none else and the circumstantial evidence in order to sustain the conviction must be complete and incapable of explanation to any other hypothesis than that of a guilt of the accused and such evidence should not only be consistent with the guilt of the accused, but should be inconsistent with his innocence.

37. Keeping in view the aforesaid position of law in the case at hand, the appellant had motive to commit the crime. PW1 and PW3 even after turning hostile has supported the prosecution version. Accused-appellant has failed to discharge his burden of proof under Section 106 of Indian Evidence Act, the weapon, namely, hammer used in the crime is also recovered on the pointing out of the appellant. Blood-stains on the hammer are confirmed by the FSL report. Medical evidence also supports the prosecution version as the ante-mortem injuries could be inflicted by the hammer recovered on the pointing out of the accused. No evidence is found with regard to robbery or dacoity in the house of the appellant. Appellant was not found in his house when the complainant returned and firstly saw the dead-body of her husband. Although the GD of arrest of the accused from the platform of railway station is not proved by the prosecution, but it may be laps on the part of the public prosecutor, which cannot shatter the prosecution case and we have to see the cumulative effect of entire evidence available on record. The Investigating Officer has deposed in his testimony that he had taken the appellant into the custody from the chauki of Government Railway Police for which entry was made in the GD. GD number and dates are also deposed by the Investigating Officer. Accused had also failed to substantiate his version under Section 313 Cr.P.C. that he was handicapped to the extent that he could not use the hammer, but his supporting witness, namely DW3 had also not supported the version rather deposed affirmatively in cross-examination that the accused could lift the weight measuring 15-20 kg. while it is in the evidence that the hammer in question was not more than 1 kg.

38. Hence, keeping in view the aforesaid circumstances of this case, the chain of circumstances is so complete and linked with each other that no doubt is left with regard to the guilt of the accused-appellant and the completion of chain of circumstances goes to prove beyond reasonable doubt that the offence is committed only by the appellant and by none else. Hence, the learned trial court has rightly convicted and sentenced the accused and appeal is liable to be dismissed.

39. Appeal sans merit and is, accordingly, **dismissed**.

(2022) 9 ILRA 1147
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.09.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 8168 of 2008

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

Counsel for the Appellant:
Sri D.S. Parmar, Sri Asharfi Lal, Sri Ashok Pandey, Sri Brijesh Sahai, Sri Gopal Singh, Sri Sushil Kumar Dwivedi, Smt. Usha Srivastava, Sri Lal Chandra Misra

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law – Criminal Procedure Code, 1973 – Sections 161, 313 & 437(a) - Indian Penal Code, 1860 - Section – 326, 364-A - Arms Act, 1959 - Section 25 - Appeal against conviction and Sentence - offence of abduction of three person i.e. PW2 & PW3 and one minor child - unnamed FIR - Appreciation of evidence - abductees were abducted by one Balram Khangar and two members of his gang to whom he used to call by name of 'Raka' & 'Saka' - Eye-witnesses PW2 & PW3 were not examined during trial - complete guess work on the part of police by putting the name of appellant *Rakesh* for '*Raka'* & *Sattideen* for '*Saka'* - there is no material on record to showed how the police submitted charge sheet against Rakes (Appellant) when even his parentage & place of residence were not disclosed in any testimonies - further, police has not adopted neither test of identification pared nor dock identification for appellant as they have carried out in case of co-accused - no any recovery of cash - no any recovery of weapon used in crime - charges were framed against the appellant much before taking St.ments of eyewitnesses - prosecution appears to be hiding some relevant facts - all these things creates a serious doubt on the prosecution story - *held* - 'benefit of doubt' would goes in favour of accused appellant - impugned order of conviction is set aside - appellant shall be release forthwith subject to compliance of section 437-A of Cr.P.C.(Para 29, 30, 31)

Criminal Appeal is allowed. (E-11)

List of Cases cited:

1. Mulla& anr. Vs St. of U.P., (2010) 3 SCC 508,

2. Brij Mohan Vs St. of Raj., (!994) 1 SCC 413,

3. Mohd. Abdul Hafeez Vs St. Of Andhra Pradesh, 1983 (1) SCC 143.

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

1. This appeal is against the judgment and order dated 19.11.2008 passed by the Special Judge (Dacoity Affected Area), Hamirpur in Special Sessions Trial No. 70 of 1997 connected with Special Sessions Trial No. 29 of 1998, arising out case crime no.64 of 1997, P.S. Kurara, district Hamirpur, convicting and sentencing the appellant-Rakesh under Section 364-A IPC to imprisonment for life coupled with fine of Rs. 5,000/- and a default sentence of three months additional R.I. It be noted that the appellant was also tried for offence punishable under Section 326 I.P.C. but he was acquitted thereunder.

INTRODUCTORY FACTS

2. Dev Singh (PW-1) submitted a written report (Exb. Ka-1), dated 27.03.1997, scribed by Rihal Singh (not examined), at PS Kurara, district Hamirpur, on 27.03.1997, at 11 am, against unknown persons, giving rise to case crime No. 64 of 1997, under Section 364-A I.P.C. The GD

entry of that report was made vide report no. 16 (Exb. Ka-4) and a Chik FIR (Exb. Ka-3) was also prepared. According to the FIR, in the evening of 26.03.1997 while informant's son Virendra Singh (PW-3) and informant's younger brother Guman Singh (PW-2) were returning from their field on their tractor, near Jalla canal culvert, the tractor developed a snag, as a result, PW-3, left PW-2 near the tractor, came to his house for help; thereafter, PW-3 and his uncle (Tau-Man Singh) (not examined) took another tractor, at about 10 pm, to tow-chain the other tractor. It is alleged that when they did not return, the informant went to look for them in the morning. At about 7 am, on 27.03.1997, informant found the two tractors parked near the culvert. He also noticed that there was no tow-chain lock put on the tractor that had developed a snag whereas the other tractor was standing with tow-chain on it. By narrating the above story and by alleging that despite hectic search the three persons could not be found, the FIR was lodged suspecting that informant's two brothers and his son have been abducted by unknown criminals for ransom.

3. After the FIR was lodged combing operation was conducted by the police but none could be found. On 29.03.1997, at Kasba Kurara in the Clinic of doctor Prajapati (not examined), two of the abductees, namely, Man Singh (not examined) and Guman Singh (PW-2) were noticed by the first investigating officer (I.O. - Sri Vijay Varma-PW-8). According to the first I.O. (PW-8), from the statement of Man Singh and Guman Singh, he could gather that Man Singh was released by the abductors in the night of 27.03.1997 to fetch Rs. 1.5 lacs for release of the other two abductees. Man Singh informed the first I.O. that Balram Khangar, who was known to him from before, with a rifle; a short-statured person, with rudimentary moustache, having a country made pistol, called once by Balram Khangar as Rakesh; and one dark complexion person with good height, having a country made rifle, called by the name Saka, were responsible for his abduction. Man Singh also informed the first I.O. that Balram Khangar, addressed the other two persons by the name of Raka and Saka; and that as the money could not be paid, Guman Singh's (PW-2's) left hand fingers, except thumb, were chopped off and he was released in the evening of 28.03.1997 on a condition that he would get Rs. 1.5 lacs or else his nephew (Virendra Singh - PW-3) would be cut into pieces. PW-8 disclosed that all the above facts were confirmed by Guman Singh (PW-2) whose statement he recorded. PW-8 also disclosed that Guman Singh had informed him that the ransom money had to be paid on 29.03.1997 between 9 and 11. On 29.03.1997, the first I.O. inspected the spot from where the abductees were abducted and prepared a site plan (Exb. Ka-8). On 30.03.1997 Virendra Singh (PW-3) earned his freedom. According to the first I.O., on 01.04.1997 the statement of the third abductee, namely, Virendra Singh was recorded.

4. In the meantime, medical examination of the two abductees, namely, Guman Singh (PW-2) and Virendra Singh (PW-3), was carried out. PW-2 was medically examined on 30.03.1997 by doctor R.S. Gupta (PW-6) at 3 pm. As per the injury report (Exb. Ka-5), PW-2 - Guman Singh was brought for medical examination by CP No. 195 Ravindra Singh of PS. Kurara. Injuries noticed were as follows:-

"Chopped wound in area of 10 cm x 10 cm x bone deep on the back of left hand with traumatic amputation of fingers

of hand except thumb. All through metacarpal bones and tendons exposed. Wound infected with puss. Clotted blood present. Advise X-ray left hand.

OPINION

Above injury is caused by sharp edged weapon. Grevious in nature. Duration about two days old. Advise X-ray left hand."

5. Injury report of Virendra Singh (PW-3), which has been exhibited as Exb. Ka-6, was prepared by doctor R.S. Gupta (PW-6). It reveals that PW-3 was brought by CP No.195 Ravindra Singh and was medically examined on 30.03.1997 at 2.45 pm. Injuries noticed were as follows:-

"Complain of pain on the right arm. Complain of pain on the left side of chest. No external injury mark seen during examination time."

6. A supplementary injury report (Exb. Ka-2) of Guman Singh dated 31.03.1997 was obtained, which suggested that a radiological examination of the left hand was carried out. As per the report, 2, 3, 4th metacarpal bones were found cut/fractured. Fifth metacarpal bone was found missing. All the fingers except thumb were found missing.

7. The first I.O. (PW-8) conducted investigation and recorded statement of the witnesses including the abductee till he was transferred. Interestingly, during the course of his cross-examination, PW-8 stated as follows:-

"गवाहान देव सिंह, ओकार सिंह, शिव सिंह, हनूमान शरन मान सिंह गुमान सिंह वीरेन्द्र सिंह जिनके मैने बयान लिये है ने मुझे बलराम खंगरा के अलावा किसी अभियुक्त का नाम पता नही बताया था बल्कि यह बताया था कि सामने आने पर पहचान सकता हूं। किसी अपहृत व्यक्तियों ने मुझे बलराम के अलावा किसी बदमाश की वल्दियत व शकूनत नही बताई थी।"

8. On 30.09.1997, the investigation was taken over by PW-7. According to his testimony, the appellant Rakesh was arrested on 15.01.1998 by police of P.S. Khanna. Upon information, PW-7 went there to record his confessional statement. It is interesting to note that charge sheet against the appellant was submitted on 20.10.1997 by PW-7 vide Ex. Ka-7. What is also interesting is that PW-7 confirmed that neither Dev Singh (informant) nor the witnesses Man Singh, Guman Singh and Virendra Singh had disclosed the parentage of Rakesh or that Rakesh was known to them. PW-7 also stated that the witnesses had only told that Balram Khangar was calling one person by the name of Rakesh. After transfer of PW-7, the investigation of the case was taken over by Satish Chand Sagaun (PW-9). According to his testimony, he took over investigation of Case Crime No. 64 of 1997 on 30.03.1998. He took police custody remand of co-accused Sattideen and arranged for identification parade of Sattideen on 02.04.1998. He took the statement of Sattideen on 03.04.1998 and submitted charge-sheet No. 71-A/98 against Sattideen under Sections 364-A and 326 I.P.C which was marked Exhibit Ka-10. During cross-examination, PW-9 stated that when he took over investigation of the case, Sattideen was already in jail since 21.08.1998 and if he had been in jail since before, he was not aware of it. He stated that he had taken the witnesses to identify Sattideen in jail. He also admitted that the name of Sattideen had surfaced during the course of investigation conducted by the previous I.O. He stated that he had not recorded the statement of the Magistrate in whose presence the identification was carried out.

9. At this stage, it would be relevant to observe that the third accused, namely,

Balram Khangar was killed in an encounter and, therefore, he was not put to trial. Whereas, the appellant Rakesh and Sattideen were separately charge-sheeted giving rise to two special sessions trials, namely, 70 of 1997 and 29 of 1998, against Rakesh and Sattideen, respectively, which were consolidated. Charges were framed against the appellant accused on 15.06.1998. On denial of the charges, trial commenced. In these two trials, a common set of evidence was led by the prosecution.

PROSECUTION EVIDENCE

10. The prosecution examined as many as nine witnesses, namely, Dev Singh (PW-1 - informant); Guman Singh (PW-2, one of the abductees); Virendra Singh (PW-3, another abductee); Doctor Sita Ram Gupta (PW-4, radiologist who proved the supplementary report - Exb. Ka-2, already noticed above); Kishan Lal (PW-5 - constable who made GD entry of the written report and prepared Chik FIR thereof); Doctor R.S. Gupta (PW-6 who conducted medical examination of PW-2 and PW-3 and proved injury reports - Exb. Ka-5 and Exb. Ka-6, already noticed above); Harish Chand - PW-7 (the second investigating officer who submitted charge-sheet against the present appellant; relevant part of his testimony has already been noticed above); Vijay Verma (PW-8, the first investigating officer- relevant part of his testimony has already been noticed above); and Satish Chand Sagaun - PW-9, who submitted charge-sheet against co-accused Sattideen after carrying test identification parade, as already noticed above.

11. At this stage, it would be useful to notice the testimony of PW-1, PW-2 and PW-3 i.e. the witnesses of fact.

12. **PW-1 - Dev Singh**. (His statement in chief was recorded on 14.10.1998). He is the informant. He reiterated the allegations made in the first information report and proved the written report, which was marked Exhibit Ka-1. Apart from above, he stated that on the date of the incident, his son Virendra Singh had taken the tractor at 2 pm and had returned at 8.30 p.m. to inform PW-1 that he is going back with the other tractor to tow-chain the faulty tractor.

During cross-examination, PW-1 stated that after his son and brothers were abducted, he had searched for them but could get no information about them. When he did not get any information about them, he came to believe that they have been abducted. Interestingly, in his entire deposition, PW-1 made no statement with regard to the demand of ransom for release of the abductees.

13. **PW-2 - Guman Singh**. (His statement in chief was recorded on 31.08.1999). He stated that in the night of 26.03.1997, he and his brother Man Singh and his nephew Virendra Singh were abducted. Prior to that, on 26.03.1997, at about 5 pm, Virendra Singh had loaded his tractor with "**Laakh**" (a kind of crop). On way, the tractor developed a fault. Virendra (PW-3) went home to fetch another tractor. PW-2 stayed with the tractor. At quarter to 10 in the night, Virendra came with the other tractor. Along with him, Man Singh (not examined) was also there. With the help of the other tractor, an effort was made to tow-chain the tractor which had developed fault. At that moment, three criminals came. They were Balram Khangar, Raka and Saka. They abducted PW-2, PW-3 and Man Singh. They took the abductees to the jungle and kept them in the jungle through out the day. In the night,

at about 9 pm, near the Naala adjoining the Betwa river, Man Singh (not examined) was released on a condition that he would get Rs. 1.5 lacs for release of the remaining two abductees. Then Balram left. The remaining two abductees were taken to another place by Raka and Saka awaiting return of Balram. When Balram returned, he gave strict instructions that only when money is received, the abductees should be released. After giving such instructions, Balram left again. Raka and Saka took the two abductees to Bajeraha jungle, near Sher Mata temple. At this stage, it would be appropriate to extract relevant portion of the statement of PW-2 made during the course of trial:-

''इतना कहने के बाद बलराम चला गया था। तथा राका व उसका साथी साका हम लोगो को लेकर आधी रात के समय बजेहरा के जंगल मे शेर माता के मंदिर के पश्चिम पहुॅचे थे और ऑखो में पट्टी बांध कर व पैरो को बांध कर हम लोगो को डाल दिया था। रात को कुछ भी खाना नही दिया था। दिनांक 28.3.97 को बलराम नही लौटा था। दोनो बदमाशो ने हमारी पट्टी खोली थी तथा निगरानी करते रहे थे। फिर शाम को 5 बजे के करीब जंगल मे हम लोगो के पास लौटा था और आते ही कहा था कि इन सालो को बांध दो और अभी गोली मारता हूं। और कहा कि इसके भाई ने धोखा दिया है और पैसा नहीं दिया है और पुलिस से मिल गया है मै किसी तरह पुलिस के पकड़ने से बच गया हूं। फिर बलराम को मारने वीरेन्द्र का दाहिना हाथ कन्धे से काटने के लिये कहा तब मैने कहा था कि मेरा हाथ काट लो पर मेरे भतीजा का हाथ मत काटो। इस पर ट्रैक्टर पर रखा हमारा फर्सा को बदमाश उठा कर ले आये थे उसको बलराम ने लेकर मेरे बांये हाथ की ऊंगली टुकड़ो मे काटना शुरु कर दिया था। और लम्बा वाला बदमाश मेरे पीठ के पीछे रायफल सटाये कहता था कि शोर किया तो गोली मार दूंगा। तथा बलराम कह रहा था कि यह मेरी तीसरी अदालत है एक अदालत उपर है दूसरी नीचे है और तीसरी मेरी अदालत है मै जो कहता हूं वही होता है और मेरे दांये हाथ के अंगूठे को छोड़कर ऊंगलियो समेत पंजे को काट डाला था। और उस काटने के बाद बलराम ने कहा कि कल तेरे भतीजे की बोटी बोटी काटकर बेतवा नदी मे फिंकवा दूंगा तो मैने बलराम से कहा था कि उसको मारना पीटना नहीं मै पैसा लाकर दूंगा, मुझे छोड़ दो तब बलराम ने कहा था एक दिन मे अपनी पट्टी करा लेना व दूसरे दिन यानि 29 तारीख की रात को 9 बजे डेढ़ लाख रुपया लेकर तुम बैलगाड़ी मे बैठकर और उसकी बांस बल्ली निकला कर बांये तरफ पहिये के पास पटीले पर जलती हुई टार्च को नीचे की तरफ करके अकेले आना किसी को साथ लेकर नहीं आना। फिर मुझे जाने के लिये कहा। मै किसी तरह आधी रात को 12 बजे अपने घर पहुंचा।''

After stating as above, PW-2 stated that after reaching home at midnight, he went with his son Bhupa Singh (not examined) to have his hand bandaged. Thereafter, PW-2 stated as follows:-

''फिर मेरा भतीजा दिनांक 30.3.97 को बदमाशो के चंगुल को किसी तरह छूट कर आया था। जब बदमाश पकड़कर ले गये थे उन बदमाशो मे से मै बलराम खंगार व राकेश को पहले से जानता था। बलराम गैंग ग्राम जल्ला के पास आता जाता था। व जल्ला मे मेरी खेती है। तभी मैने राकेश व बलराम को कई बार देखा व पहचाना है। तीसरे बदमाश की शिनाख्त करने मै जिला कारागार हमीरपुर गया था। और वहां उसकी सही शिनाख्त की थी। वह आज हाजिर अदालत मे है। गवाह ने अभियुक्त सत्तीदीन को देखकर न्यायालय मे शिनाख्त की और कहा कि यह वही अभियुक्त है जिसकी मैने जिला कारागार मे शिनाख्त की थी। एवं दूसरे हाजिर अदालत अभियुक्त को देखकर कि यह राकेश है जिसकी सही शिनाख्त की।

During cross-examination at the instance of Sattidin, PW-2 stated that accused Balram Khangar called the other two accused by the name of Raka and Saka. PW-2 clarified that he was released on 28.03.1997 whereas his nephew was released on 30.08.1997; he met the I.O. on 29.03.1997; that day, his statement was recorded. On that day, statement of his brother Man Singh was also recorded. On 30.03.1997, he again went to Balram and delivered ransom. He went there alone. He stated that he, Man Singh and Virendra Singh were all abducted on 26.03.1997. When they were abducted, the abductors had only tied their hands. He stated that when the accused had taken them to the jungle, they had not blind folded them. Immediately thereafter, he stated as follows:-

"रात को चेहरा नहीं दिखता था दिन के पट्टी बाधी थी। मै शिनाख्त के हमीरपुर एक बार आया था। यह कहना गलत है कि मै शिनाख्त के लिये दो बार आया था। दिनांक 25.3.98 को हम लोग शिनाख्त के लिये हमीरपुर नही आये थे। यह कहना गलत है कि मै उक्त तारीख को अदालत हाजिर आया हूं व उक्त तारीख को मैने अदालत मे मुल्जिमानो को देखा है। घटना के तीन महीना बाद हमे पता चल गया था कि मुल्जिम पकड़ गया है जिसकी हमे शिनाख्त करना है। शिनाख्त करने के लिये जाने वाली बात मुझे दरोगा जी ने बतलाई थी। दरोगा जी ने यह बताया था कि सत्तीदीन की शिनाख्त करने जाना है। दरोगा जी के बताने के बाद मैने शिनाख्त की थी।"

On further cross-examination at the instance of the counsel representing Sattideen, PW-2 stated as follows:-

"यह कहना गलत है कि अभियुक्त सत्तीदीन को पहले से जानता था। यह भी कहना गलत है कि दरोगा जी ने मुझे अभियुक्त सत्तीदीन को पहले से पहचनवा दिया हो। अज खुद कहा कि मेरा भाई मान सिंह व दरोगा जी फिरोती लेकर डेढ़ लाख रुपया लेकर आ रहे थे वह पैसा नहीं आ पाया था तब दुबारा मै पैसा लेकर गया था। अगर दरोगा जी ने मेरे ब्यान मे फिरौती देने वाली बात न लिखी हो तो मै उसकी वजह नही बतला सकता।"

During cross-examination, at the instance of accused Rakesh (the appellant), PW-2 specifically stated that after March 29, 1997, the I.O. did not record any further statement of PW-2 though he had met the I.O. thereafter. At this stage, the witness was confronted with an omission in his earlier statement, made during the course of investigation, wherein he had not stated that he knew Rakesh from before. Upon this, PW-2 stated as follows:-

" राकेश को पहले से पहचानने वाला ब्यान मैने दरोगा जी को दिया था यदि उन्होने न लिखी हो तो उसकी कोई वजह मै नही बतला सकता।"

The witness denied the suggestion that what he has stated in Court is for the first time, on being tutored.

At this stage, the witness was confronted with another piece of his previous statement, under Section 161 Cr.P.C. The extracted portion of the previous statement and PW-2's response is reproduced below:-

" मैने दरोगा जी को यह बयान कि "एक बदमाश जो काले रंग का था, मूंछ निकल रही थी जो कट्टा 315 बोर लिये था जिसका नाम राकेश मालूम हुआ। बलराम उसको राका के नाम से पुकारता था।" मैने दरोगा जी को नहीं दिया था, दरोगा जी ने पता नहीं कैसे लिख दिया।"

After stating as above, PW-2 stated that he knew Balram from before. Balram used to visit his village though he did not know the name of Balram's father. He stated that sometimes there were four and sometimes six persons accompanying Balram. Amongst them, he knew Rakesh but he did not know anybody else. He stated that he has seen Rakesh at Hamirpur and he had informed the I.O. about having seen Rakesh at Hamirpur but if that had not been mentioned by the I.O., he cannot give reason for the same. He stated that Rakesh is a resident of Mohar Purwa. He does not know whether Mohar Purwa is 15 km east of Sumerpur. He stated that Shivpal Singh is his relative in Chandpurwa. But he is not aware whether Rakesh has relations at Chandpurwa. At this stage, the witness stated that 2-3 months after the incident, Balram was killed in an encounter in village Khaderi Lodhan and with him six persons of his gang, namely, Kariya, Chote Lal, Smt. Guddi, Smt. Rekha and Bhura were killed. After stating as above, the witness stated that now the entire gang of Balram has been killed. The witness also stated that few months after the encounter of Balram, he got information that Rakesh has been chalaned under Section 25 Arms Act. He, however, denied the suggestion that after challan of Rakesh under Section 25 Arms Act, he came to know that there is an associate of Balram by the name of Rakesh. He denied the suggestions that accused Rakesh and Sattideen were not involved in the abduction; that Balram and his associates had not assaulted them; that he falsely implicated Rakesh at the instance of his relations in village Chandpurwa.

14. **PW-3 - Virendra Singh - another abductee**. (His statement in chief

was recorded on 31.08.1999). After narrating the FIR story, he stated that he arrived at the spot, at about 10 pm, with Man Singh. When he was tow-chaining the faulty tractor, his uncle Guman Singh and Man Singh were present. Then criminals came from village Jalla and started abusing and threatening the abductees by saying that if they run, they will be killed. One criminal was wearing black *Pathani* suit with red bandana on head. He was Balram Khangar, whom PW-3 knew from before. The other was a short height man, wearing pant shirt, his name was Raka; and the third was a tall person, whose name he did not know. He stated that he knew Raka from before. He identified the accused Rakesh in court and stated that he is Raka, who was involved in his abduction. He stated Raka is the alias name of Rakesh. He stated that initially he saw the accused in the back light of the tractor and, thereafter, he saw them again while they were in the jungle and the temple. PW-3 stated that criminal Balram had a rifle. In so far as the other two criminals were concerned, one was having a country made pistol whereas the other was having a country made rifle. He stated that he visited district jail Hamirpur to identify one of the two accused and could identify him. He stated that the accused whom he had identified, is not currently present in Court. His name is Sattideen. He stated that Balram used to call Sattideen as Saka and Rakesh as Raka. He stated that the accused had snatched lathi of his uncle and had assaulted him. Thereafter, the accused took them to the jungle. The entire night they roamed in the jungle. Next day morning, at about 4-5 am, they brought them (abductees) near a temple. The abductees were dumped in a Naala (ditch). At that time, their hands were tied and they were blind folded. PW-3 stated that the accused had kept them there till night and in the night of 27.03.1997, took them to the banks of a river. There, the accused, released Man Singh and asked him to fetch Rs. 1.5 lacs for release of the other two. The accused had warned that if the money is not brought, they will kill the other two. He stated that, at that time, it must have been 9-11 pm in the night. Thereafter, the accused took the remaining two abductees including PW-3 to Barauli Ghat and after crossing it, they took them to Baraitha Jungle. At Baraitha jungle, the abductors waited for Man Singh to arrive; at that time, there were just two abductors. The third abductor, namely, Balram, after instructing Man Singh to fetch ransom money, had left the spot and had instructed the other two abductors to keep the other two abductees in the jungle till he returns. When Balram returned, he told his other two associates that Man Singh has not kept his promise and appears to have informed the police, as a result, the abductors assaulted the two abductees and threatened to cut their hand. When the abductees were being assaulted, PW-2 pleaded that they should leave his nephew (PW-3) unscathed though they may chop off his hand. On this suggestion, the abductors, cut four fingers of the left hand of PW-2 with the aid of a farsa. At this stage, PW-3 informed the Court that at the time when his uncle's fingers were chopped, accused Rakesh had caught hold PW-3 and was having a country made pistol to threaten him. PW-3 stated that when his uncle (PW-2) was released by the abductors, Balram had instructed that if he does not get the money, then his nephew would be cut to pieces, which would be thrown in the village. Abductor Balram had also instructed PW-2 as to how he should the get money. PW-3 further stated that after his uncle (PW-2) was released, the accused, at about 8 pm, had taken him to Sahurapur village jungle

where they kept him in a vacant field. The statement made by PW-3 in this regard, as stated in Court, is being extracted below:-

''चाचा को छोड़ने के बाद बदमाश मुझे रात मे आठ बजे के करीब उक्त जंगल से सुतामापुर के जंगल मे लेकर आये थे। जहां खाली खेत मे बदमाश मुझे काफी समय तब बिठाले रख्खे। बाद में खाली खेत मे मुझे दौड़ाते रहे और मुझसे दिशाये पूछते रहे। बाद मे मुझे सहुरापुर गांव के जंगल मे ले गये। और बाद मे मुझे वापस मोरा काडर गांव के जंगल मे ले आये।''

After stating as above, PW-3 stated as follows:-

'थोड़ी देर बाद बदमाशो ने आपस मे बातचीत करते हुए कहा कि लगता है कि पुलिस आ रही है। और मुझे छोड़कर भाग गये। थोड़ी देर बाद मेरे चाचा ने आकर मेरे हाथ व पैर खोले और अपने साथ घर लिवा लाये। बदमाश मुझे छोड़कर करीब आधी रात के बाद भागे थे। सही समय मै नहीं जान पाया था।''

During cross-examination, PW-3 stated that at the time of abduction, the night was dark; it must have been 9-10 pm; in the darkness one could not recognise a person from a distance; when the accused had arrived, the light of both the tractors were on; crop was loaded on the tractor of PW-3; the other tractor was brought by Man Singh; the accused wore turbans but had not covered their faces.

PW-3 also stated that the accused had not blind folded him though had tied him. He stated that he knew Balram from before; he used to sell *Chana* (grams); that the entire gang of Balram has been finished off; that accused Sattideen was arrested by the police but he does not remember as to how many days after the incident he was arrested. In respect of identification exercise, PW-3 stated that persons to be identified were standing in one line; there were 7-8 persons; and none had covered their faces; that S.O. Kurara had brought him to the jail to identify the accused; and at the place of identification, S.O. Kurara was also sitting.

On further cross-examination, he stated that his sister is married to Gulzar Singh in village Pipreda; that he used to visit that village and had learnt that Sattideen was a resident of that village. He denied the suggestion that Sattideen was not involved in the abduction. He also denied the suggestion that he identified Sattideen at the instance of the police.

During cross-examination at the instance of accused-appellant Rakesh, PW-3 stated as follows:-

''मेरा बयान दरोगा जी ने घटना के दूसरे दिन लिया था। इस वक्त मुझे दरोगा जी का नाम याद नही है। बयान एक दरोगा जी ने लिया था। दोबारा किसी दारोगा ने घटना के बारे मे मेरा बयान नहीं लिया। मुल्जिम राकेश का नाम बलराम के बताने पर लिया था राकेश के बाप का नाम व गांव का नाम नही मालूम। राकेश का नाम यदि बलराम न बताता तो मुझे उसका नाम पता न चलता। इस घटना के पहले मेरी राकेश से कभी मुलाकात नही हुयी न मैने उसे कही कभी देखा सुना। मैने अपने बयान मे मुल्जिम राकेश का नाम नहीं बताया था।''

At the fag end of his cross-examination, the witness stated as follows:-

''यह बात सही है कि मैने न्या0 मे राकेश का नाम घटना मे शामिल होने के बाबत पहली बार कही है। मै बलराम व सत्तीदीन को पहले से जानता था।''

STATEMENT U/s 313 CrPC

15. The incriminating circumstances appearing in the prosecution evidence against the appellant were put to the appellant for recording his statement under Section 313 Cr.P.C. The appellant denied the incriminating circumstances and claimed that he has been falsely implicated by the police to show their good work.

TRIAL COURT FINDING

16. The trial court convicted the appellant-Rakesh on the basis of the testimony of PW-2 and PW-3 as well as dock identification. However, co-accused

Sattideen was acquitted upon finding that the test identification parade was not in accordance with law.

17. We have heard Sri Ashok Pandey for the appellant and Ms. Kumari Meena, learned A.G.A. for the State and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANT

18. The learned counsel for the appellant submitted that admittedly the FIR was against unnamed accused; during the course of investigation, on 29.03.1997 the statement of eye-witnesses PW-2 and PW-3 as well as Man Singh (who has not been examined during trial), were recorded; in their statement they had not disclosed the name with parentage and place of residence of any of the accused except Balram; they had only stated that if those accused are produced before them, they can identify them therefore, on what basis, the charge-sheet was submitted against the accused-appellant, even before his arrest, is a mystery. None of the investigating officers, who were examined by the prosecution, has stated as to when he could fix the identity of the accused Raka, as called by the main accused Balram, as Rakesh (the present appellant). It was submitted that if the other co-accused Saka @ Sattideen was charge-sheeted only after identification, what was the reason to charge-sheet Rakesh without putting him for identification. This by itself casts a serious doubt on the truthfulness of the prosecution case as against the appellant.

19. Learned counsel for the appellant submitted that as per prosecution story coming through eyewitnesses PW-2 and PW-3, the abductees were abducted on 26.03.1997 in the night, which was dark, and, thereafter, were taken to a jungle in the night; next day, they were dumped in a *Naala*; whereafter, one abductee, namely, Man Singh (not examined) was released in the evening of 27.03.1997 with instructions to get ransom money; when Man Singh did not get money, other abductee, namely, PW-2, was released, after chopping fingers of his left hand. PW-2 too, was released in the night. At one stage in the testimony of PW-3, it has come that the abductees were blind folded and at another stage it has come that they were not blind folded but their hands and feet were tied. It was submitted that from the statement of PW-3 it appears that when the second abductee was released, PW-3 was taken to a field where he was asked to run and tell the directions. This statement of PW-3 would suggest that PW-3 was kept blind folded otherwise, there was no occasion for the abductors to ask him to tell the direction in which he was running. The circumstances of the case suggest that the abductors abducted the abductees in the night, which was dark; the abductors thereafter traveled across the jungle with the abductees who were kept blind folded; thereafter, one of the abductee, namely, Man Singh was released in the night of 27.03.1997; the second abductee was released in the night of 28.03.1997, after his fingers were chopped; and the third abductee was not released by the abductors but could manage to escape, either on his own, or with the effort of the police, or otherwise. The sequence of events and the manner in which the abductees were kept clearly suggest that the abductors had taken due precaution to hide their identity.

20. It was submitted that from the statement of PW-3 it appears he could somehow escape from the clutches of the

abductors. It also appears from his statement that the accused had left him by saying that the police has arrived and only when he was abandoned by the abductors, his uncle had arrived to untie his hands and feet. According to PW-3, he was abandoned by the abductors at about midnight. It was submitted that from the statement of PW-3 it does not appear that ransom was paid. Moreover, the date of PW-3's release is not specifically there in his statement but as PW-3 was examined for his injuries at 2.45 pm on 30.03.1997, it appears he must have been released on or about midnight of 29/30.03.1997. All these circumstances would suggest that all relevant events took place in the darkness of night, which is indicative of the fact that the abductors took precaution to hide their identity.

21. Learned counsel for the appellant also submitted that from the statement of PW-8, it appears, the statement of PW-3 was recorded on 01.04.1997 and, thereafter, no statement of PW-3 was recorded. Interestingly, PW-8 stated that except for the name of Balram Khangar, none of the abductors' name was disclosed by PW-3 or any of the eye-witnesses. They had only disclosed that they could recognise the accused if produced before them. Thus, in absence of test identification parade, there appears no basis for the investigating officer to make the appellant an accused. It has been submitted that this is a case where the appellant was made accused to show good work and, thereafter, he was shown to the eye witnesses, and by tutoring the witnesses, a dock identification was effected, which resulted in conviction. It has been submitted that such belated dock identification, particularly, when the abduction took place in the night and the abductees were kept tied and one of the abductees stated that they were blind folded, dock identification for the first time in court after more than 2 years of the incident is unreliable and cannot form the basis of conviction. It has been submitted that the trial court committed manifest error in convicting the accused-appellant. It was thus prayed that the judgment and order of conviction be set aside and the appellant be acquitted of the charges for which he has been tried.

SUBMISSIONS ON BEHALF OF THE STATE

22. **Per contra**, the learned A.G.A. submitted that it is a case where one of the abductees had lost his fingers; the medical examination report proved that the fingers of PW-2's left hand were chopped; the evidence led before the Court clearly disclose that the abductees were kept by the abductors for as long as two days and therefore, they had every opportunity to carefully memorise the face of the accused and recognise the accused, whenever required; hence, even if there had been no test identification parade for the appellant, as the appellant has been identified during the course of trial by an injured witness who has also proved that there had been a demand of ransom under threat of extermination, the trial court rightly convicted the appellant. Learned A.G.A. further submitted that although it may not have come in the deposition of the investigating officer as to on what basis the appellant was charge-sheeted but from the material brought on case diary it appears that the parentage of the accused was fixed on the basis of information received. Therefore, merely because there was no disclosure of the parentage by the eyewitnesses, it cannot be a ground to disbelieve the prosecution case against the

appellant or extend the benefit of doubt to him. Learned A.G.A., accordingly, pleaded that the appeal be dismissed and the judgment and order of conviction recorded by the trial court be affirmed.

ANALYSIS

23. On a careful consideration of the rival submissions and the entire prosecution evidence, there are certain features of the case which stand out and have a material bearing on the evaluation of the evidence. We, therefore, enumerate them herein below:-

(i) Abduction took place in the night of 26/27.03.1997 any time after 10 pm and before 7 am;

(ii) The first information report was lodged on 27.03.1997 at 11.00 am by PW-1, father of PW-3 and brother of the other two abductees, against unknown persons in respect of abduction of three persons;

(iii) The first abductee, namely, Man Singh, who has not been examined, was released in the night of the day following the day of abduction i.e. in the night of 27.03.1997. This abductee was released to fetch ransom money of Rs. 1.5 lacs for release of the remaining two;

(iv) When Man Singh could not get ransom, one of the other two remaining abductees, namely, Guman Singh (PW-2), was released in the night of 28.03.1997, after chopping his left hand fingers. The left hand fingers were chopped by Balram Khangar (non-appellant) with a warning that if he does not bring the ransom money then the other abductee, namely, Virendra Singh (P.W.-3), nephew of PW-2, would be cut into pieces;

(v) Guman Singh (PW-2) reached home at about midnight of 28/29.03.1997;

(vi) On 29.03.1997, according to the testimony of PW-8 (the first I.O.), at Kasba Kurara, in the clinic of doctor Prajapati (not examined), PW-8 met Man Singh (not examined) and Guman Singh (PW3) and recorded their statement;

(vii) According to PW-2, in his statement made during cross-examination, the ransom was arranged and paid on 30.03.1997 whereafter, PW-3 managed to escape. But how the ransom money was arranged and when, and to whom, it was handed over is not disclosed by PW-2 in his testimony. Interestingly, PW-3, in his testimony, states that just before he was released he could hear the abductors conversing inter se that the police is coming therefore, sensing danger from the police, the abductors escaped and soon thereafter PW-3's uncle, namely, PW-2, arrived and untied his hands and feet to take him home and he reached home by about midnight. The discrepancy in the statement of PW-2 and PW-3 in respect of how the release of PW-3 was secured, in absence of details in the testimony of PW-2 as to how the ransom money was arranged and paid, bearing in mind that there is no disclosure about it by PW-1, lead us to infer that release of PW-3 was secured without payment of ransom money, may be, because, the abductors sensing danger of a police intervention left the spot, leaving PW-3 behind; and

(viii) The statement of PW-2 and Man Singh was recorded, under section 161 CrPC, on 29.03.1997 and not any time thereafter, as is confirmed by the statement of the I.O. Notably, in his previous statement, with which PW-2 was confronted, PW-2 had not stated that he knew Rakesh (the appellant) from before; PW-2 had also not disclosed the parentage and the address of the accused-appellant Rakesh. Likewise, in the previous

statement of PW-3, as it appears from the statement of the I.O. (PW-8), it was not disclosed that he knew Rakesh (the appellant) from before. PW-3, in his previous statement, had only stated that if that person is produced before him he would recognise that person.

24. Having noticed the key features in the prosecution evidence, we find that neither PW-2 nor PW-3 had disclosed the name of Rakesh with parentage and place of residence to the I.O. during the course of investigation. The names disclosed were of Balram Khangar, a dreaded criminal, who was later killed in an encounter with all his gang members, and of Raka and Saka, as Balram used to address them. Even assuming for the time being that Raka was abbreviated version of Rakesh, the name Rakesh is a common name. More than one Rakesh would be found present in a given locality. Notably, Rakesh was charge-sheeted in the case even before he was arrested. Thus, on what basis Rakesh (the appellant) was made an accused and charge-sheeted is a mystery to us. The obvious question therefore that arises for our consideration is whether to solve out the case, the I.O., on his own, picked up Rakesh, the appellant, and, thereafter, evidence was created. Importantly, even after his arrest, no effort was made to put Rakesh, the appellant, for test identification parade. In these circumstances, the crux of the matter is whether the dock identification for the first time in court after more than two years of the incident could be considered reliable so as to sustain conviction.

25. A test identification parade is an investigative step. Failure to hold test identification parade does not make the evidence of identification in court inadmissible. Where an unknown accused is put to a test identification parade, the result thereof serves as a material to corroborate or discredit the dock identification during the course of trial. To ensure that the result of test identification is not an outcome of tutoring, it is desirable to hold it as soon as possible after arrest of the accused. In **Mulla and Another v. State of U.P., (2010) 3 SCC 508,** in paragraph 45, it was observed by the Supreme Court *that "it is desirable that a test identification parade should be conducted as soon possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution."* In **Brij Mohan v. State of Rajasthan, (!994) 1 SCC 413,** the Supreme Court held that sometimes the crime itself is such that it creates a deep impression on the mind of the witness who had an occasion to see the culprits, such a deep impression is not erased within a short period of few months. In **Mohd. Abdul Hafeez vs State Of Andhra Pradesh, 1983 (1) SCC 143**, in a case related to robbery, a dock identification of the accused for the first time during trial after a lapse of four months was not considered reliable.

26. In our view, where an unknown accused has not been put to test identification parade before a witness, the delay in dock identification by that witness would have a material bearing on the trustworthiness of the testimony of that witness, particularly, where that witness got

opportunity only to have a fleeting glance of the accused. In a case where the witness as a victim of the crime had been in the company of the accused for a prolonged period, the features of the accused may get imprinted in the memory of that witness. In such a case, therefore, merely on the ground of delay in dock identification, the testimony of the witness cannot be discarded if it appears truthful and trustworthy.

27. In the instant case, PW-2 and PW-3 had been with their abductors for a reasonably prolonged period. PW-2 remained with the abductors from the night of 26.03 1997 till the night of 28.03.1997 whereas PW-3 remained with them till the night of 29.03.1997. In the circumstances, we cannot discard the dock identification made by them only on the ground of delay. But what troubles us is that if neither PW-2, nor PW-3 or Man Singh (who has not been examined), had stated before the I.O. that they knew Rakesh (the appellant) from before, and they had also not disclosed to the I.O. the parentage and the address of the appellant-Rakesh, what was the basis to submit a charge-sheet against the appellant even before his arrest and not to put him to test identification parade after his arrest. Another aspect that troubles us is, that, if the I.O. had thought it appropriate to conduct test identification parade for co-accused Sattideen, what was the reason for him not to follow the same procedure in respect of Rakesh (appellant). All of this casts a serious doubt with regard to the fairness of the investigation .

28. Ordinarily, lapses on the part of the investigating agency is not fatal to the prosecution case where the prosecution case is based on eye-witness account. But, here, the eye-witnesses have not even given the details of the accused so as to enable the investigating agency to put him on the dock. In such circumstances, we would have to carefully scrutinise and evaluate the testimony of these eye-witnesses to rule out possibility of false implication at the instance of the investigating agency to give closure to the case. On a careful scrutiny of the testimony of PW-2 and PW-3 what is clear is that the abductees were abducted in the night; they were released, one by one in the night hours, and they were being shifted from one isolated place to another. Witnesses have also deposed that the abductors were wearing bandanas and at one place use of turbans by them has also been indicated. These circumstances would indicate that there was an effort on the part of the abductors to avoid public contact. In the testimony of PW-3 it has come that he was asked by the abductors to run in a field and tell the directions. This circumstance would suggest that at some stage PW-3 was blind-folded. There are certain aspects, such as, whether the abductees were kept blind-folded; whether ransom was paid; and as to how abductees could gather that Raka stood for Rakesh, where the testimony of PW-2 and PW-3 is not consistent qua each other. Notably, PW-2 and PW-3 are inconsistent in respect of the mode and manner in which PW-3 was released. PW-2 speaks of release of PW-3 after payment of ransom money, the arrangement of which is not proved by any cogent evidence; whereas, PW-3 states that the accused left him sensing danger that the police had arrived. If it had been the case of PW-2 that after payment of ransom, the accused left PW-3 and thereafter PW-2 went to PW-3 to untie and free him, we might have believed the testimony of PW-2, in that regard. But, here, PW-2 states that PW-3 somehow managed to escape whereas PW-3 states that he was untied by

PW-2 when the accused had left him sensing danger from the police. Further, PW-2 and PW-3 are inconsistent in respect of their statement that they knew the accused-appellant (Rakesh) from before. These two witnesses, during the course of investigation, had stated only this much that they could recognise the accused if they were brought before them. In these circumstances, the testimony of PW-2 and PW-3 is not wholly reliable with regard to the involvement of the appellant in the crime therefore, to act upon their testimony some corroboratory material was required.

29. In the instant case, the prosecution set up a story that cash of Rs. 1.5 lac was to be paid by way of ransom but there is no recovery of any such cash. Further, the police witnesses examined during the course of trial, have not disclosed about the criminal antecedents of the current appellant except that the appellant was also involved in a case under Section 25 Arms Act. Interestingly, from the statement of PW-7 it appears that the appellant was arrested in connection with a case under Arms Act on 15.01.1998 at police station Khanna and when he came to know about it, he went there to record his statement. Importantly, charge-sheet was submitted against the appellant before that date. Further, though the accused-appellant is stated to be member of a gang of one Balram Khangar but there is no evidence brought by the prosecution that Balram and the appellant were residents of the same village; and that they jointly participated in various other criminal activities of which there were reports. There is thus no evidence to lay a foundation that the appellant was part of the gang of Balram Khangar. Interestingly, the prosecution witnesses have admitted that the entire gang of Balram has been exterminated in an encounter 2-3 months after the incident. If the entire gang of Balram Khangar had been killed, how the appellant was left to survive. In such circumstances, we have to carefully scrutinise the evidence to rule out the possibility of implication of the current appellant to solve out the case. At this stage, we observe that the material available during the course of investigation was that the abductees were abducted by Balram Khangar and two members of his gang whom he use to call by the name of Raka and Saka; and that Raka stood for Rakesh. No doubt, these names were disclosed by the eye witnesses to the police during the course of investigation but there was no disclosure that Raka @ Rakesh was known to the witnesses from before, or that prior to that incident they had seen him. There was also no disclosure about Raka's or Rakesh's parentage or place of residence. The disclosure was only to the extent that if those accused are produced, the witnesses would be able to recognise them. In such circumstances, there appears complete guess work on the part of the police to put the name of the appellant Rakesh for Raka and Sattideen for Saka. There appears no material on record as to how the police submitted charge-sheet against Rakesh (the appellant) when even his parentage and place of residence was not even known or disclosed by the eye-witnesses. Further, if Sattideen was put to test identification parade why similar process was not adopted for Rakesh. All of this creates a serious doubt on the prosecution story as regards the involvement of the appellant in the crime and seriously dents the value of dock identification as to form the basis of conviction, particularly, when there is no corroboratory material such as recovery of cash or any weapon used in the crime. Moreover, this is a case where the charges were framed against the appellant on

15.06.1998 and the statement of PW-2 and PW-3 was first recorded on 31.08.1999, leaving sufficient opportunity for the prosecution to show the accused-appellant to the witnesses. This delayed dock identification, in the facts of the case, in our view, is not a wholly reliable evidence to warrant conviction of the appellant.

30. Further, the prosecution also appears to be hiding some facts, such as, whether the abductee was released in a police action or after payment of ransom. In this regard it be noted that the first information report was with regard to abduction in the night of 26.03.1997/27.03.1997. The first abductee was released in the night of 27.03.1997/28.03.1997. This abductee was released to fetch ransom amount for releasing the remaining two. In the testimony of PW-8, it has come that on 28.03.1997, the police team did a combing operation in the jungle to trace out the abductees. Interestingly, the I.O. makes a statement that he met both Man Singh and Guman Singh (PW-2) on 29.03.1997 in the clinic of Dr. Prajapati. This would suggest that in between 27.03.1997 and 29.03.1997 some information regarding the abductors was received by the I.O. What was that information, has not been brought before the Court. In addition to above, though the I.O. is silent as to how the remaining abductee (PW-3) earned his freedom but the testimony of PW-3 that the abductors left him after sensing danger from the police, and the statement of one of the witnesses that the abductors had complained that Man Singh had cheated them by informing the police, would suggest that information to the police about abduction had come from Man Singh, which could be on 28.03.1997 and thereafter, the police did a combing operation. The police witness i.e. PW-8 though stated that on 28.03.1997 a combing operation was carried out in the jungle to trace out the abductees but disclose nothing further. In these circumstances Man Singh was an important witness to throw light on what were those informations. But he has not been examined. Suppression of all these informations, in ordinary course, would not be fatal to the prosecution but here is a case where the identity of the accused-appellant could not be fixed from the statement of the eye-witnesses made during the course of investigation, yet, the police has made him the accused. In such circumstances, in absence of test identification parade, particularly, when it was conducted for the other accused, the dock identification for the first time in court, after a gap of over one year from the date of framing of charge, does not inspire our confidence so as to warrant conviction of the appellant particularly when there is no corroboratory material.

31. In view of the discussion above, we are of the considered view that this is a fit case where the benefit of doubt would have to be extended to the accused-appellant. **We therefore allow this appeal. The judgment and order of conviction recorded by the trial court is set aside. The accused-appellant is acquitted of the charge for which he has been tried and convicted. He is reported to be in jail. He shall be released forthwith, unless wanted in any other case, subject to compliance of section 437 A Cr.P.C.**

32. Let the record as well as copy of the judgment be transmitted to the trial court for information and compliance.

(2022) 9 ILRA 1162
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal U/S 372 Cr.P.C. No. 253 of 2022

Pramod Kumar Parasar ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Sunil Kumar Misra

Counsel for the Opposite Parties:
Govt. Advocate

A. Criminal law - Indian Penal Code 1860 - Section 302 - Evidence Act, 1872 Section 3 - Murder - Circumstantial Evidence - cases of circumstantial evidence postulate two-fold requirement; (i) link in the chain of circumstances necessary to establish the guilt of the accused must be proved beyond reasonable doubt, (ii) the circumstances must be consistently pointed towards guilt of accused and nobody else. (Para 31)

B. Criminal law - Indian Penal Code 1860 - Section 302 - Evidence Act, 1872 - Section 3 - Murder - Circumstantial Evidence - 'Last seen theory' - It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased - last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible - last seen theory is just one piece of evidence - even if the accused was last seen with the victim, this is not enough to convict him - the prosecution has to complete the chain of circumstances to bring home the guilt of the accused (Para 35)

on 12.09.2010 informant's brother dead body was found - Informant was informed by Anil Kumar, on 12.09.2010 the that he had seen his brother at 1:00 AM in the intervening night of 11.9.2010/12.9.2010 along with accused - FIR was lodged at 10:00 AM on 12.09.2010 - court found it highly improbable that the FIR could have been lodged at 10:00 AM, given that the panchayatnama proceedings had commenced at 10:00 AM and concluded at 11:00 AM - Court concluded that the FIR was ante-timed - Postmortem report showed that the death might have occurred between 5:00 to 6:00 PM on 11.9.2010 - In that case, also it was highly improbable that Anil Kumar (PW-3) could have seen the deceased at 1:00 AM in the intervening night of 11.9.2010/12.9.2010 - In the absence of any glowing light, it was not humanly possible to identify a person who was sitting in a motorcycle - only a sealed bundle of ropes was found, with accused which is easily available in most households - rope was not even remotely connected to the commission of the crime, as it was only a nylon rope without any marks on it that could prove that it was used for strangulation - trial court had meticulously analyzed the entire case under the four corners of the law - Court concurred with the view taken by the learned Sessions Judge and acquitted the accused.

Dismissed. (E-5)

List of Cases cited:

1. Mehraj Singh (L/Nk) Vs St. of U.P. (1994) 5 SCC 18

2. Sudarshan & anr. Vs St. of Mah.; (2014) 12 SCC 312

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

4. Bodhraj Vs St. of J.& K. (2002) 8 SCC 45

5. St. of Har. Vs Jagbir & anr., (2003) 11 SCC 261

6. Rambraksh Vs St. of Chhatishgarh, (2016) 12 SCC 251

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal under section 372 Cr.P.C. has been instituted by the appellant namely Pramod Kumar Parasar, father of the informant Rahul Kumar and of deceased challenging the judgment and order dated 10.01.2019 passed by Addl. Sessions Judge, Firozabad, Court No. 4 in S.T. No. 161 of 2011 (State Vs. Sri Bhagwan and others) under Sections 302, 201 IPC in Case Crime No. 453 of 2010, Police Station - Uttar, District - Firozabad.

2. The appeal was presented before this Court on 4.4.2019 and on 8.4.2019, lower court records were summoned. Thereafter on 9.7.2019, 16.7.2019, 23.7.2019, 30.7.2019, 4.9.2019, 13.9.2019, 20.9.2019, 27.9.2019, 15.10.2019, 23.10.2019 and 13.11.2019, this appeal was taken up but it was adjourned on every dates either on the illness slip of the learned counsel for the appellant or on adjournment which reveals that learned counsel for the appellant is avoiding hearing of the appeal and thus this Court was constrained to pass an order on 11.2.2022 observing that in case learned counsel for the appellant is not present on the next date so fixed, this Court may proceed to decide the appeal with the help of learned AGA.

3. Yet today when this case was taken up, nobody appeared to press this appeal, and thus this Court is proceeding to decide the appeal with the assistance of learned AGA.

4. The factual matrix of the case as worded in the present appeal are as follows:-

(i) One Rahul (PW-1), S/o- Pramod Kumar, R/0 mohalla - Dayal Nagar, Kotla Road, Police Station - Uttar, District - Firozabad had submitted a written complaint on 12.9.2010 before Police Station - Uttar. District - Firozabad with the allegation that his brother Gaurav has certain relationship with Puja, the daughter of Bangali Babu Badhai. In this connection, the informant had even beaten his brother and restricted him not to maintain any relationship with Puja and has also made a complaint and lodged his protest before Bangali Babu Badhai advising him to restrict his daughter Puja for continuing any relationship with his brother Gaurav.

(ii) According to the first informant, on 12.9.2010 in the night, he was sleeping on the terrace of his house and his brother was sleeping inside the house. As per prosecution version when in the morning he woke up then one of his neighbour namely Anil Kumar, S/o Rameshwar Dayal apprised him that in the previous night at about 1:00 a.m. he saw his brother Gaurav standing just in front of the house of Bangali Babu Badhai and further informed that Rajesh Kumar, S/o Radha Krishna and Satendra Babu, S/o Ram Sanehi was also standing near bye-pass road and also witnessed that Sri Bhagwan was driving motorcycle and in between deceased Gaurav was sitting and in his back Satyadeo was sitting and deceased Gaurav was sitting in such a manner which reflected that his neck was hanging and according to prosecution case, the persons who had witnessed such event thought that Gaurav (since deceased) was ill and he was being taken to hospital.

(iii) As per prosecution case, on the next date, dead body of Gaurav, who happens to be brother of the informant, was found near a small bridge. Accordingly, the first informant, who happens to be the

brother of the deceased, submitted a written complaint against Sri Bhagwan, Satyadeo, Km. Puja and Bangali Babu.

(iv) On the basis of the written complaint, an FIR was lodged at Police Station - Uttar, District - Firozabad on 12.9.2010 at 10:00 a.m. registering Case Crime No. 453 of 2010, under Sections 302, 201 IPC.

(v) Investigation was put to motion consequent to the lodging of the FIR, while getting Panchayatnama prepared and sending the dead body for postmortem site plan was also prepared.

(vi) The Investigating Officer conducted the investigation and submitted charge sheet purported under Section 302, 201 IPC against Sri Bhagwan, Satyadeo and Km. Puja. However, so far as Bangali Babu is concerned, final report was submitted against him as no criminality was found against him.

(vii). The case was committed for trial. Charges were readover to the accused, who are two in numbers. They pleaded not guilt and innocent.

(viii) The prosecution produced following witnesses, namely:

1.	Rahul	PW-1
2.	Satendra Babu	PW-2
3.	Anil Kumar	PW-3
4.	Dr. Manoj Kumar	PW-4
5.	Sanjeev Kumar Dubey	PW-5
6.	Surendra Singh (I.O.)	PW-6
7.	Rajesh Kumar	PW-8

(ix) In order to prove the charges, the following documentary evidence have been produced.

1.	Written Complaint	Ex-A-1
2.	Postmortem report	Ex-A-2
3.	Chick FIR	Ex-A-3
4.	GD	Ex-A-4
5.	Panchayatnama	Ex-A-5
6.	Challan	Ex-A-6
7.	Photograph	Ex-A-7
8.	Letter of CMO	Ex- A-8
9.	Letter of Inspector	Ex-A-9
10.	Samples	Ex-A-10
11.	Site Plan	Ex-A-11
12.	Site Plan	Ex-A-12
13.	Recovery memo	Ex-A-13
14.	Site Plan of recovery memo.	Ex-A-14
15.	Chargee sheet	Ex-A-15.

5. We have Sri Ratan Singh, learned AGA and with his assistance the present appeal is being decided.

6. To began with the deposition of the prosecution, witness is to be first analysed.

7. The first informant Rahul appeared as PW-1. According to his deposition his brother Gaurav had relationship with one Puja, who happens to be the daughter of Bangali Badu Badhai. He had not only beaten his brother (deceased) but had also restricted him not to keep any relationship with Puja. He also made a complaint and lodged his protest before Bangali Babu Badhai advising him to restrict his daughter Puja for continuing any relationship with his brother Gaurav. According to the first informant, on 12.9.2010 in the night, he was sleeping on the terrace of his house and his brother was sleeping inside the house. As per prosecution version when in the morning he was awake then one of his neighbour namely Anil Kumar, S/o Rameshwar Dayal apprised him that in the previous night at about 1:00 a.m, he saw his brother Gaurav just in front of the house of Bangali Babu Badhai and also informed that Rajesh Kumar, S/o Radha Krishna and

Satendra Babu, S/o Ram Sanehi was also standing near bye-pass road and also witnessed that Sri Bhagwan was driving motorcycle and in between deceased Gaurav was sitting and in his back Satyadeo was sitting and deceased Gaurav was sitting in such a manner which reflected that his neck was hanging and according to prosecution case, the persons who had witnessed such event, thought that Gaurav (since deceased) was ill and he was being taken to hospital.

8. Satendra Babu appeared as PW-2 in the witness box. He turned hostile. According to him, he has not seen the deceased on a motorcycle which was ridden by Sri Bhagwean and he was not aware about the said fact.

9. Anil Kumar appeared as PW-3 in the witness box. According to him, on the date of occurrence, he was in mohalla - Dayal Nagar, District - Firozabad and he is a driver and on 11.9.2010 in the night he has seen Sri Bhagwan, Satyedeo and Gaurav near the house of Bangali Babu and on the next date, search of the deceased was made and when he was standing near a one of the crossing road then Rahul came and asked him about whereabouts of the deceased Gaurav, then he told about the fact that he saw the deceased near the house of Bangali Babu.

10. Dr. Manoj Kumar appeared as PW-4 and in his examination-in-chief has stated that on 12.9.2010 he was on his medical duty, and at about 4:55 O'Clock the deceased who was 17 years of age was brought for postmortem, and the dead body was sent by the SHO of Police Station - Uttar, District - Firozabad in sealed condition. He had done medical examination of the deceased and found that both the eyes of the deceased were closed and from the nostril blood was oosing out and the body itself was in stiff situation. According to him, there were as many as six injuries sustained by the deceased.

11. Sanjeev Kumar Dubey appeared as PW-5 being a formal witness, is the scriber of the FIR. According to him on 12.9.2010, he was posted as Constable/ Clerk in the Police Station - Uttar, District - Firozabad and he has registered the FIR in question.

12. Surendra Singh, the Investigating Officer and PW-6 is also a formal witness. According to him on 12.9.2010, he was posted as Incharge Inspector at Police Station - Uttar, District - Firozabad and on that date, a Case Crime No. 453 of 2010, under Sections 302, 201 IPC was registered against Sri Bhagwan and others and he after investigation submitted the charge sheet.

13. Rajesh Kumar appeared as PW-7 and in his statement he has deposed that the incident happened on 11.9.2010 in the night at 1:30 hours. He and Satendra both were standing in a tri-bye-pass road where there is a Ganga Resort and lights were glowing and there were movements of vehicles and he had returned after dropping one of his relatives then he at that time saw Sri Bhagwan riding motorcycle and in between Gaurav was sitting and his neck was hanging and Satyedeo who was sitting back on the motorcycle and he had held the deceased, but perceived that Gaurav was ill and he was being taken to hospital. According to PW-7, he had told the entire facts to the first informant itself at the time when the dead body of the deceased was found near a small bridge over the lake.

14. Anar Singh Diwakar (DW-1) has stated that he is the owner of the Ganga Resort which is situated at Bamba bye-pass

road, Satya Nagar Tappa, near Baghel Colony, Firozabad. According to him on 11/12.9.2010 there was no marriage ceremony or any function organized in his Resort, and the functions which are orgnazied in his Resort are noted in diary.

15. Undisputedly as per prosecution version there is no eye witness, who had seen the commission of crime by the accused. According to the prosecution it is a case of circumstantial evidence. In the matter of circumstantial evidence, this Court has to bear in mind every link in the chain of circumstances necessarily to establish the guilt of accused which must be proved by the prosecution beyond reasonable doubt and the circumstances must be consistently pointing out towards guilt of the accused.

16. Before marshalling the deposition of the prosecution witness, this Court is to first analyse the fact as to whether the present FIR is anti-timed or not.

17. Admittedly, as per records, it reveals that the FIR has been lodged by the first informant on 12/9/2010 before the concerned police station at 10:00 hours in the morning.

18. Further as per prosecution case, the FIR was lodged on 12.9.2010, proceedings of panchayatnama (Exhibit-A-5) commenced at 11:10 hours and concluded at 12:40 hours. According to the first informant, he had reached at the place of occurrence at 9:00 and he met the police official there and at that point of time the police took out the dead body of the deceased from a drain (Nala) and police thereafter proceeded from the place. According to prosecution, after identifying the dead body of his brother, the first informant proceeded to police station for lodging the FIR. The entire sequence of the events made it highly improbable that the FIR could have been lodged at 10:00 am when he received information at 9:00 am and the proceedings of panchayatnama has commenced at 10:00 O'clock and concluded at 11:00 hours and thereafter the first informant identified the body of his brother.

19. Another aspect which needed to be considered is that Anil Kumar (PW-3) in his statement has stated that at 10:00 - 11:00 hours in the morning of 12.9.2010, he found the dead body of the brother of the informant and thereafter he went to the hospital at 11:00 - 11:30. He was there for 1-2 hours where he met police. He thereafter took the family members of the deceased inclusive of Rahul and others to the concerned police station and thereafter, he remained there at the time of lodging of the FIR from 1:00 - 1:30 noon on the said date and he also stayed there till 2:00 - 3:00 hours.

20. Besides this Rajesh Kumar (PW-7) in his deposition has made statement that he had gone to the police station alongwith the first informant at 11:00 am and was accompanied with his father and he met Rahul at 11:00 a.m. and stayed there for 2-3 hours and he had informed the police that he had not seen the incident.

21. So much so, Surendra Singh (PW-6) the Investigating Officer, in his statement has deposed that when he reached the place of occurrence, the body was found in a drain and he prepared panchayatnama and the body was taken out at about 11:00 hours.

22. The court below has analysed the entire aspect of the matter and recorded finding that the FIR in question is ante-timed FIR as it is highly improbable and not possible at all that the FIR has been

lodged at 10:00 hours, particularly when the prosecution witness being Anil Kumar (PW-3), Surendra Singh (PW-6) and Rajesh Kumar (PW-7) have themselves given different time, from which it is evident that the FIR is anti-timed.

23. Hon'ble the Supreme Court in the case of M**ehraj Singh (L/Nk) Vs. State of UP** reported in **(1994) 5 SCC 188** in para-12 has observed as under:

"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime wascommitted, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been 'ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8."

24. Further in the case of **Sudarshan and another Vs. State of Maharashtra**; **(2014) 12 SCC 312**, Hon'ble the Supreme Court had the occasion to consider the issue relatable to ante-timed FIR. In paragraphs - 14, 15 and 16, the Supreme Court has held as under :

"14. No doubt, different persons may react differently to the same situation. However, at the same time, as mentioned above, it appears very improbable that when there were as many as 15 to 20 persons, namely, the complainant and his friends, none of them even thought of going to the Police Station to report the matter, which is odd and out of ordinary behaviour in such cases. Instead, they chose to go to an Advocate, who was staying at a distance of 15 kms. The persons who were allegedly

very scared would not take the risk of going a distance of 15 kms. rather than approaching the nearby Police Station within the jurisdiction of the area where the incident had taken place.Strangely, in the process of defending the said conduct of the complainant and his friends, the High Court became presumptuous as it itself gave an imaginary story that there was a possibility that these persons had consumed liquor and the material thrown by them included liquor as well. It was not even the case of the prosecution, probable or otherwise. We may have agreed with the High Court that not reporting to the Police and going straightaway to an Advocate could have been because of the reason that all these persons were very scared, had it been a standalone fact. However, when this fact is examined in conjunction with other circumstances, which we narrate hereinafter, we find that approaching an Advocate instead of going to the Police Station to report the matter, was not that innocent a step as the prosecution has made us to believe.

15. Even after meeting their Advocate and his advise that the matter be reported to the police, these persons didn't come back to Ballarshah Police Station, which was the proper Police Station for this purpose. Instead, the FIR was lodged in Chandrapur Police Station. Things do not end here. Mr. Umesh, Sub-Inspector, was at Chandrapur Police Station, who had recorded the FIR. He has appeared as PW-12 during trial. The FIR which was lodged with him is proved as Exhibit-213. Column 15 of the FIR pertains to "date and time of dispatch to the Court'. This column is left blank, which means that no date and time of the dispatch/delivery of this FIR to the concerned Court is mentioned. In the cross-examination, PW-12 was specifically asked about the requirement of submitting a copy of the FIR to the concerned Magistrate within 24 hours. He replied in the affirmative insofar as this need is concerned. However, at the same time, he was candid in admitting that he was unable to say as to by whom and when the copy of Exhibit-213 was sent to the Magistrate. A specific suggestion was put to him that the copy of the FIR was not sent to the concerned Magistrate. Though he denied, but thereafter no attempt was made to prove as to when and how the copy was sent. The necessity of sending the copy of the FIR to the concerned Magistrate hardly needs to be emphasized. The primary purpose is to ensure that truthful version is recorded in the FIR and there is no manipulation or interpolation therein afterwards. For this reason, this statutory requirement is provided under Section 157 of the Code of Criminal Procedure, 1973.

16. We, thus, feel that it was a glaring omission on the part of the prosecution which lends credence to the plea of the defence about ante- timing the FIR. It gets strengthened on finding more glaring and intriguing events taking place thereafter, which are described hereinafter."

25. Applying the above noted judgment, in the facts of the present case, it becomes apparently clear that the FIR could not have been lodged at 10:00 A.M, and thus the FIR in question is an ante-timed FIR, which had been lodged just in order to falsely implicate the accused herein.

26. Now another facet which needs to be considered which is as to what time, the death took place while considering the medical report in question. According to informant at 1:00 am of the intervening night/morning of 11.9.2010/12.9.2010,

Anil Kumar (PW-3) apprised him that he saw deceased in the house of Sri Bhagwan alongwith Satyadeo. According to testimony of Dr. Manoj Kumar (PW-4), who had done the postmortem at 4:55 hours the death occurred on 11.9.2010 between 9:00 p.m. to 10:00 p.m. wherein difference can be of 3 hours. According to him after 3 hours of the death, there is stiffness in the dead body and fully get stiffed after 12 hours and it remains steady for 12 hours and in next 12 hours, the stiffness of the body gets removed. As per the postmortem report, death occurred 24 hours prior to the post mortem that means the death might have occurred between 9:00 p.m. - 10 p.m. on 11.9.2010 and in case difference of three hours is being calculated, then probably at 5:00 p.m. or 6:00 p.m. of 11.9.2010. Thereafter, it is highly improbable that Anil Kumar (PW-3) could have seen the deceased to be standing near the gate of Sri Bhagwan at 1:00 a.m. in the intervening night of of 11.9.2010/12.9.2010.

27. As per prosecution witness there is nobody who has seen commission of the crime. So far as Rahul (PW-1) is concerned, he was totally unaware about the whereabouts of his brother. So far as Satendra Babu (PW-2) is concerned, he turned hostile and said that he has not seen the deceased on a motorcycle which Sri Bhagwan was riding.

28. According to Anil Kumar (PW-3), he was apprised by Satendra Babu also that the deceased was in the motorcycle of Sri Bhagwan. However, Satendra Babu (PW-2) turned hostile and thus now the testimony of Rajesh Kumar (PW-7) is to be seen.

29. Rajesh Kumar (PW-7) in his statement has deposed that he had seen the deceased on 11.9.2010 at 1:30 hours in the night with the aid of light which was glowing in Gamga Resort. According to PW-7, he was accompanied with one Satendra near the bye-pass road. The reason of the presence of PW-7 as stated by him was that on 11.9.2010 his sister and his brother-in-law had come and they had stayed in his house for 7-8 hours as they come to his house at 2:00-2:30 noon and they had to go back to Delhi by train and he had taken them by Auto. On being specifically asked as to what is the detail of the train by which his sister and brother-in-law were to proceed to Delhi, he had expressed his ignorance. Further in the deposition PW-7 has stated that in the night of 11.9.2010 he has taken his sister and brother-in-law at 10:00 - 11:00 p.m. to railway station and thereafter he proceeded from railway station to his house walking. According to him, he stayed at the railway station for 1-1/2 hours till 12:30 hours and the distance of railway station to his house is about 45 minutes.

30. The Trial Court has noticed the inconsistency and material contradiction in the statements while recording a finding that it was humanly impossible for PW-7, Rajesh Kumar to have witnessed the accused along with deceased in a motorcycle, particularly when the resort in question was closed and there was no function or ceremony organized thereat, which stood proved from the statement of the owner of the Ganga Resort, who got himself examined as DW-1 and produced diary containing the details. In the night itself in the absence of any glowing light, it is not humanly possible to identify a person, who is sitting in a motorcycle. Additionally, as per PW-7, Rajesh Kumar, Satyendra was also present at that point of time, who along with him saw the accused with the deceased, but he turned hostile.

Thus the statement of PW-7, Rajesh Kumar does not inspire confidence so as to pointedly mark that the accused had committed the crime. The Trial Court has also analyzed the issue relatable to the recovery of incriminating articles from the accused. According to the Trial Court, only a sealed bundle of ropes were found, which is easily available in most of the house holds. However, the said rope was found not even remotely connected with commission of crime, as the same is only a nylon rope without having any marks in it so as to prove that the same was used for strangulation or commission of the crime.

31. Even otherwise, analyzing the present case, from the four-corners of law, if it stretched too far, then the same can be said to be of circumstantial evidence, as there is no eye-witness testimony. It is well settled that in the cases of circumstantial evidence postulate two-fold requirement; (i) link in the chain of circumstances necessary to establish the guilt of the accused must be proved beyond reasonable doubt, (ii) the circumstances must be consistently pointed towards guilt of accused and nobody else.

32. In the case of ***Shard Birdhichand Sarda Vs. State of Maharastra, (1984) 4 SCC 116,*** the Hon'ble Supreme Court in para-153 has observed as under.

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra(') where the following observations were made:

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

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

33. The Hon'ble Supreme Court in the case of ***Bodhraj Vs. State of Jammu and Kashmir*** reported in ***(2002) 8 SCC 45***, in paras 9 and 10 has observed as under :

"9. Before analyzing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal

fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence. the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other persons. (See Hukam Singh v. State of Rajasthan, AIR (1977) SC 1063), Eradu and Ors. v. State of Hyderabad, AIR (1956) SC 316, Earabhadrappa v. State of Karnataka, AIR (1983) SC 446, State of U.P. v. Sukhbasi and Ors., AIR (1985) SC 1224, Balwinder Singh v. State of Punjab, AIR (1987) SC 350, Ashok Kumar Chatterjee v. State of MP AIR (1989) SC 1890. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab, AIR (1954) SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt."

34. Further in the case of ***State of Haryana Vs. Jagbir and another***, reported in ***(2003) 11 SCC 261***, the Hon'ble Court in para-8 has observed as under :

"8. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt."

35. More so, the last seen theory also does not stand attracted in the present case as it has come on record and proved by medical evidence that the death took place on 11.9.2010 approximately between 5:00 pm - 6:00 pm. However, Anil Kumar (PW-3) has deposed in his statement that he saw the deceased standing in the gate of Sri Bhagwan with the accused at 1:00 in the night. The time gap of presence of the accused with the deceased as stated by the prosecution and the time of death itself does not corroborate with each other. The

Hon'ble Supreme Court in the case of ***Rambraksh Vs. State of Chhatishgarh, (2016) 12 SCC 251*** in para-12 has observed as under :

"12. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused."

36. None the less the postmortem report is fully proved by the medical evidence so produced by the prosecution, according to which while taking further clue from the same, it is highly improbable and inconceivable that the accused was found to be with the deceased on 11.9.2010 at 1:30 hours in the night.

37. As already discussed, the learned trial court has meticulously analyzed the entire case under four-corners of law while appreciating the evidences so adduced in the background of the ocular testimony.

38. Hence, in any view of the matter applying the principles of law so culled out by the Hon'ble Apex Court in the facts of the present case, we have no option but to concur with the view taken by the learned Sessions Judge.

39. The appeal is devoid of merits and is **dismissed** at the stage of admission stage itself.

40. Records of the present case be sent back to the concerned court below.

(2022) 9 ILRA 1172
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal U/S 372 Cr.P.C. No. 6038 of 2010

Molai Prasad ...Appellant/Informant
Versus
State of U.P. & Anr. ...Respondents/Accused

Counsel for the Appellant:
Sri B.L. Yadav, Sri K.K. Kanojiya

Counsel for the Respondents:
Govt. Advocate, Sri Ravindra Prasad, Sri Shailendra Pratap Singh

A. Criminal law - Code of Criminal Procedure, 1973 - Section 372 - Appeal against acquittal - An appellate court hearing an appeal against a judgment of acquittal should not overrule or disturb the trial court's judgment - unless the trial court's judgment of acquittal *proceeds on a wrong footing* or direction of law, or *if the judgment skips material evidence* that would have been a game-changer in deciding whether the accused is entitled to acquittal or conviction - in case of acquittal presumption of double innocence is available with the accused (Para 11)

B. Criminal law - Evidence Act - Circumstantial Evidence – when a case

rests upon circumstantial evidence following tests must be satisfied - the circumstances from which an inference of guilt is sought to be drawn, must be cogently & firmly established i.e. the circumstances must be fully proved and must be of a conclusive nature - Every link in the chain of circumstances, necessary to establish the guilt of the accused, must be established beyond reasonable doubt i.e. there must be no gaps in the chain of evidence - each circumstance must point unerringly to the guilt of the accused - All of the circumstances must be consistent with the guilt of the accused and inconsistent with his innocence i.e. the circumstances must form a complete chain of events that leaves no other reasonable explanation for the crime - circumstantial evidence must be complete and incapable of explanation by any other hypothesis than that of the guilt of the accused i.e. the evidence must be such that it is impossible to believe that the accused is innocent - entire chain of events is to be linked in such a manner that there is no other probability than the fact that the accused had committed the offence - complete chain of events and the sequence had to be linked so as to up hold the conviction (Para 24, 30, 31, 32)

Informant alleged that his mother had gone out for work, when he was not home - when he returned, he was informed that her dead body had been found - He went to the scene and saw that she had injuries, which led him to suspect that she had been physically assaulted and molested - FIR was registered u/s 394, 302 IPC - P.W. 3 stated she overheard the accused saying that the accused has killed the deceased - Held - Prosecution's case based on circumstantial evidence, as there are no eyewitnesses to the crime - however, the circumstantial evidence do not link the accused to the crime - Investigation was also defective, as the site plan was not prepared - testimony of the prosecution witnesses not strong enough to convict the accused - motive for the crime not proved, as the informant did not protest against the construction of the boundary and *madhai* by the accused & when they allegedly abused & threatened - No incriminating articles were recovered from the accused or the crime scene - deposition of P.W. 3 does not inspire the confidence particularly in view of the fact that without seeing how can she gauge the identity of somebody across the wall in his house making conversation regarding the deceased being disposed of by the accused - prosecution failed to prove the commission of offence by the accused beyond doubt - judgment of acquittal does not suffer from any errors of law or fact - trial court has carefully analyzed the evidence - double presumption of innocence is available with the accused (29, 33)

Dismissed. (E-5)

List of Cases cited:

1. Ashok Kumar Chatterjee Vs St. of M.P. 1989 Supp (1) SCC 560

2. C. Chenga Reddy & ors. Vs. St. of A. P. (1996) 10 SCC 193

3. Shailendra Rajdev Pasvan & ors. Vs St. of Guj. etc. Criminal Appeal Nos. 333-334 of 2017 dt 13.12.2019

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This is an appeal u/s 372 Cr.P.C. preferred by the appellant/informant challenging the judgment and order dated 03.08.2010 passed by Special Judge (SC/ST) Act, Court No. 03, Deoria inSpecial Sessions Trial No. 14 of 2007 (State Vs. Shailendra Pandey @ Babloo S/o Shrikant Pandey) u/s 394, 302 IPC read with section 3(2)5 SC/ST Act, P.S. Ekauna, District Deoria, acquitting the accused respondent no. 2.

2. The present appeal was presented before this Court on 08.09.2010 and thereafter the following orders were passed:-

Order dated:- 13.09.2010

"Admit.

Summon the L.C.R.

Issue bailable warrant to C.J.M.

List on 08.11.2010."

Order dated:-19.07.2012

"Heard learned counsel for the appellant, learned A.G.A. for the State of U.P. and Sri Ravindra Prasad appearing on behalf of accused respondent No. 2.

It is submitted by Sri Ravindra Prasad that accused respondent No. 2 Shailendra Pandey @ Babloo has furnished the bail bonds before the court of learned C.J.M. Deoria, but learned C.J.M. Deoria has not sent such report.

Office is directed to summon such report from learned C.J.M. Deoria.

List on September 17, 2012."

Order dated:- 17.09.2012

"Heard learned counsel for the appellant, learned AGA and Sri Ravindra Prasad appearing on behalf of accused respondent..

Report submitted by C.J.M. Deoria, shows that the accused respondent no. 2 Shailendra Pandey @ Babloo has appeared before him and he has furnished his bail bonds. The order sheet shows that the lower court record has been received. On behalf of accused respondent appearance has been made by his counsel.

Office is directed to proceed further for hearing of the appeal."

Order dated:- 29.08.2018

On the request of K.K. Kanojiya, counsel for the appellant, the case is passed over as he wants to prepare the case.

List in the week commencing 22.10.2018.

Order dated:- 22.10.2018

"Passed over on the illness slip of Sri B.L. Yadav, learned counsel for the appellant."

Order dated:- 23.10.2021

"Case called out.

None appears to press this appeal.

List on 3.12.2021.

It is clarified that no further adjournment will be granted."

Order dated:- 19.04.2022

"When the matter was taken up, none present for the appellant. However, Shri Shailendra Pratap Singh, learned counsel for the accused-respondent no. 2 as well as learned AGA for the State are present.

Considering the absence of counsel for the appellant, in the interest of justice, an opportunity is being given.

List the matter in the week commencing 11.07.2022 alongwith fresh office report.

It is made clear that if learned counsel appearing for the appellant will not appear on the next date fixed in the matter, the Court will proceed to appoint Amicus Curiae on behalf of appellant or decide the issue involved in the matter at this stage with the help of learned A.G.A."

3. Perusal of the order dated 29.08.2018, 22.10.2018, 23.10.2021 and 19.04.2022 it will reveal that the appellant is avoiding disposal of the appeal despite the fact that as per the order sheet dated 03.07.2017, paper book was ready. Ultimately, on 19.04.2022 this Court precoded to pass an order noticing the absence on the appellant/informant side while not getting the appeal heard and disposed of while observing that in case, the counsel appearing for the appellant does not appear on the date so fixed, the Court will proceeded to appoint amicus curiae on behalf of the appellant or to decide the issue involved in the matter with the help of the learned A.G.A.

4. Even after passing of the order dated 19.04.2022 today when the matter has been taken up in the revised list also nobody appears to press the present appeal on behalf of the appellant thus, this appeal is being decided with the assistance of learned A.G.A.

5. Briefly stated facts as apparent from record are that the appellant/informant, Molai Prasad S/o Khedan Prasad, R/o Village- Lilapur, Police Station Ekauna, Deoria and he had sent a written complaint on 14.05.2007 before the Station House Oficer, P.S. Ekauna with a allegation that his mother Pyari Devi (since deceased) at that relevant point of time was 75 years of age and on 13.05.2007 at 7 in the evening she had gone for certain work and so far as the appellant/informant is concerned he was not in his house as he was occupied while being physically present in a marriage occasion. It has been alleged that when the appellant/informant came back to his house then he was apprised about the fact that the dead body of his mother was found from a place Lilapur Siwan towards Anusa Marg. Accordingly, when the appellant/informant went at the place of occurrence of the alleged commission of offence then he discovered that there was certain injuries near the left eye and scratch over the navel portion and he suspected that she was physically assaulted and molested as even otherwise injury was found on the nose and the nose pin which she was wearing on her nostril was missing. It was thus apprehended by the appellant/informant that his mother had been disposed of and the same was an unnatural death. On the basis of the information so reported by the appellant/informant an FIR No. 18 of 2007 being Case Crime No. 139/2007 u/s 394, 302 IPC was lodged against unknown persons and the said FIR got itself found its presence in G.D. report no. 11 at 08:45 pm.

6. Pursuant to the lodging of the above mentioned FIR investigation was put to motion and then the S.H.O. Sri Basant Lal was nominated to conduct the investigation which according to the appellant/informant was proceeded while taking the dead body of the deceased in their custody, preparation of Panchnama. It has been further referred that the saari which the deceased was wearing showed the presence of blood and thereafter the deady body of the deceased was put in the custody of the Constable Harish Chand Singh and Udai Bhan Singh who were assigned the duty for the purposes of postmortem. Site plan was also prepared and on the basis of statement of witnesses were taken which concluded in submission of a charge sheet against the accused-respondent no. 2 u/s 394, 302 IPC read with section 3(2)5 SC/ST Act.

7. The case was committed for trial before the Sessions on 05.09.2007. Charges were read over to the accused-respondent, he denied the charge and claimed to the trial while pleading innocence.

8. In order to bring home the charges the following witness were produced:-

1.	Molai Prasad	P.W.-1
2.	Constable Harish Chand Singh	P.W.-2
3.	Badami Devi	P.W.-3
4.	Bhrighunath	P.W.-4
5.	Asha Devi	P.W.-5
6.	Bechai Prasad Nayak	P.W.-6
7.	S.I. Basant Lal	P.W.-7
8.	S.H.O. Baijnath Singh	P.W.-8
9.	Sri Ram Gupta, Senior Clerk C.M.O., Deoria	P.W.-9

9. The following documents were also produced by the prosecution in order to give support to their stand:-

1.	Written Report	Ex.A-1
2.	Panchayatnama	Ex.A-2
3.	Chik FIR	Ex.A-3
4.	G.D.	Ex.A-4
5.	Blood Stained Saari	Ex.A-5
6.	Police Letter	Ex.A-6
7.	Photo	Ex.A-7
8.	Letter addressed to C.M.O.	Ex.A-8
9.	Letter addressed to C.M.O.	Ex.A-9
10.	Letter addressed to Inspector	Ex.A-10
11.	Samples	Ex.A-11
12.	Site Plan	Ex.A-12
13.	Certificate	Ex.A-13
14.	G.D.	Ex.A-14
15.	G.D.	Ex.A-15
16.	G.D.	Ex.A-16
17.	F.I.R.	Ex.A-17
18.	Postmortem Report	Ex.A-18

10. We have heard Sri Ratan Singh, learned A.G.A. who appears for the State and with his assistance the present appeal is being decided.

11. Being mindful of the proposition of law so culled out by the Hon'ble Apex Court in the catena of decisions that the appellate court hearing an appeal filed against the judgment of acquittal, should not overrule or otherwise disturb the trial court judgment of acquittal if the appellate court does not finds any substantial and compelling reasons for doing so. The appellate court must also keep in mind the fact that presumption of double innocence is already available with the accused and in case, the judgment of acquittal proceeds on a wrong footing and direction of law and skips material evidences which would act as a game changer in deciding whether the accused is entitled for the benefit of acquittal or conviction and the view taken by the trial court is palpably erroneous and wrong then in those eventualities the appellate court should exercise its jurisdiction in overturning the judgment of acquittal.

12. In the light of the law so laid down by the Hon'ble Apex court in the above noted decisions, the present controversy is to be decided.

13. As per the prosecution the fateful incident took place on 13.05.2007 when the mother of the informant being Pyari Devi aged about 75 years had proceeded from her house at 7 in the evening for discharging social obligation. It has come on record that the informant was not present in his house at the relevant point of time, however, he was made aware about the demise of his mother and she sustained injuries coupled with the suspicion towards molestation. Record further reveals that the FIR was also lodged by the appellant/informant against unknown persons and thereafter, pursuant to the investigation so sought to be conducted by the I.O., charge sheet was submitted against the accused-respondent herein u/s 394, 302 IPC read with section 3(2)5 SC/ST Act.

14. While proceeding to unfold the prosecution theory so propagated by them

the deposition of the prosecution witness is to be first analysed.

15. P.W.1 himself is the son of the deceased and informant also. According to him on 14.05.2007 the dead body of his mother was found near a small bridge (pulia) on the road going to Asana. As per P.W.1 Molai Prasad, the dead body of the deceased was discovered by one Babloo @ Harendra who is the resident of the same village and the dead body of the deceased was covered with the saari. After removing the sari, the injuries were discovered on several parts of the body and there were swelling on the face of the deceased. P.W.1 has further deposed that he belongs to Dhobi Caste and on 13.05.2007 his mother had gone to attend a marriage and he was made aware about the death of his mother on 14.05.2007 at 7 in the morning and accordingly, he had given a written complaint also. So far as the issue of motive is concerned, P.W.1 in his statement had deposed that the accused herein had about 3 times quarrelled with the informant and the accused herein belongs to Brahmin Community and during the course of the quarrel the accused had threatened to kill him and thereafter, the threatening so administered by the accused herein took the shape of the death of his mother. P.W. 1 has also stated that the accused herein had erected a wall near the *madhai* and the boundary wall of the accused is just adjacent to the house of the informant. P.W. 1 has further deposed that one Badami Devi W/o Keshav Prasad who is P.W.3 had overheard the conversation which was entered into between the accused herein with his family members wherein the accused had stated that he has disposed of the mother of the informant. It has been further deposed that Bhrigunath who happens to be the P.W. 4 who is the uncle of P.W. 1 and is an old age person. P.W. 1 has also stated that when the dead body of the deceased was recovered and when the informant went to see the body then P.W. 3 Badami Devi and P.W. 4 Bhrigunath were also present. In the statement of P.W.1 it has come on record that he has not got narrated in the FIR regarding the fact that the accused herein at one point of time put flames in the hut of the informant and abused him, however, P.W.1 has further stated that the aforesaid allegations had been put on surface only after one month of lodging of the FIR while pointing the fact the accused herein had committed crime.

16. So far as P.W.3 Badami Devi is concerned, she has presented herself as a prosecution witness wherein she has come up with a stand that on 13.05.2007 she had gone to the informant's house in connection with recovering certain amount which she had given as a financial assistance to the informant and at that point of time the informant was not present, however, his wife Smt. Asha Devi P.W. 5 was in the house and she had apprised the P.W. 3 Badami Devi that the informant had gone to attend the marriage and when he will come back, he would tender the said amount. P.W. 3 Badami Devi has also stated that she sat in the house of the informant and made certain conversations with P.W. 5 Asha Devi and when P..W. 3 was returning back to her house, P.W. 3 being Badami Devi while crossing the house of the accused herein, she overheard the accused saying that the accused had finished the day today altercation and he has killed the deceased. P.W.3 Badami Devi had further deposed that she had heard the voice of the accused herein but she did not see the accused.

17. P.W. 4 Bhrigunath in his statement has deposed that at 08:00 pm on

13.05.2007 he had gone to the field and at that point of time he saw that the accused was coming from the road going from Panchrukha to Anusa and the accused was walking speedly and when he switched on the torch then he found the accused herein and thereafter, P.W. 4 went to his house and after taking his meals, he went to sleep.

18. P.W. 5 Smt. Asha Devi also got herself examined as a prosecution witness and according to her statement, her mother-in-law had gone to attend the marriage, however, she did not return back.

19. P.W. 6 Bechai Prasad Nayak is a witness to the Pancnama.

20. P.W. 2 Constable Harish Chand Singh who got the Panchnama done and had drawn the blood stained articles.

21. P.W. 7 Basant Lal claims to be an S.H.O. of Police Station Ekauna and he had witnessed the issue relating to Chik FIR.

22. P.W. 8 being Baijnath Singh has also deposed regarding the manner in which the investigation was done.

23. P.W. 9 being Sri Ram Gupta is Senior Clerk, C.M.O., Deoria proved the postmortem.

24. Records reveals that there is no eye witness who could see the commission of the crime and the entire case (if any) stands on circumstantial evidence. In order to hold the accused herein guilty of crime while putting the last nail on coffin for conviction the entire chain of events is to be linked in such a manner that there is no other probability than the fact that the accused herein had committed the said offence. To put it otherwise, the complete chain of events and the sequence had to be linked so as to up hold the conviction.

25. Admittedly, as per the statement of P.W. 1 Molai Prasad he was not an eye witness and rather not present in the house when the said occurrence occasioned. This much has been stated in the statement of P.W. 1 that the accused herein bore enmity and rivalry with the informant fraction and that become the basis for commission of the crime as the informant belongs to Dhobi Community as well as the accused belongs to Brahmin Community. As per the prosecution, the boundary wall and the madhai were also demolished by the accused and abuses were also hurled. Even otherwise P.W. 5 Asha Devi who happens to be the wife of the informant had stated in the deposition that the accused herein used to hurl abuses in Hindi vernacular and also threatened to stripped off her clothes. Record further reveals that the said issues relating to commission of crime in the back drop of motive, was never made part and the parcel of the FIR nor there was any complaint so lodged by the informant and his fraction before any authority. Further P.W.7 being the Investigating Officer has deposed that P.W. 1 and P.W. 5 did not give any statement regarding adminsitering beating and hurling of abuses and further regarding the demollition of medhai. Had the said act and omission of the accused herein being there then obviously proceedings either civil or criminal ought to have instituted by the informant's fraction but the same was at no point of time done. The learned trial court has analysed the said aspect of the matter and has recorded categorical finding that conduct and the manner in which the allegations have been put forward does not constitute motive as a basis for commission of crime.

26. Additional aspects also need to be noticed at the stage is with regard to the fact that P.W. 3 Badami Devi had deposed in her statement that she overheard the accused herein while making conversation with his family members that the accused had disposed of the deceased herein. It has also come on record that as per the statement of P.W. 3 Badami Devi that she had just overheard the said utterance but did not see the accused making the said statement as she was passing by the house of the accused wherein she heard the same. P.W. 3 in her statement has further deposed that on 13.05.2007 in the night she had gone to P.W. 1 Molai's house for receiving an amount of Rs. 1000/- which she had given to P.W. 1 and at that point of time P.W. 1 was not present in his house and his wife P.W. 5 being Asha Devi has apprised that P.W. 1 was not in his house and when he will return, he will give back the money and P.W. 3 Badami Devi had proceeded and then she overheard the accused narrating the fact that he had disposed the deceased. In the cross-examination P.W. 3 has further deposed that she has commenced her journey from her new house to the house of P.W. 1 Molai Prasad. According to her statement she had deposed that in case she commences her journey from a new house to P.W. 1 Molai's house then the house of the accused does not find its presence in the said way. She further deposed that after having conversation with the wife of P.W. 1 at 9 in the night she proceeded from P.W. 1 Molai's house towards her old house to see the appertinent land which she possess and in the said way the house of P.W. 1 came in between. The entire deposition of P.W. 3 Badami Devi does not inspire the confidence particularly in view of the fact that without seeing how can she gauge the identity of with somebody across the wall in his house was making conversation regarding the deceased being disposed of by the accused. On being specifically asked in the deposition P.W. 3 was not sure as to whether the deceased was uttering the said words loudly or murmuring. Thus the trial court has rightly held that deposition of P.W. 3 Badami Devi does not inspire the confidence.

27. So far as P.W. 4 being Bhrigunath is concerned he has this much deposed that he had witnessed the accused running speedly when he was going from Panchrukha to Anusa village and when he switched on the torch he could see the accused and thereafter, he took his meals and went to sleep. P.W. 4 in his deposition has further stated that the I.O. had come to the house of P.W. 1 Molai Prasad 3 or 4 times and he was also called, he got recorded his statement. Apart from the same as per the deposition of P.W. 4 when the body of the deceased was discovered then he was also present over there but his statement was not recorded and after 20-25 days the Investigating Office took his statement, however, he had not shown the place of occurrence to the Investigating Officer. According to P.W. 4 even the site plan was not prepared and no proceeding in that regard was also initiated.

28. Nonetheless, no recovery of any offending article or weapon which could have been used for the purpose of commission of crime and marking the presence of the accused, was recovered.

29. Analysing the deposition of the prosecution witness and the material exhibits which are shown to the basis for supporting the prosecution theory while putting the wheels of conviction upon the accused, this Court finds that firstly there is

no eye witness testimony. Secondly, even circumstantial evidence itself does not link the accused with respect to commission of the crime. Thirdly, investigation appears to be highly defective as from the perusal of the statement of P.W. 4 Bhrigunath, site plan was also not prepared and necessary requirement for conduction of investigation was not properly adhered to. Fourthly, the testimony of P.W. 3 Badami Devi also does not hold the accused guilty though suspicion can be said to find its presence particularly when P.W. 3 Badami Devi did not see the accused uttering the commission of the crime. Fifthly, the theory of the motive so engineered by the prosecution is not proved particularly in view of the fact that though it has been stated that abuses were also hurled upon P.W. 5 Asha Devi and she was threatened to have stripped off her clothes and act of constructing boundary and medhai were illegally proceeded with but no protest either before any authority or civil or criminal proceedings was undertaken. Sixthly, no recovery of any offending articles were made from the place of occurrence or the accused so as to link the accused for commission of crime even there are material contradictions in the statements of the prosecution witness which can be pressed in service (if according to the prosecution) could be a matter of suspicion but the prosecution has failed to prove the commission of offence by the accused beyond doubt.

30. The Hon'ble Apex Court in the case of **Ashok Kumar Chatterjee Vs. State of M.P.** reported in **1989 Supp (1) SCC 560** in paragraph no. 30 has observed as under:-

"30. This appeal arises against the concurrent findings of facts except for the modification of the sentence made by the High Court. There is no direct evidence to prove this case and the conviction is founded solely on circumstantial evidence. This Court in a line of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests :

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively; should from o chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra)."

31. The Hon'ble Apex Court in the case of **C. Chenga Reddy and Others Vs. State of Andhra Pradesh** reported in **(1996) 10 SCC 193** in paragraph no. 21 has observed as under:-

"20. in a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with

the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

32. The Hon'ble Apex Court in the recent judgment in the case of **Shailendra Rajdev Pasvan and Others Vs. State of Gujarat Etc. Criminal Appeal Nos. 333-334 of 2017 decided on 13.12.2019** in paragraph no. 12 has observed as under:-

"12. Thus the entire case of the prosecution is based on circumstantial evidence. It is well settled that in a case which rests on circumstantial evidence, law postulates two fold requirements:-

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

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

33. This Court after giving anxious consideration to the fact of the case in the factual back ground of law existing on land comes to the irresistible conclusion with the judgment of acquittal passed by learned trial court does not warrant any interference as the view taken by the learned trial court is possible view and according to this Court it is not a case wherein in other view is liable to be taken other than the view so arrived by the learned trial court. The learned trial court has meticulously analysed the fact of the case and has formed an opinion that the accused is liable to be acquitted. Notably, double presumption of innocence is available with the accused. Absence of any perversity accompanied with the fact that the judgment of acquittal does not suffer from any misreading of the evidence, we find no option but to concur with the judgment of acquittal.

34. Resultantly, the present criminal appeal is **dismissed**.

35. Record of the present case be sent back to the concerned court below.

(2022) 9 ILRA 1181
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2022

BEFORE

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

Special Appeal No. 276 of 2022 with 291 of 2022
And other connected cases

High Court of Judicature at Allahabad
...Respondent/Appellant
Versus
Robin Singh & Ors.
...Petitioner/Respondents

Counsel for the Appellant:
Sri Ashish Mishra, Sri Avanish Kumar Pandey, Sri Hriday Raj Tripathi, Sri Rahul Agarwal, Sri Chandan Sharma, Sri Manish Goyal (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Fuzail Ahmad Ansari, Sri Ksitij Shailendra, Sri Siddharth Khare, Sri Kauntey Singh, Sri Ashok Khare (Senior Adv.), Sri Shashi Nandan (Senior Adv.)

Examination- Petitioners are unsuccessful aspirants of Review Officers/Assistant Review Officers-criteria of evaluation of typing speed based on net typing speed and not gross typing speed is brought out in clause 6.2-

advertisement was clear-no fault in procedure adopted-interference by single judge is unwarranted-Petitioners appeared in the exam well versed with the norms exam-whole recruitment process was transparent-**Intra court.**

Appeals allowed. (E-9)

List of Cases cited:

1. Ramjit Singh Kardam& ors. Vs Sanjeev Kumar & ors. reported in 2020 (0) Supreme (SC) 297

2. Ashutosh Shrotriya & ors. Vs Vice Chancellor, Dr. B.R. Ambedkar University & ors., reported in 2016 (116) ALR 310 (FB)

3. Ramjit Singh Kardam & ors. Vs Sanjiv Kumar & ors., 2020 (0) Supreme (SC) 297

4. Ramjit Singh Kardam & ors. Vs Sanjiv Kumar & ors., 2020(0) Supreme (SC) 297 [2020(20) SCC 209]

5. Union of India & ors. Vs S. Vinod Kumar & ors. 2007 (8) SCC 100

6. Om Prakash Shukla Vs Akhilesh Kumar Shukla & ors. (1986 Supp SCC 285)

7. Vijendra Kumar Verma Vs Public Service Commission, Uttarakhand & ors., (2011) 1 SCC 150

8. Madan Lal & ors. Vs St. of J & K, 1995(3) SCC 486

9. Sadananda Halo& ors. Vs Momtaz Ali Sheikh& ors., 2008(4) SCC 619

10. Ramesh Chandra Shah& ors. Vs Anil Joshi & ors., 2013 (11) SCC 309

11. Chandigarh Administration & anr. Vs Jasmine Kaur 2014(10) SCC 521

12. Pradeep Kumar Rai Vs Dinesh Kumar Pandey, 2015 (11) SCC 493

13. Ashok Kumar Vs St. of Bihar, 2017 (4) SCC 357

14. Bihar Staff Selection Commission & ors. Vs Arun Kumar & ors. reported in 2020 (6) SCC 362

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

1. Heard Sri Manish Goyal, learned Senior Counsel assisted by Sri Ashish Mishra, Sri Rahul Agarwal and Sri Chandan Sharma, learned counsels for the appellant-High Court of Judicature at Allahabad in Special Appeal No.276 of 2022, Sri Shashi Nandan, learned Senior Counsel assisted by Sri Kshitij Shailendra and Sri Fuzail Ahmad Ansari, learned counsel for the Appellant-National Testing Agency in Special Appeal No.291 of 2022, Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Vibhu Rai, learned counsel in Special Appeal Defective No. 136 of 2022, Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare and Sri Kauntey Singh, learned counsel for the respondents-writ petitioners.

2. An Intervention Application dated 19.04.2022 has been filed through Sri Hriday Raj Tripathi, Advocate, on behalf of 03 selected candidates for the post of Assistant Review Officers stating that they have been selected and their names are reflected in the select list and that the Special Appeal No.276 of 2022 deserves to be allowed on the ground that the impugned order of the learned Single Judge has been passed without impleading them. An Intervention Application dated 19.04.2022 has also been filed on behalf of the 14 other selected candidates for the post of Assistant Review Officers through Sri Avanish Kumar Pandey, Advocate. Sri R. K. Ojha, learned Senior Counsel has advanced arguments on behalf of the interveners.

3. Sri C. L. Pandey, learned Senior Counsel assisted by Sri Durvesh Kumar, Advocate, has also been heard in opposition to the Special Appeals.

4. The instant Intra Court Appeals have been filed questioning the legality, propriety and correctness of the order dated 6.4.2022 passed by the learned Single Judge in Writ-A No.4253 of 2022 (Robin Singh and 38 others versus State of U.P. and 6 others) clubbed together with 10 other writ petitions whereby and whereunder the learned Single Judge while inviting counter and rejoinder affidavits has directed by way of an interim order that no appointment letters shall be issued to the selected candidates pursuant to selections held as per the Advertisement No.01/RO& ARO/ 2021 dated 17th August, 2021, Review Officer Recruitment Examination-2021 and Assistant Review Officer Recruitment Examination-2021 as also Advertisement No.01/CA/2021 dated 17.08.2021 for Computer Assistant Recruitment Examination-2021 published under the signatures of Registrar General, Allahabad High Court, Allahabad and Senior Director (Examination), National Testing Agency. At the same time, directions have been issued to the Registrar General to communicate the order to all the selected candidates by 8th April, 2022 so that they may file their respective intervention/impleadment applications to have their say in the matter on the next date.

5. During the course of hearing of the above appeals, it was informed at the Bar that the subject matter of the Appeals is also under challenge in several writ petitions filed by the unsuccessful candidates and their rights would be affected by the outcome of the orders passed in these appeals and the writ petitions be also heard along with the appeals so that the issues raised therein may also be addressed. The Registry of the Court was accordingly vide order dated 27.04.2022 directed to place all the writ petitions arising out of the selection of Review Officers/Assistant Review Officers/Computer Assistants before the Hon'ble the Chief Justice on the administrative side for obtaining nomination. Hon'ble the Chief Justice, vide order dated 04.05.2022, has directed all the Appeals and writ petitions involving same issue to be listed together and have been nominated to this Court. The orders passed in the Appeals shall also govern the connected writ petitions.

6. The writ petitions tagged along with these Intra Court Appeals are being categorized in terms of the relief claimed into four categories i.e. writ petitions challenging Review Officers/Assistant Review Officer, Part-I & II examinations (only two writ petitions); writ petitions challenging Review Officers, Part-II examinations (eight writ petitions); writ petitions challenging Assistant Review Officers, Part-II examinations (48 writ petitions) and writ petitions challenging Computer Assistants examinations (only two writ petitions).

7. The writ petitioners/respondents in the writ petitions giving rise to the Special Appeals are unsuccessful aspirants for the post of Assistant Review Officers and were all aggrieved by Part-II of the Examination. They approached the learned Single Judge with the allegations that:-

i. The evaluation of the respective candidatures has been conducted in a most arbitrary manner leading to erroneous results.

ii. The normalized total aggregate marks of the petitioners has not been specified in the score cards issued to them and it has been concluded that the

petitioners are ineligible, whereas the position is otherwise. The normalization procedure was liable to be applied also in determining as to whether a candidate qualified or failed to qualify. Such determination could not have been done on the basis of raw marks.

iii. Each of the petitioners fulfilled the eligibility criteria of obtaining 25 marks out of 50 marks in typing test and have correctly typed 500 words and have also obtained typing speed of 25 words per minute and on the conjoint reading of Clause 8.7.2 and 8.8.2, their candidatures were liable to be considered.

iv. As per the terms of the instructions contained in the Advertisement, the respondent authorities have proceeded to treat the petitioners as not having qualified the Part-II examination on account of not having secured minimum typing speed of 25 words per minute.

v. The respondent authorities adopted a criteria not advertised for the purposes of computing the typing speed or for determining of qualified/non qualified candidates inasmuch as Clause 14.7 of Chapter-14 of the guidelines which stipulates a provision with regard to the time limit and submission of the answer typed on the computer screen, provides that when timer reaches zero, the examination will end by itself and the candidate will not be required to end or submit the examination and the time duration provided for the CBT was 20 minutes. Meaning thereby that the examination was to end after 20 minutes by itself.

vi. There existed no instructions to the effect that in case, a candidate completed the typing work prior to expiry of 20 minutes, the candidate was required to end the examination by any method. In the absence of any instruction requiring a candidate to end the examination immediately on conclusion of the typing test has vitiated the entire selection.

vii. The adoption of criteria not advertised for the purposes of computing the typing speed or for determination of qualified / non qualified candidates tantamount to change of the rules of the game after the game is over, cannot be permitted.

viii. The respondent authorities did not specify in the instructions whether it would be the net typing speed or gross typing speed which was to be taken into consideration for determining the essential qualification of 25 words per minutes. The respondents have illegally taken into consideration the net typing speed.

ix. The National Testing Agency (hereinafter referred to as the "NTA') was authorized by the High Court to conduct examination, but NTA took help from M/s Aptech Ltd., which had been blacklisted and the writ petition challenging the blacklisting had been upheld by this Court. Since, NTA had taken the assistance of a blacklisted company in conducting the selection, the entire selection is vitiated.

8. It was, accordingly, prayed that the entire selection was liable to be quashed.

9. The writ petitioners in the connected writ petitions are unsuccessful aspirants to the post of Review Officers/Assistant Review Officers/ Computer Assistants. Besides the above allegations they have raised the following additional allegations of challenge to the selection process which are enumerated as under:-

The respondents have not followed the reservation guidelines as provided in the advertisement dated

17.08.2021 while declaring the results of the post of Assistant Review Officer/Review Officer.

Sports quota benefit of 1% has not been extended to the candidates who applied for the post of Assistant Review Officer.

Physically handicapped quota of 3% has not been extended to the candidates who applied for the post of Assistant Review Officer.

Ex-Servicemen quota of 5% has not been extended to the candidates who applied for the post of Assistant Review Officer.

Dependent of Freedom Fighter reservation of 2% has also not been extended to the candidates who applied for the post of Assistant Review Officer.

The respondents ought to have applied the horizontal reservation by rounding off the fraction 1.75 as 2 under the unreserved category for the post of Assistant Review Officer and thereafter proceeded to declare the result (sports quota).

10. The writ petitions giving rise to these bunch of appeals were resisted by the High Court (Appellants of Special Appeal No.276 of 2022) mainly on the ground that as per the guidelines issued qua the Part-II examination, the minimum duration prescribed for typing approximate 500 words was 20 minutes and the minimum typing speed fixed was 25 words per minute. Thus, the duration could be less than 20 minutes and the minimum speed can be more than 25 words per minute. In Clause 6.2, Chapter-6, it was clearly provided that the net typing speed was to be taken into consideration and not the gross typing speed. It was also urged that Clause 14.7 of the guidelines is not applicable to Part-II of the examination and applied only to Part-I. The Part-II of the examination was for testing the computer knowledge of the candidates and they were expected to respond to the pop ups being displayed on their screens requiring them to submit their examination prior to 20 minutes.

11. The National Testing Agency (Appellant of Special Appeal No.291 of 2022) also resisted the writ petitions on the ground that the same was not maintainable as the petitioners had voluntarily participated in the examination and now could not be permitted to challenge the selection having not succeeded in the examination.

12. The learned Single Judge after considering the rival contentions of the respective parties *prima-facie* found that the entire exercise of selection/non selection of the candidates was based upon the parameters which were never specified in the Advertisement. The criteria or method of evaluation of the typing speed of the candidates has also not been mentioned in the Advertisement as to whether it was to be calculated according to net typing speed or gross typing speed. The learned Single Judge also found that the loss of candidate, who could not submit their typing test prior to expiry of 20 minutes in the absence of any instructions to that effect. The learned Single Judge also noted the fact that a candidate was required to have basic computer knowledge before taking the Part-II test was not specified in the instructions and the instructions go to show that it was a computer based typing test and not a computer knowledge test. The learned Single Judge further noted that the National Testing Agency/Union of India could not explain as to why the NTA had taken the help of M/s Aptech Ltd.,

which had been blacklisted. The learned Single Judge repelled the argument of counsel for the High Court that Clause 14.7 of the guidelines was not applicable to Part-II examination and held that in fact the said Clause 14.7 applied to the petitioners. The learned Single Judge also repelled the objection of the NTA that the writ petition at the instance of unsuccessful writ petitioners was not maintainable relying upon the decision of Apex Court in the case of ***Ramjit Singh Kardam & others versus Sanjeev Kumar and others*** reported in ***2020 (0) Supreme (SC) 297*** and accordingly proceeded to issue the impugned directions.

13. The appellants have assailed the order of the learned Single Judge principally inter-alia on the following grounds:-

i. The impugned order passed by the learned Single Judge though is an interlocutory order has the trappings of a judgment inasmuch as the findings recorded are of a final nature without considering the arguments of the appellant herein.

ii. The interim order/impugned order has been passed without hearing the selected candidates even though the same is prejudicial to their interests.

iii. The Part-II of the examination which was the Computer Knowledge Test in English only was designed to test the qualities of speed, knowledge, efficiency, accuracy and endurance of a candidate. The Computer Knowledge Test of 500 words for the duration of 20 minutes was approved by the Recruitment Committee and implemented by the National Testing Agency.

iv. The Advertisement and the instructions attached to the Advertisement clearly provides that a candidate has to be successful in two qualifiers i.e. secure minimum speed of 25 words per minutes in English typing of approx 500 words on computer and also secure minimum qualifying marks of 25 out of 50 marks. In case, a candidate does not qualify either of the aforesaid two conditions, he would be deemed to be not qualified and would not be considered for final selection, even if his overall marks (i.e. Part-1 + Part-II) are higher than a selected candidate.

v. The learned Single Judge erred in going only by the heading of Chapter XIV of the General Procedures/Guidelines/information appended to the Advertisement to prima-facie hold that the Para 14.7 applied to the typing test (Part-II of the Computer Knowledge Test) as also to the Multiple Choice Objective Questions (Part-I of the Computer Knowledge Test).

vi. The learned Single Judge completely overlooked the fact that for Part-II (Computer Knowledge Test) all candidates were given an option to end the examination themselves through a button carrying the necessary caption highlighted in red at the bottom of the typing window. The end typing button was enabled for all candidates right from the beginning of the test itself which was indicative of the fact that candidates could submit their response at any time during the test.

vii. Most of the writ petitioners had submitted their Part-II Computer Based Knowledge Test much prior to the allotted 20 minutes and as such, could not have raised any grievance with respect to the premature submission or any alleged wrongful evaluation on that basis.

viii. The learned Single Judge erred in observing that prima-facie the Advertisement has not mentioned as to whether the typing speed has to be

calculated according to the net typing speed or gross typing speed in as much as the very fact that the candidates were required to reproduce on the computer in the same format the content of the passage of approx. 500 words was indicative of the fact that any error committed by the candidates would be disregarded while computing the speed as also the number of words typed particularly in view of the specifications in Para- 6.2 of the Chapter XIV of the General Procedures/Guidelines/ Information.

ix. The learned Single Judge got unnecessarily swayed away by the oral submissions of the petitioners that the National Testing Agency which had been entrusted the task of conducting the examination had in fact taken help from M/s Aptech Ltd. which had been blacklisted.

x. Lastly, it has been submitted by the appellants that the impugned order of the learned Single Judge has adversely impacted the effective functioning of the High Court inasmuch as 80% of the posts of Assistant Review Officer, 20% of the posts of Review Officer and 50% posts of the Computer Assistant are lying vacant. The said posts were sought to be filled up by the selection undertaken but the learned Single Judge has by the impugned order stayed the issuance of the appointment letters to the selected candidates.

14. It is thus prayed that the Special Appeals be allowed and the order dated 6.4.2022 be set aside and the stay application preferred by the petitioners be rejected.

15. We have heard the respective counsels for the parties and have also perused the record. Although the writ petitions were listed as per directions of Hon'ble the Chief Justice along with the Special Appeals majority of the Counsels have not come forward to address the Court in respect of their writ petitions.

16. In order to appreciate the rival submissions of the respective counsels it would be appropriate to understand the background of the case.

17. The Recruitment Committee of the High Court considering the large number of vacancies existing for the posts of Review Officers, Assistant Review Officers and Computer Assistants after detailed deliberations, resolved to fill up 55 posts of Review Officers, 344 posts of Assistant Review Officers and 15 posts of Computer Assistants. The Committee resolved for the selection procedure to be adopted for filling up of the three posts. It was decided that the difficulty level of question paper of Assistant Review Officer shall be higher than that of Computer Assistant and the difficulty level of question paper of Review Officer shall be higher than that of Assistant Review Officer. The exam was resolved to be held in two parts simultaneously, namely the objective type test of General Studies for maximum 200 marks (Part-I) and the Computer Knowledge Test for maximum 50 marks (Part-II). It was further resolved that a speed of 25 words per minute in English Typing on computer will also be the qualification for recruitment for all the three posts. The minimum marks to be obtained in Part-II to be eligible for final selection was resolved to be 25 marks out of 50 marks. The Part-I and II Examination would be conducted simultaneously in a single shift with the gap of 15 minutes. No interviews were to be held for the selection.

18. The Committee further resolved that the National Testing Agency which is

an autonomous body of the Ministry of Education, Department of Higher Education, Government of India be approached for its services and was to evolve a suitable software for computer-based evaluation of computer type sheets keeping in view both speed and accuracy. Upon consideration of various procedural aspects including the evaluation criteria for Part-II submitted by NTA, the proposal submitted by NTA regarding the marking scheme/evaluation criteria for Part-II Examination i.e. Computer Knowledge Test for Review Officer, Assistant Review Officer Examination-2021 and Computer Assistant Recruitment Examination - 2021 were duly approved by the Hon'ble the Chief Justice. The draft advertisement was also approved by the Recruitment Committee. The advertisement itself provided for National Test Abhyas to enable the candidates to take mock test for various competitive examinations such as JEE Mains, NEET-UG including the Allahabad High Court Recruitment Examination. The App was launched to facilitate the candidates to access high quality mock test as the NTA's test practice centres were closed due to COVID-19 pandemic. The advertisement further provided for web based query redressal system for purposes of any kind of ambiguity in the mind of the candidates.

19. The examination was ultimately held in accordance with the guidelines and directions duly considered and approved by the High Court.

20. A preliminary objection as to the maintainability of the Intra Court Appeals has been raised by the petitioners/respondents No.1 to 39 on the ground that the appeals are directed against an interlocutory order. The writ petitions giving rise to the appeals have been kept pending and counter and rejoinder affidavits have been invited and the writ petitions have been directed to be listed as fresh. The appellants ought to have filed counter affidavit and prayed for vacation of the interim order and there was no occasion for preferring the present appeals.

21. Per contra, learned counsel for the appellants submit that the Intra- Court Appeal are very much maintainable as the learned Single Judge has recorded finding in favour of the writ petitioners/respondents which are final in nature and has proceeded to restrain the appellants herein not to issue the appointment letters to the successful candidates even without hearing them. In our opinion, the order of the learned Single Judge certainly has the trappings of a judgment and cannot be regarded purely of a procedural nature in aid of the progression of the case. Rather it affects the vital and valuable rights of the appellants as also the selected candidates causing serious injustice to them. Consequently applying the ratio of the full Bench decision of this Court in the case of ***Ashutosh Shrotriya and others Vs. Vice Chancellor, Dr. B.R. Ambedkar University and others***, reported in ***2016 (116) ALR 310 (FB)*** we hold the Intra Court Appeals to be maintainable and preliminary objection of the petitioners/ respondents stands overruled.

22. Learned counsel for the appellants vehemently submit that the learned Single Judge erred in law in entertaining the writ petitions at the instance of the writ petitioners who have participated in the selection process without any demur and declared unsuccessful and challenged the selection process by placing reliance upon the decision of the Apex Court in the case of ***Ramjit Singh Kardam and others Vs.***

Sanjiv Kumar and others reported in ***2020 (0) Supreme (SC) 297*** is completely misplaced inasmuch as in the said case the criteria of selection applied by the Commission was declared by the Commission only at the time of declaration of the final result which is not the case in the case at hand. The learned Single Judge erroneously found that the entire exercise of selection/non selection is upon the parameters which were never specified in the advertisement. It was also held that the criteria or method of evaluation of the typing speed of the candidates was not mentioned in the advertisement as to whether it was to be calculated by taking into consideration the net typing speed or the gross typing speed.

23. We have perused the advertisement dated 17.08.2021 as also the general procedures/guidelines/information attached to the advertisement for the Review Officer Recruitment Examination, 2021 and Assistant Review Officer Recruitment Examination, 2021 filed as Annexure No.1 to the writ petition. Since the controversy involved in the writ petition and consequently in the present Special Appeals relates to the selection to the post of Assistant Review Officer, we shall confine ourselves to the provisions relating to the said post.

24. In order to appreciate the arguments advanced by the parties and adjudicate the controversy involved it is apt to reproduce certain clauses from the general procedure/guidelines/information attached to the advertisement dated 17.08.2021.

25. Chapter 4 of the General Procedures/Guidelines/Information relates to the eligibility criteria and ***Clause 4.1*** relates to the essential qualification which a candidate must possess for the post in question on the closing date of submission of the online application form. According to the said clause a candidate must possess a minimum typing speed of 25 words per minute in English Typing on Computer. Clause 4.1 of Chapter 4 of the General Procedures/Guidelines/Information is quoted here-under:-

Chapter-4
ELIGIBILITY CRITERIA

4.1 Essential Qualifications

The applicant must possess following essential educational qualification/Computer Qualifications for the post of Review Officer and Assistant Review Officer on the closing date of submission of the On-line Application Form :

Name of Post	Essential Qualifications
Review Officer	1. Bachelor's Degree of a University established by law in India, Or A Qualification recognized as equivalent thereto. **And** 2. Diploma/Degree in Computer Science from a recognized Institution / University established by Law in India, Or 'O' Level Certificate awarded by NIELET/DOEACC Society, Or "CCC' Certificate in Computer Science from recognized institute established by law in India. **And** 3. Minimum Typing Speed of 25 Words per minute in English Typing on Computer.
Assistant Review Officer	1. Bachelor's Degree of a University established by law in India, Or

	A Qualification recognized as equivalent thereto. **And** 2. Diploma/Degree in Computer Science from a recognized Institution / University established by Law in India, Or 'O' Level Certificate awarded by NIELET/DOEACC Society, Or "CCC' Certificate in Computer Science from recognized institute established by law in India. **And** 3. Minimum Typing Speed of 25 Words per minute in English Typing on Computer.

26. ***Chapter 5*** deals with the selection procedure and Clause 5.1 provides the syllabus and modalpities of the selection procedure. We are concerned with Part-II of the examination as the same has been challenged. Part-II of the selection procedure so far as the post of Assistant Review Officers are concerned provides that the computer knowledge test in English only is a Computer Based Test Exam of 20 minutes duration and of 50 marks. The prescribed minimum qualifying marks is 25 out of 50 and minimum typing speed is 25 words per minute in English typing. The syllabus for Part-II is that a candidate shall be provided a test in English of approximate 500 words on computer which he/she shall be required to reproduce on the computer in the same format. Chapter 6 deals with the marking scheme. Clause 5.1 of Chapter 5 of the General Procedures/Guidelines/Information is quoted here-under:-

Chapter-5

SELECTION PROCEDURE

5.1 Syllabus & Modalities

There shall be "SINGLE STAGE' Examination for the following Posts, consisting of "TWO PARTS", as mentioned below:

Name of Post	Part-I	Part-II	Syllabus
REVIEW OFFICER	Type : Multiple Choice Objective Questions Mode of : Computer Based Test Exam Total number : 200 of MCQ Maximum Marks : 200 Duration: 03 Hrs (180 Minutes) NO NEGATIVE MARKING. NO MINIMUM QUALIFYING MARKS.	Type: Computer Knowledge Test in English Only Mode of : Computer Based Test Exam Maximum Marks : 50 Duration: 20 Minutes NO NEGATIVE MARKING. MINIMUM QUALIFYING MARKS : 25 MARKS OUT OF 50 MARKS MINIMUM SPEED: 25 WORDS PER MINUTE IN ENGLISH TYPING ON COMPUTER.	*Part-I : Multiple Choice Objective Questions from:* *(A) General Science* *(B) History of India* *(C) Indian National Movement* *(D) Indian Polity, Economy and Culture* *(E) Indian Agriculture, Commerce and Trade* *(F) Population, Ecology and Urbanisation (in Indian Context)* *(G) World Geography and Geography and Resources of India* *(H) Current National and International Important Events*

			(I) General Aptitude (J) Special Knowledge regarding Education, Culture, Agriculture, Industry, Trade, Living and Social Traditions of Uttar Pradesh (K) Knowledge of General English and General Hindi of Graduation Level (L) Elementary Knowledge of Computers. *Part-II : Computer Knowledge Test* *A candidate shall be provided a text in English of approximately 500 words on computer which shall be required to reproduce on the computer in same format.*	ASSISTANT REVIEW OFFICER	Type : Multiple Choice Objective Questions Mode of : Computer Based Test Exam Total number : 200 of MCQ Maximum Marks : 200 Duration: 03 Hrs (180 Minutes) NO NEGATIVE MARKING. NO MINIMUM QUALIFYING MARKS.	Type : Computer Knowledge Test in English Only Mode of : Computer Based Test Exam Maximum Marks : 50 Duration: 20 Minutes NO NEGATIVE MARKING. MINIMUM QUALIFYING MARKS : 25 MARKS OUT OF 50 MARKS MINIMUM SPEED: 25 WORDS PER MINUTE IN ENGLISH TYPING ON COMPUTER.	*Part-I : Multiple Choice Objective Questions from:* *(A) General Science (B) History of India (C) Indian National Movement (D) Indian Polity, Economy and Culture (E) Indian Agriculture, Commerce and Trade (F) Population, Ecology and Urbanisation (in Indian Context) (G) World Geography and Geography and Resources of India (H) Current National and International Important Events (I)*

			General Intelligentsia (J) Special Knowledge regarding Education, Culture, Agriculture, Industry, Trade, Living and Social Traditions of Uttar Pradesh (K) Knowledge of General English and General Hindi of Graduation Level (L) Elementary Knowledge of Computers. *Part-II : Computer Knowledge Test A candidate shall be provided a text in English of approximately 500 words on computer which shall be required to reproduce on the computer in same format.*

27. ***Clause 6.2*** relates to the Part-II Computer Knowledge Test and provides that 0.1 marks shall be deducted on each mistake, left out words and spelling mistakes (error) will be treated as full mistake (error); typing of letters, words, characters, symbols or anything other than the contents of passage as asked in the question paper shall be treated as full mistake (error); words typed beyond the prescribed words limit shall be deleted/ ignored. Clause 6.1 & 6.2 of Chapter 6 of the General Procedures/ Guidelines/Information is quoted here-under:-

Chapter-6
MARKING SCHEME

6.1 Part I - Multiple Choice Objective Type Test

(i) To answer a Multiple Choice Question, the candidate needs to choose one option corresponding to the correct answer or the "most appropriate answer'.

(ii) Each correct answer shall carry One (01) Mark.

(iii) There is no negative marking for incorrect answers.

(iv) No marks will be given for questions un-answered/un-attempted/marked for review.

(v) If a question is found to be incorrect or ambiguous or having more than one answer during the Key Challenge, only those candidates who have attempted the question and chosen one of the correct answers shall be given the mark.

(vi) In case a Question is dropped due to some technical mistake (error) or

any other reason, full mark shall be given to all the candidates.

6.2 Part II - Computer Knowledge Test

(i) Marks to be deducted on each mistake (error)

[Value of mistake (error): 01 Mistake (Error) = 0.1 marks]

(ii) Left-out words and spelling mistakes (errors) will be treated as full mistake (error).

(iii) Typing of Letters, Words, Characters, Symbols or anything other than the contents of passage as asked in question paper shall be treated as full mistake (error).

(iv) Words typed beyond the prescribed words limit shall be deleted / ignored.

(v) The evaluated copy must indicate

o No. of mistakes (errors) made by the candidate

o Total Marks awarded

(vi) Marks to be deducted on each mistake (error)

(Value of mistake (error): 01 Mistake (error)=0.1 mark).

(vii) The Formula would be as under :-

Column-I	***Column-II***
Number of words with mistake (error)	*Marks to be deducted Value of mistake (error) 01 Mistake (error) = 0.1 mark*
1	*0.100*
2	*0.200*
3	*0.300*
4	*0.400*
5	*0.500*
..	..
10	*1.000*
..	..

28. Chapter 8 deals with the evaluation criteria and ***Clause 8.1*** clearly lays down that the performance of the candidates in Part-I and Part-II shall be evaluated as per the marking scheme mentioned in ***Clause 6.1 and 6.2.*** Clause 8.1 and 8.7.2 of Chapter 8 of the General Procedures/Guidelines/ Information is quoted here-under:-

Chapter-8

EVALUATION CRITERIA

8.1 The performance of the Candidates in Part-I: Multiple Choice Objective Type Test and Part-II: Computer Knowledge Test shall be evaluated as per the marking scheme mentioned in Clause 6.1 & 6.2.

8.7.2 ***Step-2: Compilation of Percentile Score (NTA Score) for each shift/ Session for each Candidate only for those who qualify:***

(i) ***Those obtaining less than 25 raw marks or having typing speed less than 25 words per minute in Part-II will be declared as ''Not-Qualified' and remaining others as ''Qualified'***

(ii) Raw Marks obtained by each candidate in the shift/session who qualify will be converted into Percentile Score (NTA Score) as follows:

Raw Marks obtained in Part-I into Percentile Score (NTA Score) TP1)

Raw Marks obtained in Part-I + Part-II into Percentile Score (NTA Score) (TP)

(iii) The Percentile Score (NTA Score) would be calculated for each candidate who qualifies in the shift/Session as follows:

Let TP1 be the Percentile Score (NTA Score) of Raw Score of Part-I and TP Percentile Score (NTA Score) of Total Raw Score for Part-I & Part-II of that candidate.

Percentile (TP) : 100.0X	*No. of candidates appeared from the shift/session with raw score EQUAL TO OR LESS than the Candidate Total* ---------- ---------- ------ *Total No. of candidates appeared in the shift/session*

Similarly, TP1 for Part-I shall be calculated.

Note: Percentile Score (NTA Score) will be calculated up to 7 decimal places to avoid bunching effect and reduce ties.

(iv) The following will be available for each candidate:

Candidate Result	Raw Marks			Percentile Score (NTA Score)*	
	Part-I	Part-II	Total (Part-I + Part-II)	Part-I	Total (Part-I + Part-II)
Not-Qualified	XXX	YYY	ZZZ	----------	----------
Qualified	XXX	YYY	ZZZ	AAA.AAAAAAA	BBB.BBBBBBB

''*' ''---------''- Not Computed'. Percentile Score (NTA Score) is calculated only for qualified Candidates.

29. Chapter 14 deals with the procedure/instructions for appearing in Computer Based Test. Clause 14.4 and 14.7 of the Chapter 14 of the General Procedures/Guidelines/Information is quoted here-under:-

Chapter-14
FOR APPEARING IN COMPUTER BASED TEST (CBT)

14.4 The keyboard attached to the computer, if any, will be disabled during the entire duration of the examination. Depending on the type of question, the answers to questions can either be entered by clicking on the virtual on-screen keyboard (numeric or otherwise) using the computer mouse or by clicking the chosen option(s) using the computer mouse.

14.7 The on-screen computer clock counter of every candidate will be set at the server. The count-down timer in the top right side of computer screen will display the time remaining (in minutes) available for the candidate to complete the examination. When the timer reaches zero, the examination will end by itself. Candidate will not be required to end or submit the examination.

30. Further, in case the Part-I and Part-II examination is conducted in more than one shift the normalization procedure shall be adopted for exercising equivalency in the question papers administered to the candidates in different shifts.

31. Thus having perused the advertisement dated 17.08.2021 and the general procedure/guidelines/information attached in respect of the selection undertaken, we find that each and every parameter for effecting the selection/non-selection of a candidate has been specifically laid down and we do not approve the conclusion drawn by the learned Single Judge that the parameters had not been specified. We also find that the reliance placed by the learned Single Judge upon the decision of the Apex Court in the case of ***Ramjit Singh Kardam and***

others Vs. Sanjiv Kumar and others, reported in ***2020(0) Supreme (SC) 297 [2020(20) SCC 209]*** is completely misplaced in view of our conclusion that each and every parameters for effecting the selection/non selection had been specifically laid down. The ratio of Ramjit Singh Kardam (Supra) is clearly not applicable to the case at hand. The decisions relied upon by the Counsel for the Appellants in the case of ***Union of India and others Vs. S. Vinod Kumar and others 2007 (8) SCC 100, Om Prakash Shukla Vs. Akhilesh Kumar Shukla and others (1986 Supp SCC 285)*** and ***Vijendra Kumar Verma Vs. Public Service Commission, Uttarakhand and others***, reported in ***(2011) 1 SCC 150*** are clearly attracted and the writ petitions at the instance of unsuccessful candidates challenging the examination/selection process are clearly not maintainable. The Special Appeal are liable to be allowed on this score alone. Paragraph Nos.25 to 28 of the judgment passed in ***Vijendra Kumar Verma (Supra)*** are quoted here-under:-

"25. In this connection, we may refer to the decision of the Supreme Court in Dr. G. Sarana Vs. University of Lucknow & Others. reported in (1976) 3 SCC 585 wherein also a similar stand was taken by a candidate and in that context the Supreme Court had declared that the candidate who participated in the selection process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. Para 15 inter alia reads thus:-

"15..... He seems to have voluntarily appeared before the Committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the Committee."

26. In ***P.S. Gopinathan Vs. State of Kerala and Others*** *reported in* ***(2008) 7 SCC 70****, this Court relying on the above principle held thus;*

"44. ..... Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15-7-1992 issued by the Governor had not been challenged by the appellant. Once he chose to join the mainstream on the basis of option given to him, he cannot turn back and challenge the conditions. He could have opted not to join at all but he did not do so. Now it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition. The High Court, therefore, in our opinion, rightly held that the appellant is estopped and precluded from questioning the said order dated 14-1-1992. The application of principles of estoppel, waiver and acquiescence has been considered by us in many cases, one of them being G. Sarana (Dr.) v. University of Lucknow....."

27. In ***Union of India and Others Vs. S. Vinodh Kumar and Others*** *reported in* ***(2007) 8 SCC 100*** *at paragraph 18 it was held that*

"18. ..... it is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same.

28. Besides, in ***K.H. Siraj Vs. High Court of Kerala and Others*** *reported in* ***(2006) 6 SCC 395*** *in paragraph 72 and 74 it was held that candidates who participated in the interview with knowledge that for selection they had to secure prescribed minimum marks on being*

unsuccessful in interview could not turn around and challenge that the said provision of minimum marks was improper, said challenge is liable to be dismissed on the ground of estoppel."

32. Likewise, we find that the criteria of evaluation of the typing speed of the candidates based on net typing speed and not gross typing speed is clearly brought out from Clause 6.2. Accordingly, we do not approve the conclusion of the learned Single Judge that the advertisement was not clear that the candidates were not to be judged according to the net typing speed.

33. So far as the view of the learned Single Judge as regards the aspect that the candidates could not submit their typing test prior to the expiry of 20 minutes in absence of any instructions to that effect is concerned, we find that all candidates were given an option to end the examination themselves through a button carrying the necessary caption highlighted in Red at the bottom of the typing window. The said "End Typing Test" button was enabled for all candidates right from the beginning of the test. A perusal of the eligibility criteria discloses that the candidate applying for the post of Review Officer or Assistant Review Officer must possess either; (i) Bachelor's Degree of a University established by law in India or a qualification recognized as equivalent thereto; and (ii) Diploma/Degree in Computer Science from a recognized Institution / University established by Law in India, or 'O' Level Certificate awarded by NIELET/DOEACC Society, Or "CCC' Certificate in Computer Science from recognized institute established by law in India; and (iii) Minimum Typing Speed of 25 Words per minute in English Typing in computer. This comprises that the candidate who is sitting for the examination has a proficiency to understand the meaning of the option (a typing test). Hence, the view of the learned Single Judge to the effect that there were no instructions contained in the Advertisement providing an option to end examination before 20 minutes, is a finding without taking into consideration the eligibility criteria prescribed in Chapter-4 of the Advertisement. No fault can be found in the procedure adopted by the appellants and the interference of the learned Single Judge in the recruitment process on that score is unwarranted and not liable to be sustained.

34. Further, the view of the learned Single Judge that the candidates were required to have basic computer knowledge before taking the test was not specified in the instructions and the instructions reveal that it was a computer based typing test and not a computer knowledge test is completely misplaced and could not form the basis to issue the impugned directions. Admittedly, the candidates were not tested in the knowledge of hardware, used in the computers or software used for operating the system nor their knowledge of the English Language, Grammer or Spelling of Words was to be tested. Candidates were tested on the proficiency in working on the computer namely in typing and formatting the given text. They were tested on the words actually typed and not which they missed out or could not type. The evaluation was done strictly according to Clause 6.2 of Chapter 6 of the Guidelines. The method adopted is a well recognized method considered and adopted by all IIMs, IITs and International Examination bodes in which marks were awarded on the performance. The purpose was to test the candidates in the use of the computer for typing and formatting.

35. The Writ Court appears to have been impressed by the oral submissions advanced on behalf of the writ petitioners to the effect that the National Testing Agency had been authorised to conduct the examination but the Agency took the assistance of M/s Aptech Ltd. which had been blacklisted and as such the entire selection becomes doubtful. We are of the opinion that the Writ Court was not justified to rush to the conclusion that the selection stood vitiated on account of the involvement of M/s Aptech Ltd. and issue the impugned directions. We find substance in the submissions of the learned Counsel for the appellants that the High Court had contracted with the National Testing Agency to carry out the examination and had no direct relationship with M/s Aptech Ltd. As per the information provided by NTA, the assistance of M/s Aptech Ltd. was taken for the purpose of providing hardware/computer terminals on which the test was conducted as more than 1.5 Lacs candidates took the examination. Besides, we find that no allegations of improper conduct of the examination on account of the involvement of M/s Aptech Ltd. or any candidate having been adversely affected by engaging the services of M/s Aptech Ltd. by NTA. In such view of the matter, the view of the learned Single Judge is unsustainable.

36. In the connected writ petitions which are also being decided by this common order almost similar points have been raised which have been discussed herein above, however, no separate arguments have been advanced. So far as the challenge made to the selection process is concerned, we have examined the writ petitions individually and grounds raised therein as well as we have also perused the original record pertaining to selection. The pith and substance of the counter affidavit filed by the appellants in the writ petitions is that the advertisement dated 17.08.2021 provides the benefit of reservation whether it falls under the vertical reservation or horizontal reservation, would be given to the candidates who are domicile of U.P. subject to production of domicile certificate issued by the Competent Authority as recognized by law or relevant rules of State of U.P. The candidates who failed to produce the domicile certificate would not be entitled to the benefit of reservation and such candidates would be treated as general (unreserved) category candidates. It is the specific case of the appellants that those candidates who claimed reservation (vertical or horizontal) did not produce the Domicile Certificate and thus were treated as general (unreserved) category candidates. So far as the contention of the petitioners that the horizontal reservation available to the sports person was not extended to the candidates. It is submitted that Clause 3.4 of the advertisement laid down that the horizontal reservation for sports person would be provided in terms of Rule 23-A of the Allahabad High Court Officers and Staff (Condition of Service and Conduct) Rules, 1976.

*"23-**A. Recruitment for sportsperson**-One percent of vacancies in all class II (Deleted) & class III posts of the establishment of the Court shall be reserved at the stage of direct recruitment for such skilled players and sports persons as may have represented **on behalf of any State in India or the Country as a whole in National or International games** at least for two years and in International competitions for one year or who have represented their Universities at least for three years in Inter Universities Tournaments organized by the Inter*

Universities Sports Board or who have represented their Schools in International Sports Meets organized by the All India Schools Sports Board in Badminton, Basket Ball, Cricket, Football, Hockey, Table Tennis, Volley Ball, Tennis, Weight Lifting, Wrestling, Boxing, Judo, Gymnastics and Rifle Shooting."

37. As per the information provided, the total vacancies advertised for the post of Review Officers was 55, for Assistant Review Officers was 344 and for Computer Assistants was 15. The compartmentalized horizontal reservation was applied as per the Government Order dated 28.08.2015 which provided that "rounding off" shall not apply for computation of vacancies in reserved categories and only the main number shall be considered as final and decimal shall be ignored. Therefore, the number of vacant post (1.75) under the sportsperson sub category in General Category for the post of Assistant Review Officer has been taken as 1 and not as 2. The appellants/respondents in the writ petitions have filed a chart depicting the compartmentalized horizontal reservation without rounding off as per the Government Order dated 28.08.2015 and High Court Rules, applied against the posts of Assistant Review Officer/Review Officer and Computer Assistant which is reproduced below which clarifies the position.

Compartmentalised Horizontal Reservation
Without rounding off as per G.O. Dated 28.08.2015 & High Court Rules
(C) Horizontal Reservation of 55 vacancies of Review Officer

Category/ sub Category	Vacancy	Women (20%)	Dependent of Freedom Fighters (02%)	Ex-servicemen (05%)	Physically handicapped (03%)	Sportsperson (01%)
Unreserved	29	05	00	01	00	00
OBC	14	02	00	00	00	00
SC	11	02	00	00	00	00
ST	01	00	00	00	00	00
Total	55	09	00	01	00	00

(D) Horizontal Reservation of 344 vacancies of Assistant Review Officer

Category/ sub Category	Vacancy	Women (20%)	Dependent of Freedom Fighters (02%)	Ex-servicemen (05%)	Physically handicapped (03%)	Sportsperson (01%)
Unreserved	174	34	03	08	05	01
OBC	92	18	01	04	02	00
SC	72	14	01	03	02	00
ST	06	01	00	00	00	00
Total	344	67	05	15	09	01

(E) Horizontal Reservation of 15 vacancies of Computer Assistant

Category/ sub Category	Vacancy	Women (20%)	Dependent of Freedom Fighters (02%)	Ex-servicemen (05%)	Physically handicapped (03%)	Sportsperson (01%)
Unreserved	08	01	00	00	00	00
OBC	04	00	00	00	00	00
SC	03	00	00	00	00	00
ST	00	00	00	00	00	00
Total	15	01	00	00	00	00

38. The chart clearly demolishes the case of the writ petitioners. We also find that none of the petitioners satisfy the minimum eligibility in terms of not obtaining the minimum qualifying marks and the minimum qualifying speed so as to be considered for preparation of the final merit list.

39. We also take note of the fact that the writ petitioners of the subsequent writ petitions which admittedly were filed subsequent to the Writ (A) No.4253 of 2022 (Robin Singh & 38 others Vs. State of U.P. & 6 other) and 10 other connected writ petitions and only after the learned Single Judge had granted indulgence by the order dated 06.04.2022. The petitioners of the subsequent writ petitions appear to have been standing on the fence awaiting the outcome of Writ (A) No.4253 of 2022 and connected writ petitions and once indulgence was granted vide order dated 06.04.2022 jumped into the fray opening a floodgate of writ petitions. We do not approve of such conduct, however, since we otherwise find no merit in the writ petitions and hold them not maintainable in view of the law laid down by the Apex Court in the case of ***Madan Lal and others Vs. State of Jammu and Kashmir,*** reported in ***1995(3) SCC 486***, ***Sadananda Halo & Others Vs. Momtaz Ali Sheikh & Others,*** reported in ***2008(4) SCC 619***, ***Ramesh Chandra Shah & Others Vs. Anil Joshi & Others,*** reported in ***2013 (11) SCC 309***, wherein the Apex Court has observed that unsuccessful candidates, after having taken part in the examination process, could not turn back and assail the selection process only because the result of the examination is not palatable to them.

40. In ***Ramesh Chandra Shah (Supra),*** wherein candidates who were competing for the post of Physiotherapists in the State of Uttarakhand participated in a written examination, the Apex Court in pursuance of the advertisement, observed that if they had cleared the test, the respondents would not have raised any objection to the selection process as to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 of the Constitution of India and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. The Apex Court observed as under:-

"18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter turn around and question the method of selection and its outcome."

41. Further, in ***Chandigarh Administration and another Vs. Jasmine Kaur*** reported in ***2014(10) SCC 521*** the Apex Court held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. Similar view has been reiterated in ***Pradeep Kumar Rai Vs. Dinesh Kumar Pandey, 2015 (11) SCC 493 and Ashok Kumar Vs. State of Bihar, 2017 (4) SCC 357.***

42. It is, thus, clear that each of the writ petitioners filled the online application form after carefully reading, understanding and agreeing to the norms and selection criteria of the examination, which were provided in the advertisement and material attached to it. The petitioners appeared in the examination well versed with the norms of the examination taking a calculated risk

or chance and have now been declared unsuccessful, they cannot be allowed to turn around and question the same selection process in which they have voluntarily participated. The writ petitioners have raised baseless allegations against the selection criteria attempting to twart the whole examination process and hinder the selection process as futile only because they have not been declared successful.

43. We, accordingly, hold that the writ petitions are not maintainable as in all the writ petitions the challenge to the selection has been made by candidates who participated in the exams with open eyes and are now challenging the same after having been declared unsuccessful.

44. In totality of the circumstances, we find that the whole recruitment process was carried out in a transparent manner, besides being just and proper which requires no interference, whatsoever, in exercise of powers under Article 226 of the Constitution of India.

45. The Apex Court in the case of ***(Bihar Staff Selection Commission and others Vs. Arun Kumar & others)*** reported in ***2020 (6) SCC 362*** in para 25 observed as follows:-

"25. The decision in Ran Vijay Singh, after a review of all previous decisions, held as follows:

.....

32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the Courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the Court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination-whether they have passed or not; whether their result will be approved or disapproved by the Court; whether they will get admission in a college or University or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers."

46. In view of the above discussion and the foregoing reasons the impugned judgment and order of the learned Single Judge dated 06.04.2022 passed in Writ (A) No.4253 of 2022 (Robin Singh and 38 others Vs. State of U.P. & 6 others) clubbed together with 10 other writ petitions) is set aside. The Intra Court Appeals are ***allowed***. Consequently, the

writ petitions giving rise to the Intra Court Appeals stand **dismissed**.

47. Since we have already held that all information about the conduct of the test had been disclosed to the candidates in the advertisement and the materials attached therewith the writ petitions at the instance of the unsuccessful candidates are not maintainable in view of the law laid down by the Apex Court. Consequently, all the writ petitions tagged along with these bunch of Appeals under order of the Hon'ble the Chief Justice are dismissed.

(2022) 9 ILRA 1201
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2022

BEFORE

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

Writ-A No. 1247 of 2020

Smt. Paudhari Devi ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Subhasis Halder

Counsel for the Respondents:
Sri Vikash Chandra Tripathi, Sri Devendra Tripathi, Sri Vivek Kumar Rai

Criminal Law - Code Of Criminal Procedure, 1973 (2 of 1974) - Section 439 (2) - Bail Cancellation - High Court power to entertain an application for cancellation of bail is not taken away merely because of pendency of an application u/s 482 Cr.P.C. challenging an order passed by the Sessions Judge holding that the bail cancellation application ought to be filed before the Magistrate (Para 9)

Bail order was passed keeping in view the fact that the accused persons and the informant had entered into a settlement as per which the accused persons paid Rs. 40 lacs to the informant, in part performance of the settlement and they issued post dated cheques of the balance amount to the informant - accused persons categorically stated before court that they would follow the terms of settlement - bail cancellation application filed as the cheques which had been given by the accused persons were dishonored for the reason that payment had been stopped by the drawer Held - accused persons' subsequent conduct in issuing instructions to their bank for stopping payment of the cheques amounts to the accused persons resiling from the conditions which formed the basis of the bail order - subsequent conduct of the opposite party in trying to go to Bahrain and threatening the informant, is a clear violation of the conditions incorporated in the bail order that the accused persons will not go outside the boundaries of the country and they will not influence the witnesses - Accused respondents, bail cancelled they were directed to surrender before the Court concerned (para 15, 16, 18)

Allowed. (E-5)

List of Cases cited:

1. Sanjay Chandra Vs CBI, (2012) 1 SCC 40

2. Satender Kumar Antil Vs Central Bureau of Investigation 2022 Scc OnLine SC 825

3. Emperor Vs H. L. Hutchinson AIR 1931 All 356

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

1. The instant writ petition has been filed questioning the judgment and order dated 22.10.2019 as also the order dated 31.7.2019 passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad in Original Application No. 870 of 2011. A prayer to quash the order dated

3.6.2005 passed by the Divisional Electrical Engineer (DEE), Operation, Tundla, Allahabad Division and order dated 2.4.2011 passed by the Divisional Railway Manager, North Central Railway, Allahabad has also been prayed for.

2. Apart from above prayers, the petitioner has sought a direction to the respondent No. 2 for grant of post retiral benefits to the petitioner such as family pension, LIC, gratuity, leave encashment etc., as also compassionate appointment of her son in a Group D post.

3. By the order dated 31.7.2019, the Original Application No. 870 of 2011 was dismissed by the Tribunal being of the view that the relief sought by the applicant cannot be granted.

4. By the order dated 22.10.2019, the review application seeking review of the order dated 31.7.2019, dismissing the original application, was also dismissed.

5. It is the case of the petitioner that her husband Chandrama Ram working on the post of Assistant Electrical Driver at Railway Station, Tundla under the respondents-Department was found missing from the place of his duty on 18.2.2003 and has been untraceable since then. The petitioner filed a report dated 11.10.2005 in the Police Station Tundla reporting her husband to be missing, whereupon, an FIR was registered in the police station. Since, the petitioner was finding it difficult to sustain herself as also her four children who were entirely dependent upon the husband of the petitioner, she preferred an application dated 17.1.2006 before the competent authority to provide appointment on compassionate ground. The petitioner was informed by the competent authority of the respondents that her case for compassionate appointment as well as for grant of post retiral benefits would be considered after getting final police report. The police vide letter dated 10.4.2008 informed the petitioner that no information has been received about the whereabouts of the husband of the petitioner and that the investigations were going on.

6. Subsequently, the case of the petitioner was rejected vide impugned order dated 2.4.2011 on the ground that she is not entitled to compassionate appointment as services of her husband had already been terminated on 3.6.2005. The order dated 2.4.2011 proceeded on the assumption that the husband of the petitioner absented himself without notice and had remained unauthorizedly absent from his post since 18.3.2003. Ultimately, vide order dated 3.6.2005, the husband of the petitioner was removed from service. The original application was resisted by the respondent on the ground that the husband of the petitioner had been absconding since 18.3.2003 and on 3.6.2005 his services were dispensed with on account of being unauthorizedly absent. It was also stated that the husband of the petitioner was served notice dated 18.5.2004 requiring him to join his duty and charge-sheet was served on 22.5.2004 which was never replied.

7. The Tribunal proceeded to dismiss the original application on the ground that the order dated 3.6.2005 for dismissal from service of Chandrama Ram had not been challenged and so long as the order of dismissal from service was existing, no relief for compassionate appointment could be granted. The Tribunal proceeded on the presumption that the respondents could not be directed to do something which is an

impossibility. The Tribunal, accordingly, dismissed the original application by order dated 31.7.2019.

8. A review application under Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987 was filed seeking review of the order dated 31.7.2019 passed in Original Application No. 870 of 2011 on the ground that:-

the claim of the applicant was rejected vide order dated 2.4.2011 indicating therein that she was not entitled for any relief as service of her husband had already been terminated on 3.6.2005 although no such ground was taken either in the counter affidavit filed or at any stage while making correspondence about considering the case of the applicant and asking to submit final report of the Police.

the husband of the applicant was found missing from his place of duty w.e.f. 18.2.2003. There was no information about the whereabouts of the husband even despite making herculean efforts to trace out the whereabouts of the applicant and he remained untraced. In such circumstances, the authority were required to proceed accordingly.

the respondents/Railways did not provide any information about the whereabouts of the husband of the applicant.

in service jurisprudence printed format to show cause notice, charge-sheet is not permissible and should not be entertained.

as per circulars, no charge-sheet could be issued to dead person and it is surprising, how a dead person could be served with a show cause or a charge-sheet or for that matter an order of dismissal.

9. The review application was dismissed holding that a review cannot be an appeal in-disguise and under the grab of review the matter could not be re-agitated. In a review, it is not open to re-appreciate the evidence/materials and such a different conclusion even if that was possible. The scope of review is very limited.

10. Learned counsel for the petitioner submits that the Tribunal manifestly erred in rejecting the claim of the petitioner both for compassionate appointment and for grant of retiral benefits proceeding on the assumption that the services of the husband of the petitioner had been terminated on account of absconding since 18.3.2003 and not replying to show cause notice and charge-sheet dated 18.5.2004 and 22.5.2004, respectively. The case of the husband of the petitioner was not one of absconding, but one of missing person and in the wake of the own circular of the respondents No. 720-E/XXXV/Pension dated 12.91 and 30.9.1986, the petitioner was entitled to at least the pensionary benefits.

11. We have heard learned counsel for the petitioner and perused the record, particularly, the circulars referred to above, which are being reproduced hereunder:-

*"**No. 720-E/XXXV/Pension***

Dated: 12.91

Subject: Cancellation of penalty of removal from service imposed on charge of unauthorized absence where it later transpires that the case is one of genuine missing and grant of consequent benefits to the missing person's family.

A copy of Railway Board's letter No. E (D&A) 91 RG 6.41 dated 22.8.91 is sent herewith for directions and necessary action. Railway Board's letter No. F(E) III/86/PNI/17 dated 19.9.86 mentioned in this letter has already been issued and sent to you vide (P) Br. P.S. No. 9064.

Copy of letter No. E (D&A) 91 RG 6.41 dated 22.8.91

***Sub**:- Cancellation of penalty of removal from service imposed on charge of unauthorized absence where it later transpires that the case is one of 'Genuine missing' and grant of consequent benefits to the missing person's family.*

Some cases have come to notice where Railway servants who were missing and whose whereabouts were not known to their family were removed from service for unauthorized absence. It has been represented by the NFIR in PNM Meeting with Railways Board that initiation of disciplinary action in such cases where even the police after all out efforts have not been able to trace the employee is not justified since they are to be presumed as dead under Section 108 of the Indian Evidence Act. The NFIR also represented that in such cases, the disciplinary action punishment should be annulled and the families be granted family pension and their request for compassionate appointment to wards etc., to which they would have been entitled but for the disciplinary action be also considered.

2. The Board have considered the matter and it is clarified that in case of the type mentioned above where it is established that the railway employee was really missing and not unauthorizedly absent the disciplinary action should be treated as initiated on valid premises and the on going disciplinary proceedings in such cases may be made by the disciplinary authority, in the case of punishment orders already issued, the annulment may be made by the appellate/revisionary authority, as the case may be. For this purpose, it is not necessary to follow any 'Revision' or 'Review' procedure since the charges/punishment are obviously based on valid premises. After the dropping of the disciplinary action and annulment of the punishment of removal, as the case may be, the relevant benefits like grant of leave encashment, salary dues, retirement benefits, etc., may be extended as outlined in Board's letter No. F (E) III/86/PNI/17 dated 19.9.1986.

3. In cases of the aforesaid type, the question of giving compassionate appointments to wards may also be considered after a period of 7 years / 3 years as provided in item (iii) of para 1 of Board's letter No. E (NG) iii/RCI/I dated 7.4.1983."

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*" **क्र. सं.9064 संख्या–720ई/0/XXX ;पेंशनद्ध, दिनांक 30.9.1986***

***विषय–** लापता रेलवे कर्मचारियों के समापन देय का भुगतान।*

उपरोक्त विषय पर रेलवे बोर्ड के पत्र संख्या नं0 एफ (ई) III/86/पी एन–1/17 दिनांक 19–9–86 की प्रतिलिपि सूचना एवं आवश्यक कार्यवाही हेतु प्रेषित की जा रही है।

Copy of Rly Bd's letter No.F(E)III/86/PN-1117 dated 19.9.1986.

***Sub**:- Grant of Settlement dues to eligible family members of railway employees who have suddenly disappeared and whose whereabouts are not known.*

A number of cases are referred to this Department for grant of family pension to the eligible family members of the employees who have suddenly disappeared and whose whereabouts are not known. At present all such cases are considered on merits in this department. In this normal course unless a period of 7 years has elapsed since the date of disappearance of the employee, he cannot be deemed to be dead and the retirement/benefits cannot be paid to the family. This principal is based on Section 108 of the Indian Evidence Act which provides that when the question is whether the man is alive or dead and it is

proved that he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

2. The matter has been under consideration of the Government for sometime as withholding of the benefits due to the family has been causing a great deal of hardship. The President is now pleased to decide that (I) When an employee disappears leaving his family, the family can be paid in the first instance the amount of salary due, leave, encashment due and the amount of Provident Fund pertaining to his own subscription in the State Railway Provident Fund having regard to the nomination made by the employee. (ii) After the elapse of a period of one year other benefits like CRG/Family pension in respect of pensionary staff and the Government Contribution/Special Contribution towards Provident Fund in respect of staff governed by SRPF (Contributory) Rules may also be granted to the family subject to the fulfillment of conditions prescribed in the succeeding paragraphs.

3. The above benefits may be sanctioned after observing the following formalities:-

(i) The family must lodge a report with the concerned Police Station & obtain a report that the employee has not been traced after all efforts had been made by the police.

(ii) An Indemnity Bond should be taken from the nominated dependents of the employee that all payments will be adjusted against the payment due to the employee in case he appears on the scene and makes any claim.

4. The Head of Office will assess all Government dues outstanding against the Government servant and effect their recovery in accordance with extent rules/instructions in force for effecting recovery of Government dues.

5. The family can apply to the Head of the Office of the Government servant for grant of family pension and DCR Gratuity, Government contribution/SC to PF, as the case may be, after one year from the date of disappearance of the Government servant in accordance with the prescribed procedure. In case the disbursement of DCR Gratuity or SC to PF, as the case may be, is not effected within three months of the date of the application, the interest shall be paid at the rates applicable and responsibility for the delay fixed in accordance with extant orders."

12. In the wake of the above, we find that the case of the petitioner's husband was a case of genuine missing and as such, his services ought not to have been dispensed with, as has been done in the case at hand. The disciplinary action/punishment is liable to be annulled and is accordingly annulled. The orders dated 31.7.2019 and 22.10.2019 passed by the Central Administrative Tribunal dismissing the original application No. 870 of 2011 and the review application respectively are set aside. The order dated 3.6.2005 and order dated 2.4.2011 passed by the Divisional Electrical Engineer (DEE) Operation, Tundla, Allahabad Division are quashed. The respondent No. 2 is commanded to release the post retiral benefits in respect of the husband of the petitioner who is stated to have been working as Assistant Electrical Driver at Railway Station, Tundla, within 45 days from service of certified copy of this order.

13. We also find that the claim of the petitioner for grant of compassionate appointment for herself or her son was

wrongly rejected. It shall be open for the respondent No. 2 to consider the claim of the petitioner for grant of compassionate appointment to any of her family members strictly in accordance with law.

14. The writ petition is ***allowed*** to the extent above.

(2022) 9 ILRA 1206
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 3254 of 2021

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

Counsel for the Petitioner:
Sri Shantanu Khare, Sri Siddharth Khare, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Bhupendra Kumar Yadav

A. Constitution of India, Art. 226 - Writ Petition against show cause notice - Maintainability - although it is well settled that High Court should refrain from interfering at the stage of show cause notice - but when the show cause notice has been issued on irrelevant considerations, in such cases, the High Court may under Art. 226 intervene and entertain a writ petition (Para 27)

In the instant case, the only allegation in the notice is that the petitioner is not eligible to be appointed on account of obtaining two degrees simultaneously - Held - the allegation made in the notice is based upon irrelevant considerations and is not supported by any material on record which requires any factual investigation - High Court quashed the notice (Para 28, 29)

B. Civil Law - Service law - Appointment - *Pursuing two courses simultaneously* - Director General of School Education issued a letter dated 18.01.2021 stating that a candidate would be ineligible for appointment if he had pursued two-degree courses simultaneously as a regular student - legality of the condition challenged - *Held* - there is no provision in the law that explicitly prohibits a candidate from pursuing two-degree courses simultaneously, such as a B.Ed. and B.T.C. course - imposing such a condition through a letter issued by the Director General of School Education is illegal. (Para 20)

Petitioner did B.T.C. training certificate course in the session 2015-17 & completed her B.Ed. course in the session 2016-18 - Notice issued to her on ground that she had obtained two regular degrees namely B.Ed. and B.T.C. course certificates in the same session - Held - sessions of the petitioner for the B.T.C. training course and B.Ed are different as the session for the B.Ed course was 2016-18 whereas the session of B.T.C. was 2015-17 - No objection raised by the authority that the petitioner did not attend 75% of lectures, tutorials, seminars, and practicals in the B.T.C. course to become eligible to appear in the examination - petitioner's B.T.C. course certificate is valid -**Even if the petitioner's B.Ed. degree is ignored, the petitioner is still eligible to be appointed as an Assistant Teacher (Para 20, 25)**

Allowed. (E-5)

List of Cases cited:

1. Kuldeep Kumar Pathak Vs St. of U.P. & ors., (2016) 3 SCC 521

2. A. Dharmraj Vs The Chief Educational Officer, Pudukkottai & ors. Civil Appeal No.1301 of 2022

3. Board of Basic Education & anr. Vs Arvind Prakash Dwivedi & ors. Special Appeal Defective No.898 of 2020,

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

Order on Amendment Application No.4/2021

Learned counsel for the petitioner through the present amendment application is seeking permission to incorporate the following prayer and the same may be treated as part of the writ petition.

"(f) issue a writ, order or direction in the nature of certiorari quashing the clause 16 of the circular dated 18.01.2021 issued by the Director General - School Education - UP, Lucknow."

Because the amendment sought is formal, therefore, the amendment application is allowed.

learned counsel for the petitioner/applicant is permitted to carry out the necessary amendment within one week from today.

Order on Writ Petition

1. Heard Sri Ashok Khare, learned Senior Advocate, assisted by Sri Siddharth Khare, learned counsel for the petitioner, Sri Vikram Bahadur Yadav, learned Standing Counsel for the State respondent nos. 1 & 2 and Sri B.K.Yadav learned counsel for respondents nos.3 & 4.

2. The petitioner through the present writ petition, has prayed for quashing of notice dated 02.01.2021 issued by the Basic Shiksha Adhikari, Firozabad, and a writ of mandamus directing the opposite party to grant appointment to the petitioner as an Assistant Teacher in a Junior Basic School of District Firozabad and permit the petitioner to join in pursuance thereto and to discharge all duties as Assistant Teacher and to pay regular monthly salary on the said post.

3. The facts, in brief, are that under an advertisement notified as Assistant Teacher Recruitment Examination, 2019 for recruitment of 69000 Assistant Teachers in Junior Basic Schools of the State, the petitioner who belongs to the OBC category and is qualified for appearing in the said selection, submitted an application for selection in the said recruitment. She appeared in the examination and was declared successful.

4. On 13.5.2020 those candidates who succeeded in the Assistant Teacher Recruitment Examination, 2019 were required to apply for consideration for an appointment as Assistant Teacher. In response thereto, the petitioner also submitted her application online for the appointment of Assistant Teacher. It is stated that the petitioner specified all details of her educational qualification including teacher training qualification in the application. The teacher training qualification specified by the petitioner in the said application was B.T.C. training course passed in the year 2018 in an examination conducted by Examination Regulatory Authority, Prayagraj. It is stated that the petitioner was selected for appointment and was allotted District Ghaziabad. The petitioner was required to participate in counseling scheduled before the Basic Shiksha Adhikari, Firozabad on 02/03, September 2020. The petitioner participated in the counseling.

5. According to the petitioner, the appointment orders were scheduled to be issued in District Firozabad on 05.12.2020,

but no appointment order was issued to the petitioner. The petitioner was informed that a complaint had been received against her that she had obtained two regular degrees namely B.Ed. and B.T.C. course certificates in the same session. Later on, a notice dated 02.01.2021 was issued by the Basic Shiksha Adhikari, Firozabad requiring the petitioner to submit documents within one week, failing which, action would be taken against her. It is further stated that the petitioner being a duly selected candidate for the post of Assistant Teacher, has availed no benefit of her B.Ed degree, therefore, the action of the respondents in not issuing an appointment letter to the petitioner is arbitrary. It is also stated that the petitioner has no objection if her B.Ed degree may be invalidated. In the aforesaid backdrop, the petitioner has prayed for the aforesaid relief.

6. A counter affidavit has been filed by respondent no.4 stating therein that paragraph 16 of the letter dated 18.01.2021 of the Director General, School Education and Director of State Project addressed to all Collectors and District Basic Education Officers of the State provides that such candidates who have completed two regular courses in same academic session as a regular student, their selection is not legal because of Paragraph 16 of the letter dated 18.01.2021, therefore, the District Selection Committee decided to cancel the appointment of the petitioner. The further case of the respondent is that the minutes of the meeting of the Expert Committee constituted by the University Grants Commission (U.G.C.) reveal that it had considered the issue of pursuing more than one degree simultaneously, and U.G.C. issued a notification dated 15.01.2016 by which it did not endorse the idea of pursuing two-degree courses simultaneously. Accordingly, it is stated that as the petitioner could not pursue two regular courses simultaneously, therefore, she cannot be appointed. Consequently, her appointment has been cancelled.

7. In the rejoinder affidavit filed by the petitioner, it is clarified that the petitioner was admitted to B.T.C. Batch 2015 and passed the same in the year 2019. The admission of the petitioner to Bachelor of Education was in the year 2016. The petitioner also gave details of the examination of B.T.C., in which the petitioner participated which are specified below:

(i)	1st Semester Examination	18.04.2017 to 20.04.2017
(ii)	2nd Semester Examination	07.12.2017 to 09.12.2017
(iii)	3rd Semester Examination	08.05.2018 to 10.05.2018
(iv)	4th Semester Examination	01.11.2018 to 03.11.2018

8. Petitioner also stated the details of Bachelor of Education Examination which is detailed below.

(i)	1st Year Examination	Commencing from 08.12.2017
(ii)	2nd Year Examination	22.09.2018 - 04.10.2018

9. The further averment made in the rejoinder affidavit is that the petitioner had left the Bachelor of Education paper commencing from 08.12.2017 and appeared in re-examination. The petitioner along with the rejoinder affidavit also enclosed UGC (minimum standards of instructions for the grant of the first degree through formal education) Regulation 2003.

10. Learned Senior Counsel has contended that there is no rule which prohibits pursuing two courses simultaneously, therefore, the objection of the respondents that the petitioner is disqualified for appointment due to pursuing two courses simultaneously in the same session is arbitrary. It is contended that the petitioner was first admitted in B.T.C. course for the session 2015-16 whereas the petitioner did B.Ed course in the session 2016-18, therefore, non-issuance of appointment letter to the petitioner on the ground that she has pursued two courses simultaneously in the same session is based upon misappreciation of facts on record and is not sustainable In law.

11. It is further contended that there is no objection raised by the respondents or by any authority that the attendance of the petitioner in the B.T.C. course was not complete. Consequently, it is submitted that if any invalidity to the degree is attached, that would be to the B.Ed course which was after the B.T.C. course.

12. It is submitted that the qualification for recruitment in Assistant Teacher is B.T.C. and as the petitioner has not taken any benefit of B.Ed degree, therefore, she is eligible for the appointment even if her B.Ed. Degree is invalidated to which the petitioner has no objection.

13. Lastly, it is contended that the U.G.C. permits the petitioner to pursue one degree course and one certificate course simultaneously, and therefore, the objection raised by the respondents about the appointment of the petitioner is misconceived and does not stand to merit. Learned Senior Counsel has placed reliance upon the judgments of the Apex Court in the case of ***Kuldeep Kumar Pathak Vs. State of U.P. & Ors., (2016) 3 SCC 521*** and ***Civil Appeal No.1301 of 2022 A.Dharmraj Vs. The Chief Educational Officer, Pudukkottai & Ors.*** and judgment of this Court passed in ***Special Appeal Defective No.898 of 2020, Board of Basic Education & Anr. Vs. Arvind Prakash Dwivedi & Ors.***

14. Per contra, learned Standing Counsel would contend that the petitioner has preferred the writ petition against the show cause notice, therefore, the writ petition at this stage is premature and is liable to be dismissed on this ground alone. It is further contended that because of paragraph 16 of the letter dated 18.01.2021 of Director General, School Education and Director of State Project that in case a candidate has pursued two courses simultaneously, he/she is disqualified for being appointed as Assistant Teacher. Hence, the petitioner is not entitled to the appointment as Assistant Teacher. Accordingly, it is submitted that the writ petition is devoid of merit and deserves to be dismissed.

15. I have heard learned counsel for the petitioner and learned counsel for the respondents.

16. In the instant case, the record reflects that the petitioner has done B.T.C. training certificate course in the session 2015-17. The session was late due to which her B.T.C. certificate course had been completed in the year 2019 as it is evident from the mark sheet of the 4th semester of the petitioner of B.T.C. Batch 2015, appended on Page 20 of the writ petition, that second-year examination was held in 2018. The petitioner has completed her

B.Ed. course in the session 2016-18, which is evident from the second year mark-sheet of the petitioner, appended on page 29 of the writ petition. Thus, it is manifest from the record that the sessions of the petitioner for the B.T.C. training course and B.Ed are different as the session for the B.Ed course was 2016-18 whereas the session of B.T.C. was 2015-17. At this point, it would be apt to refer to paragraph 5.8 of the U.G.C. (Minimum Standards of Instructions for the Grant of the First Degree through Formal Education) Regulation, 2003 (hereinafter referred to as 'Regulation 2003'):

"The minimum number of lectures, tutorials, seminars and practicals which a student shall be required to attend for eligibility to appear at the examination shall prescribed by the university, which ordinary shall not be less than 75% of the total number of lectures, tutorials, seminars, practicals, and any other prescribed requirements."

17. Paragraph 5.8 of Regulation, 2003 is relevant in the context of the present case. It specifies the minimum number of lectures that a student is required to attend to become eligible for appearing in the examination at the university.

18. In the case in hand, the respondents do not dispute the fact that the petitioner had pursued the B.T.C. certificate course in the session 2015-17, whereas she did B.Ed. course in the session 2016-18. Thus, the sessions for the two courses are different. It is also pertinent to mention that there is no averment in the counter affidavit that the petitioner did not attend 75% of lectures, tutorials, seminars, and practicals in the B.T.C. course to become eligible to appear in the examination. In such view of the fact, it can be concluded that the petitioner's B.T.C. course certificate is valid and does not suffer from any infirmity.

19. Learned counsel for the respondent has heavily placed reliance upon paragraph 16 of the letter dated 18.01.2021 issued by Director General, School Education and Director of State Project to contend that since there is a restraint imposed in paragraph 16 of the letter dated 18.01.2021, therefore, the authorities have acted as per law in rejecting the appointment of the petitioner. In this context to appreciate the controversy at hand, it would also be relevant to reproduce para 16 of the letter dated 18.01.2021.

*16. **एक शैक्षिक सत्र में दो कोर्स**- ऐसे अभ्यर्थी जिनके द्वारा एक शैक्षिक सत्र में दो कोर्स उत्तीर्ण किया गया है उनमें यदि दोनो कोर्स संस्थागत परीक्षार्थी के रूप में उत्तीर्ण किया गया है, तो ऐसे अभ्यर्थियों का चयन मान्य न किया जाये, किन्तु यदि दोनो कोर्स में से कोई एक कोर्स व्यक्तिगत परीक्षार्थी के रूप में उत्तीर्ण किया गया है, किन्तु उन दोनों परीक्षाओं का अधिभार चयन में एक साथ सम्मिलित न हो तो ऐसे अभ्यर्थी के संबंध में नियुक्ति पत्र निर्गत किये जाने हेतु जनपदीय चयन समिति के समक्ष प्रस्तुत करते हुए, मूल अभिलेखों से मिलान एवं अन्य साक्ष्यों का परीक्षण करते हुए, प्रकरण निस्तारित किया जाये। किन्तु यदि उन दोनों परीक्षाओं का अधिभार चयन में एक साथ सम्मिलित किया गया हो तो ऐसे अभ्यर्थी के चयन पर विचार किया जाना उपयुक्त नहीं होगा।*

20. The perusal of paragraph 16 of the letter dated 18.01.2021 though indicates that a candidate shall become ineligible for the appointment if he had pursued two-degree courses simultaneously as a regular student, but the fact remains that in the absence of any statutory provisions prohibiting the pursuing of two-degree courses simultaneously, can such a condition be imposed by a letter of Director General, School Education and Director of State Project dated 18.01.2021. In the

opinion of the Court, the answer to the same is emphatic 'No' for the reason that there is no provision in the law that has been pointed out by the learned Standing Counsel which prohibits a candidate to pursue two courses simultaneously. If there is no statute prohibiting pursuing two courses simultaneously and if there is no illegality attached to pursuing two courses simultaneously and obtaining a degree then a candidate cannot be disqualified on the ground that he has pursued two courses i.e. B.Ed. And B.T.C. Simultaneously. In such view of the fact, this Court finds that paragraph 16 of the letter dated 18.01.2021 is arbitrary and has no nexus with the object sought to be achieved.

21. The Apex Court in ***Kuldeep Kumar Pathak (supra)*** in paragraph No. 7 of the judgment has held that where there is no prohibition in the regulation prohibiting pursuing two courses simultaneously, the intermediate certificate of a candidate cannot be cancelled. Paragraphs Nos. 6, 7, and 8 of the judgment are reproduced herein below.

"6. Before us, Mr. Pradeep Kant, learned senior counsel for the appellant has made a neat legal argument. He submits that though the impugned judgment proceeds on the basis that appearing in two examinations simultaneously for the same year is violation of the Regulations of the Board, this reason given by the High Court is clearly unsustainable inasmuch as no such Regulation is shown by the Board which prohibited any such candidate to appear in two examinations in the same year. The learned senior counsel further argued that the impugned order passed by the respondents for confiscating his Certificate of Intermediate exam was, otherwise also, contrary to the principles of natural justice inasmuch as no show cause notice and opportunity of hearing was given to the appellant before passing such an order, which was passed belatedly after a period of nine years from the passing of the said examination by the appellant.

7. We are of the opinion that both the submissions of the learned senior counsel are valid in law and have to prevail. The High Court has been influenced by the argument of the respondents that simultaneous appearance in two examinations by the appellant in the same year was 'contrary to the Regulations'. However, no such Regulation has been mentioned either by the learned Single Judge or the Division Bench. Curiously, no such Regulation has been pointed out even by the respondents. On our specific query to the learned counsel for the respondents to this effect, he expressed his inability to show any such Regulation or any other rule or provision contained in the U.P. Intermediate Education Act, 1921 or Supplementary Regulations of 1976 framed under the aforesaid Act or in any other governing Regulations. Therefore, the entire foundation of the impugned judgment of the High Court is erroneous.

8. It is also pertinent to note that the appellant's intermediate examination and result thereof was not in question before the U.P. Board. No illegality in the admission in that class has been pointed out by the respondents. The alleged charge of simultaneously appearing in two examinations, one of the U.P. Board and other of the Sanskrit Board, was with respect to Class X and equivalent examination which did not relate to admission in intermediate course. The only provision for canceling the said admission is contained in Regulation (1) of Chapter VI-B. It details the procedure for passing the order of punishment canceling

intermediate results and, inter alia, prescribes that a committee consisting of three different members is to be constituted and entrusted with the responsibility of looking into and disposing of cases relating to unfair means and award appropriate penalty as specified in the Regulations itself. However, there is no allegation of any unfair means adopted by the appellant in the instant case and, therefore, that Regulation has no applicability. Even otherwise, no such committee was constituted. Therefore, having taken admission in Intermediate on the basis of past certificate issued by a separate Board, which was recognised, and not on the basis of the result of Class X of the U.P. Board, the appellant derived no advantage from his examination of the U.P. Board while seeking admission in Intermediate course. Thus, from any angle the matter is to be looked into, the impugned orders dated April 20, 2011 and May 10, 2011 passed by the respondents are null and void, apart from the fact that they are in violation of the principles of natural justice."

22. Similarly, in the case of ***A. Dharmraj (supra)*** the Apex Court almost in identical circumstances has held that cancellation of appointment of a candidate for pursuing two degrees simultaneously is illegal when there is no bar in the statute. In this respect, the Court observed that even if one of the degrees i.e. the subsequent degree obtained by the appellant namely M.A. (Tamil) is ignored, the appellant could have been promoted to the post of B.T. Assistant (English) because of the degree of B.A. (English) obtained by him. Paragraphs No. 5 and 5.1 of the judgment are reproduced herein below:

5. Having heard the learned counsel appearing on behalf of the respective parties and on perusal of the judgment and order passed by the learned Single Judge as well as the Division Bench, it appears that the promotion of the appellant to the post of B.T. Assistant (English) has been set aside by the High Court on the ground that the appellant obtained two degrees namely B.A. (English) and M.A. (Tamil) simultaneously and therefore as per Rule 14 he was ineligible for promotion. However, considering Rule 14, it can be seen that the bar was against teachers who have obtained B.A./B.Sc./B.Ed degree simultaneously during the same academic year. In the present case it cannot be said that the appellant obtained the degree of B.A. (English) and M.A. (Tamil) during the same academic year. The appellant pursued his B.A. (English) during January, 2012 to December, 2014. He pursued his M.A. (Tamil) which was a two years distance education course between the academic years 2013-2014 to 2014-2015. Therefore, as such Rule 14 is not applicable to the facts of the case on hand stricto senso. The degree of M.A. (Tamil) cannot be equated with B.A./B.Sc./B.Ed.

5.1 Assuming that the subsequent degree obtained by the appellant namely M.A. (Tamil) is ignored, in that case also, considering his degree in B.A. (English) he could have been promoted to the post of B.T. Assistant (English). That both the degrees secured by the appellant cannot be ignored. It is not in dispute that the degree of B.A. (English) was sufficient as per the eligibility criteria for promotion to the post of B.T. Assistant (English).

23. The Division Bench in the case of the ***Board of Basic Education (supra)*** following the judgment of ***Kuldeep Kumar Pathak (supra)*** has held as under:

"It is not in dispute that at the relevant time the respondent-petitioner

could have obtained two qualification simultaneously and the respondent-petitioner as such possessed requisite qualification to hold the post of Assistant Teacher as well as the further promotional post.

Learned single Bench in view of it, has not committed any error that may warrant interference in appellate jurisdiction.

While dismissing the appeal, we would like to observe that the government authorities must be quite sensitive while imposing the severe punishment of dismissal as a consequence to disciplinary action. It is strange that in the instant matter the authority competent despite knowing the fact that the respondent-petitioner is having requisite qualification to hold the post chose to impose the penalty of dismissal.

With the observations as above, the appeal stands dismissed accordingly."

24. In view of the aforesaid discussion, the condition imposed by paragraph 16 of the letter dated 18.01.2021 is hit by Article 14 of the Constitution of India.

25. In the instant case, there is no averment or allegation in the counter affidavit that the two degrees acquired by the petitioner have been obtained by fraud or suffer from any illegality on account of non-compliance of any provision of law like non-fulfilling of criteria of minimum 75% attendance as provided in paragraph 5.8 of U.G.C., so this Court believes that the objection raised by the respondent for cancelling the appointment of the petitioner is illegal and is not sustainable in law.

26. Viewed from another angle, in the instant case applying the ratio of law elucidated by the Apex Court in paragraph 5.1 of the judgment in the case of ***A. Dharmraj (supra),*** if the B.Ed. degree of the petitioner for session 2016-18 is ignored, which has been obtained after the B.T.C. certificate course which the petitioner did in the session 2015-17, it can easily be concluded that the petitioner is eligible to be appointed as Assistant Teacher. Therefore, in view of the said fact, the objection raised by the respondents is misconceived and not sustainable in law.

27. Now coming to the submission advanced by learned counsel for the respondents that the writ petition is premature as it has been instituted against the show cause notice. In this regard, it is apposite to state that though it is settled in law that this Court should refrain from interfering at the stage of show cause notice, there is no bar that this Court cannot exercise its power under Article 226 of the Constitution of India where the notice itself is bad as having been issued on irrelevant considerations. In the instant case, the only allegation in the notice is that the petitioner is not eligible to be appointed on account of obtaining two degrees simultaneously, besides this, no other ground has been raised for invalidating the appointment of the petitioner. In the counter affidavit also the only stand taken by the respondents is that the petitioner is not eligible to be appointed because of para 16 of the letter dated 18.01.2021 as she has pursued two courses simultaneously.

28. From the discussion aforesaid, it is evident that the allegation made in the notice for declaring the petitioner to be ineligible for the appointment is based upon irrelevant considerations and is not supported by any material on record which requires any factual investigation. Since the

counter affidavit in the instant case has been invited and filed, this Court finds that it is one such case that falls in the exceptional category where the Court can exercise its power under Article 226 of the Constitution of India and, therefore, in such view of the fact, the objection raised by the learned counsel for the respondents is not sustainable.

29. For the reasons given above, the writ petition is ***allowed***, and notice dated 02.01.2021 issued by the Basic Shiksha Adhikari, Firozabad and paragraph 16 of the letter dated 18.01.2021 are quashed and a writ of mandamus is issued to the respondents to issue appointment letter to the petitioner as Assistant Teacher in any Junior Basic School to which she has opted as per her preference within one month from the date of production of the certified copy of this order and the respondents shall ensure the joining of the petitioner and shall pay regular monthly salary on the said post regularly every month with all consequential benefits to which she is entitled in law. There shall be no order as to cost.

(2022) 9 ILRA 1214
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ-A No. 18302 of 2021

Pradeep Kumar Gupta ...Petitioner
Versus
Government of U.P. & Ors.
...Respondents

Counsel for the Petitioner:
Sri Pradeep Kumar Gupta (In Person). Sri Prabhakar Awasthi

Counsel for the Respondents:
C.S.C.

Civil Law - Rights of Persons with Disabilities Act, 1995- Petitioner-differently abled-50 % locomotor disorder-applied for advertisement-appointment on post of Library Peon (one Post)-essential qualification-class V pass and ability to ride cycle-Petitioner claims violation of his rights and humiliation-before reservation to be claimed-identification of post necessary-absence of the same-reservation cannot be claimed-in absence of specification of 'bicycle' in advertisement-he should have been allowed to ride a tricycle-and should be compete as a General category candidate-Petitioner is entitled to compensation at Rs. 5,00,000/- by the Respondent St. Government-**W.P. partly allowed.** (E-9)

Held, *the amount of compensation has been awarded to let the petitioner know, the St. may take time to hear & understand its citizen and his plight but, it is neither deaf nor heartless as may ever remain indifferent, forcing him to drag his feet, almost literally, to this Court to seek justice. The citizen works at the heart of the giant being the St. is. Unless the heart beats freely, the being cannot thrive.* ***(para 31)***

List of Cases cited:

K.S. Puttaswamy (Privacy-9J) Vs U.O.I., (2017) 10 SCC 1

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard the petitioner - Sri Pradeep Kumar Gupta, in person and learned Standing Counsel for the State. Also, on the request of the Court, Sri Prabhakar Awasthi, Advocate has assisted the Court to ascertain the correct facts.

2. The petitioner is a differently abled person having 50% locomotor disorder. On 24.06.2006, an advertisement was published inviting applications for appointment, amongst other, on the post of

Library Peon (one post) at Government Degree College, Deoband, Saharanpur. The essential qualifications prescribed were Class V pass and ability to ride cycle. The petitioner applied for appointment on that post. He was called for interview. However, in the interview, the petitioner was not evaluated. It is his grievance, he was summarily required to leave as he could not ride a bicycle, which test was insisted upon him though the petitioner could ride a tricycle with equal efficiency. Thus, the petitioner claims violation of his rights and alleges humiliation caused to him, mainly by the then Principal of the Government Degree College, Deoband, Saharanpur.

3. The petitioner agitated the matter. Subsequently, a higher educational qualification (for the post of Library Peon) of High School was insisted. Since the petitioner did not hold that qualification, he was excluded. The petitioner alleges hostile discrimination having been practised by the State respondents and complete violation of his special rights under the Rights of Persons with Disabilities Act, 1995 (hereinafter referred to as the 'Old Act'). The petitioner assailed the selection made, by filing Writ Petition No. 17917 of 2007.

4. Also, upon the petitioner escalating the issue and lodging complaints, the Regional Employment Exchange (Divyangjan), Meerut Division instituted an enquiry into the allegations levelled by the petitioner. It submitted report dated 23.11.2007. Thereunder, it was observed as under:

"प्रदेश के समस्त विभागों पर विकलांगजन अधिनियम 1995, विकलांगजन हेतु आरक्षण व पदो के चिन्हांकन का शासनादेश प्रभावी होने के बावजूद भी उक्त नियुक्ति प्रक्रिया में प्राचार्य/नियुक्ति प्राधिकारी द्वारा विकलांग अभ्यर्थी श्री प्रदीप कुमार गुप्ता के अधिकारों का हनन/ अतिक्रमण करके जानबूझकर उसे नियुक्ति के लाभ से वंचित किया गया है। उपरोक्त से स्वतः ही स्पष्ट है कि प्राचार्य/नियुक्ति प्राधिकारी के द्वारा अपनायी गयी चयन प्रक्रिया पूर्ण रूप से पक्षपातपूर्ण, त्रुटिपूर्ण एवं दोषपूर्ण है।"

5. Thereafter the court/office of State Commissioner (Divyangjan), exercising powers vested under Section 82 of the Old Act directed the District Magistrate, Saharanpur and the Additional Commissioner (Divyangjan), Saharanpur, to institute a magisterial enquiry into the complaint made by the petitioner. Admittedly, the magisterial enquiry was conducted and its report submitted on 09.09.2019. In that, the Magistrate found the fact allegation made by the petitioner to be correct and made the following observation:

"प्रश्नगत प्रकरण में मा० आयुक्त, सहारनपुर मण्डल, सहारनपुर के निर्देशों के क्रम में क्षेत्रीय सेवायोजन अधिकारी (दिव्यांग) मेरठ/सहारनपुर मण्डल द्वारा अपने कार्यालय के पत्रांक- सेवा-1/अ/स्थापना/0302/जांच/2008 दिनांक- 12-02-2008 को प्रेषित की गयी, जिसमें मुख्यतः उल्लिखित किया गया कि राजकीय स्नातकोत्तर महाविद्यालय, देवबन्द मे प्राचार्य/नियुक्ति प्राधिकारी द्वारा नवम्बर 2006 में परिचारक पद के चयन के समय अपने ही द्वारा समाचार पत्रों में विज्ञापित समूह 'घ' कर्मचारी सेवा नियमावली 1985 के आधार पर चयन समिति गठन न करना, साक्षात्कार की तिथि के समय विभाग में विकलांग आरक्षित पदों के रिक्त होने के बावजूद दिव्यांग अभ्यर्थी श्री प्रदीप कुमार गुप्ता की महाविद्यालय में नियुक्ति संबंधी विकलांग जन आयुक्त, उ०प्र० व निदेशकः (उच्च शिक्षा), शिक्षा निदेशालय उ०प्र० इलाहाबाद के पत्र दिनांक 13/11/2006 को संज्ञान में न लेना तथा आयोजित साक्षात्कार से पूर्व ही इन पत्रों पर अपने विभागाध्यक्ष / मुख्यालय से परामर्श में न लेना, शासन से परिचारक का पद विकलांग - जन हेतु चिन्हांकित होने के बावजूद विकलांग अभ्यर्थी श्री प्रदीप कुमार गुप्ता को प्रभावी नवीनतम शासनादेशों के अनुरूप साईकिल चलाने की परीक्षा में शिथिलता न देना तथा चयन समिति से पूर्व नियम विरूद्ध बनायी गयी समिति में हाईस्कूल का अंकपत्र प्रस्तुत न करने का सहारा लेकर प्रदीप कुमार गुप्ता को अनर्ह घोषित करना समूह घ' कर्मचारी सेवा नियमावली के प्राविधानों के विरूद्ध साक्षात्कार के 50 अंको का दोषपूर्ण तरीके से विभाजन करना परिचारक के पद पर लखनऊ से एक मात्र पिछड़ी जाति के अभ्यर्थी को सामान्य वर्ग में

चयन करना, इसी आवेदक को बाद में विभागीय अभिलेखों में उसे पिछड़ी जाति का दर्शाना नियम विरुद्ध व शासनादेशों के विपरीत है। क्षेत्रीय सेवा योजन अधिकारी (विकलांग), मेरठ मण्डल, मेरठ द्वारा अपनी जांच में यह भी उल्लेख है कि भर्ती के समय प्रभावी शासनादेशों को संज्ञान में न रखना, नियुक्ति प्राधिकारी द्वारा भर्ती प्रक्रिया में व्यापक स्तर पर की गई अनियमितताओं, पक्षपातपूर्ण कार्यवाही ही शिकायत की सत्यता को परिलक्षित करती है। शिक्षा निदेशक (उच्च शिक्षा) उ०प्र० इलाहाबाद ने अपने पत्र में प्रभावी शासनादेशों के अनुपालन का दायित्व संबंधित नियुक्ति प्राधिकारी का ही होना स्पष्ट किया है। वर्तमान में भी महाविद्यालय में चतुर्थ श्रेणी के रिक्त पद दफ्तरी- 01, स्वीपर कम चौकीदार-01, है जिनमें दफ्तरी का पद विकलांगजन हेतु चिन्हांकित किये जाने का उल्लेख गया है। प्रदेश के समस्त विभागों पर विकलांगजन अधिनियम-1995, विकलांगजन हेतु आरक्षण व पदो के चिन्हांकन का शासनादेश प्रभावी होने के बावजूद भी उक्त नियुक्ति प्रक्रिया में प्राचार्य/ नियुक्ति प्राधिकारी द्वारा दिव्यांग अभ्यर्थी श्री प्रदीप कुमार गुप्ता के अधिकारों का हनन / अतिक्रमण करके जानबूझकर उसे नियुक्ति के लाभ से वंचित किये जाने तथा प्राचार्य/नियुक्ति प्राधिकारी के द्वारा अपनायी गयी चयन प्रक्रिया पूर्ण रूप से पक्षपातपूर्ण, त्रुतिपूर्ण एवं दोषपूर्ण होने का उल्लेख किया गया है।

अतः उपरोक्त तथ्यों तथा प्रार्थी द्वारा उपलब्ध कराये गये साक्ष्यों के अवलोकन से स्पष्ट है कि उक्त चयन प्रक्रिया में प्राचार्य/नियुक्ति प्राधिकारी द्वारा शासनादेशो एवं नियमों का पालन नहीं किया गया है।

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6. Also, upon receipt of direction issued by the court/office of State Commissioner (Divyangjan) dated 23.05.2019, the District Magistrate, Saharanpur, acting as the Additional Commissioner (Divyangjan), Saharanpur, made his own enquiry and passed an order dated 30.11.2019, wherein it was observed as under:

"उक्त प्रकरण में सम्पादित हुई जाँचाख्याओं एवं साक्ष्यों के परीक्षणोपरान्त दिव्यांगजन (समान अवसर अधिकार संरक्षण एवं पूर्ण भागीदारी) अधिकार अधिनियम के प्रावधानों तथा दिव्यांगजन हेतु उ०प्र० शासन के द्वारा समय-समय पर जारी शासनादेशो को दृष्टिगत रखते हुए राजकीय स्नात्कोत्तर महाविद्यालय, देवबन्द (सहारनपुर) के वर्तमान प्राचार्य/नियुक्ति प्राधिकारी को आदेशित किया जाता है कि दिव्यांग श्री प्रदीप कुमार गुप्ता को दिनाँक 30.11.2006 में जानबूझकर नियुक्ति के अधिकार से वंचित करने तथा नियुक्ति सम्बन्धी अधिकारों का हनन करने के कारण श्री प्रदीप कुमार गुप्ता को उसी तिथि से नियुक्ति एवं नियुक्ति के अन्य सभी लाभ दिया जाना सुनिश्चित करते हुए एक सप्ताह के भीतर नियुक्ति पत्र पंजीकृत डाक के माध्यम से श्री प्रदीप कुमार गुप्ता को जारी करते हुए कृत कार्यवाही से इस न्यायालय/कार्यालय को भी अवगत कराये। दिव्यांगजन के हित में कार्य करना, संवेदना तथा सहानुभूति पूर्वक कार्य करना शासन के विभागों की प्राथमिकता है, ताकि उपेक्षित दिव्यांगजनो के हितो का संरक्षण करते हुए उन्हें समाज की मुख्य धारा के साथ जोड़ा जा सके, परन्तु तत्समय नियुक्ति प्राचार्य ने इसके विपरीत जानबूझकर दिव्यांग को उसके नियुक्ति एवं जीवन यापन करने के अधिकार से वंचित किया है, उक्त प्रकरण में सम्पादित हुई जाँचाख्याओं एवं साक्ष्यों के आधार पर प्राचार्य पूर्ण रूप से दोषी पाये गये है। अतः तत्समय नियुक्त प्राचार्य के विरुद्ध भी कार्यवाही किया जाना अति आवश्यक है।"

7. At that stage and in view of the order dated 30.11.2019 passed by District Magistrate, Saharanpur, the petitioner withdrew his earlier writ petition No. 17917 of 2007, in belief of appointment thus assured to him.

8. However, the above order was assailed by the then Principal of the Government Degree College, Deoband, Saharanpur, in Writ ? A No. 1975 of 2020 (Ashok Kumar Sharma Vs. State of U.P. & 3 Ors.). It transpires, in the course of those proceedings, office of the District Magistrate/Additional Commissioner (Divyangjan), Saharanpur, vide further order dated 17.02.2020 withdrew in entirety its earlier order dated 30.11.2019. In that regard, the following recital is contained in the order dated 17.02.2020 :

"उपरोक्त तथ्यों की पुष्टि उत्तर प्रदेश शासन के उच्च शिक्षा अनुभाग-5 से निर्गत कार्यालय-ज्ञाप दिनांक 04-03-2011 से हुई। जिसके अन्तर्गत संस्थित

अनुशासनिक कार्यवाही में श्री अशोक कुमार शर्मा को दोष मुक्त पाया गया है। किन्तु जिला दिव्यांगजन सशक्तिकरण अधिकारी सहारनपुर द्वारा प्रस्तुत टीप आख्या दिनांक 11-10-2019 व 22-11-2019 में उक्त तथ्य, जो कि निर्णायक तथ्य थे, को छिपाते हुए वास्तविकता का उद्घाटन नही किया गया जिसके कारण आदेश संख्या-6797/ जि०दि०ज०स०अ०, दिनांक 30-11-2019 अस्तित्व में आया। अब उक्त तथ्यों के संज्ञान में आने के उपरान्त आदेश संख्या-6797/जि० दि०ज० स०अ०, दिनांक 30-11-2019 को तत्काल प्रभाव से वापस लिया जाता है।"

9. Thereafter, the petitioner appears to have agitated the matter further and has filed the present petition. Though the relief, as framed, is not happily worded, upon assistance from the Sri Prabhakar Awasthi and the learned Standing Counsel, and upon the matter being discussed with the petitioner (in person), it transpires, he has sought remedial action against the respondents both for himself as also with respect to enforcement of the Act.

10. It has been thus submitted, the petitioner was entitled to be granted reservation as a person with disability by virtue of the Old Act. In fact, reservation was provided under the original notification dated 24.06.2006. Accordingly, the petitioner was called for interview by granting age relaxation allowable to reserved category candidates, though on that date, he was more than 40 years of age, his date of birth being 01.07.1966.

11. According to the petitioner, it is not a simple case of hostile discrimination but is one that has caused deep humiliation as during the course of interview, the petitioner was forced to part with his tricycle which he uses to commute and was called upon to ride a bicycle which obviously he could not and which fact was self apparent from the physical appearance of the petitioner. This humiliation and discrimination is attributed (by the petitioner), to the then Principal of the Government Degree College, Deoband, Saharanpur.

12. Second, it has been submitted, only to deprive the petitioner opportunity of employment, the selection process was stalled and higher educational qualification (than that possessed by the petitioner), was pressed. It was done only to exclude the petitioner from the zone of consideration. Also, such course was adopted by the then Principal of the Government Degree College, Deoband, Saharanpur, only to avoid compliance of the directions issued by other State authorities to give effect to the reservation granted under the old Act.

13. Third, it has been submitted, the State Commissioner (Divyangjan), the Magistrate, Saharanpur, the District Magistrate, Saharanpur and the Magisterial enquiry had found the petitioner to have been discriminated and humiliated. At the same time, the District Magistrate, Saharanpur, had passed the order requiring the petitioner to be granted employment against the post of Library Peon at the Government Degree College, Deoband, Saharanpur. That order was wrongly withdrawn by the then District Magistrate, Saharanpur, for reasons not known to the petitioner.

14. Last, the petitioner has prayed for a high level enquiry to be instituted to hold the guilty responsible so that justice may be done to the petitioner.

15. On the other hand, learned Standing Counsel would submit, this is not the first writ petition filed by the petitioner. His earlier writ petition being Writ ? A No. 17917 of 2007 filed to seek quashing of the select list pursuant to the advertisement

referred to above, was dismissed as withdrawn on 07.01.2020. Therefore, no challenge may arise to the selection already made.

16. Insofar as the enforcement of the order of the District Magistrate, Saharanpur, dated 30.11.2019 is concerned, it has been submitted, the same was withdrawn vide order dated 17.02.2020, which fact has also been taken note of in the order dated 20.02.2020 passed in Writ ? A No. 1975 of 2020 (Ashok Kumar Sharma Vs. State of U.P. & 3 Ors.).

17. As for the orders passed by the State Commissioner and the Magistrate, no direction has been issued as may allow any relief of appointment (on any post), to be granted to the petitioner, at this stage.

18. Last, in view of the decision of this Court in Ashok Kumar Sharma Vs. State of U.P. & 3 Ors, no further enquiry is warranted, at this stage.

19. Having heard the petitioner (in person), learned Standing Counsel for the State and Sri Prabhakar Awasthi, in the first place, it cannot be denied, there is no room to consider the challenge to selection already made. That challenge was made in the earlier writ petition filed by the petitioner being Writ - A No. 17917 of 2007. That petition came to be dismissed as withdrawn vide order dated 07.01.2020. In absence of liberty granted to the petitioner to file a second writ petition that relief may not be granted now especially since the petitioner is past the age of fresh employment (being about 56 years of age) and he has not impleaded the duly selected candidate.

20. Besides the fact, the petitioner is about 56 years of age, in any case, before any reservation may have been claimed for a person with disability, identification of post was necessary to be made under the Old Act. No such identification or reservation of post for person with locomotor disability is shown to have been provided before issuance of the advertisement. In absence of post identification and reservation made, the petitioner could not have claimed a right to be appointed on the post of Library Peon upon claiming reservation under the Old Act.

21. However, what is most disturbing is the fact that instead the petitioner being apprised of this fact and the consequent position in law, it does appear, the petitioner was unfairly asked to ride a bicycle which he obviously could not. In any case, in absence of specification of 'bicycle' in the advertisement dated 24.06.2006, the petitioner should have been allowed to ride a 'tricycle' which also qualifies as a cycle. In other words, if otherwise eligible the petitioner should have been allowed to compete as a General Category candidate. His carrying a disability did not render him ineligible.

22. Though the order of the District Magistrate dated 30.09.2019 stood withdrawn by the subsequent order dated 17.02.2020, it is surprising, no action has been taken pursuant to the magisterial enquiry report dated 09.09.2019, pursuant to the order of the State Commission dated 23.05.2019.

23. Here, again, the piquant situation exists, inasmuch as, the withdrawal of the order dated 30.11.2019 has not been challenged by the petitioner. In fact, on the strength of the withdrawal of that order, Writ A No. 1975 of 2020 (Ashok Kumar

Sharma Vs. State of U.P. & 3 Ors.) came to be disposed of.

24. Therefore, no positive relief is found deliverable to the petitioner in such circumstances, at this belated stage.

25. In the first place, there is found no post identified or reserved for persons with locomotor disablity, before issuance of the advertisement inviting application for the post of Library Peon at the Government Inter College, Deoband, Saharanpur. Second, the petitioner was more than 40 years of age on the date of first application on 2006. In absence of reservation for person with locomotor disability, the petitioner could not have claimed benefit of relaxation of age treating himself to be candidate belonging to the reserved category. That occasion would have arisen only if the enabling reservation had been first provided for. Though necessary, clearly, that was not done. Third, at present, no relief can be granted in the nature of employment for reason of passage of time as also for reason of the enabling order passed by the District Magistrate dated 30.11.2019 was withdrawn in toto. Besides no challenge thereto, that action had been practically endorsed by the Court in its earlier order dated 20.02.2020 passed in Writ ? A No. 1975 of 2020 (Ashok Kumar Sharma Vs. State of U.P. & 3 Ors.). Also, for that reason, no further enquiry is to be made at this belated stage.

26. However, it yet survives for consideration, whether the petitioner may be found entitled to any other relief for reason of being dealt with unfairly to the point of his dignity being violated and being humiliated at the instance of the State authorities, for no fault and for the State and its functionaries having failed to protect him, which act was against the mandate of the Constitution.

27. No occasion may have existed to make this consideration if the respondent State authorities had apprised the petitioner of the correct facts and made him understand the same without violating his dignity as a human being and without committing any positive act of humiliation in making him feel inadequate, owing to his different ability.

28. Having done that the State and its functionaries have not only failed a special citizen but also violated his fundamental right to life and liberty - for what worth is human existence if it is denuded of dignity and respect deserving its cherished existence. Deprived of dignity, liberty is a sea-shell washed to the shore, dead and of ornate value for others but worthless to the being that used to live within it.

29. In **K.S. Puttaswamy (Privacy-9J) Vs. Union of India, (2017) 10 SCC 1,** detailed discussion and analysis of the fundamental right to life and liberty has been made. In that, considering the entire gamut of law the following pertinent observations have been made in the majority decisions:

"108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of

dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

110. A Bench of two Judges in Francis Coralie Mullin v. UT of Delhi [Francis Coralie Mullin v. UT of Delhi, (1981) 1 SCC 608 : 1981 SCC (Cri) 212] ("Francis Coralie") while construing the entitlement of a detenue under the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Cofeposa) Act, 1974 to have an interview with a lawyer and the members of his family held that : (SCC pp. 618-19, paras 6-8)

"6. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

7. the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival.

8. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."

111. In Bandhua Mukti Morcha v. Union of India [Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 : 1984 SCC (L&S) 389] , a Bench of three Judges of this Court while dealing with individuals who were living in bondage observed that : (SCC p. 183, para 10)

"10…This right to live with human dignity enshrined in Article 21 derives its life breath from the directive principles of State policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State ? neither the Central Government nor any State Government ? has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

113. Human dignity was construed in M. Nagaraj v. Union of India [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] by a Constitution Bench of this Court to be intrinsic to and inseparable from human existence. Dignity, the Court held, is not

something which is conferred and which can be taken away, because it is inalienable : (SCC pp. 243 & 247-48, paras 26 & 42)

"26… The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give (sic be given). It simply is. Every human being has dignity by virtue of his existence.

***

42. India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realised only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realised."

(emphasis supplied)

114. In Maharashtra University of Health Sciences v. Satchikitsa Prasarak Mandal [Maharashtra University of Health Sciences v. Satchikitsa Prasarak Mandal, (2010) 3 SCC 786 : (2010) 1 SCC (L&S) 894] , this Court held that the dignity of the individual is a core constitutional concept. In Selvi [Selvi v. State of Karnataka, (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1] , this Court recognised that : (SCC p. 376, para 244)

"244… we must recognise that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences."

115. In Mehmood Nayyar Azam v. State of Chhattisgarh [Mehmood Nayyar Azam v. State of Chhattisgarh, (2012) 8 SCC 1 : (2012) 4 SCC (Civ) 34 : (2012) 3 SCC (Cri) 733 : (2012) 2 SCC (L&S) 449] , this Court noted that when dignity is lost, life goes into oblivion. The same emphasis on dignity finds expression in the decision in NALSA [National Legal Services Authority v. Union of India, (2014) 5 SCC 438] .

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."

30. Also, the respondents are generally at fault in not providing for identification and reservation of adequate post for person with locomotor disability at Government Degree College at Deoband, Saharanpur.

31. Thus, in the entirety of the facts and circumstances of the case,

cumulatively, the State has failed it's special citizen. He is therefore found entitled to lump-sum compensation assessed at Rs. 5,00,000/-, which may be paid out to the petitioner by the respondent State Government directly into the following Savings Bank Account (disclosed by the petitioner), held in the name of Shivam Gupta bearing A/C No. 919010037208046 (IFSC Code UTIB0002426), within a period of three months from today. In absence of payment made within that time, that amount would attract interest @ 8% from today till the date of actual payment.

32. The amount of compensation has been awarded to let the petitioner know, the State may take time to hear & understand its citizen and his plight but, it is neither deaf nor heartless as may ever remain indifferent, forcing him to drag his feet, almost literally, to this Court to seek justice. The citizen works at the heart of the giant being the State is. Unless the heart beats freely, the being cannot thrive.

33. Respondent no.1 is entrusted to ensure due compliance of this order. It is made plain, in this case compensation awarded is on the State as a whole and not on its executive wing alone.

34. With the aforesaid observation, the present petition stands **partly allowed**.

(2022) 9 ILRA 1222
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 18535 of 2021

Dilip Chandra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Gupta, Sri Ramesh Rai, Sri R.K. Ojha (Senir Adv.)

Counsel for the Respondents:
C.S.C., Ms. Arti Raje, Sri Arun Kumar, Sri Manoj Kumar Singh, Sri Pramod Kumar Singh, Sri Pratik J. Nagar, Sri Ram Pal Singh

Civil Law - U.P. Nagar Mahapalika Sewa Niyamawali, 1962-Petitioner's service dispensed -major penalty-without following regular disciplinary proceedings-earlier enquiry dropped-recommendation to start fresh enquiry by framing charges-dismissal order passed without fresh enquiry -impugned order quashed-Petitioner reinSt.d.

W.P. allowed. (E-9)

List of Cases cited:

A.N.D'Silva Vs U.O.I., AIR 1962 SC 130

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

1. Heard Sri R.K.Ojha, learned Senior Advocate assisted by Sri Manish Gupta, learned counsel for the petitioner and Sri J.Nagar, learned Senior Advocate assisted by Sri Pratik J. Nagar, learned counsel for the respondent nos 5,6 and 7 and learned Standing Counsel for the State respondents.

2. Invoking extra ordinary equitable jurisdiction of this Court, the petitioner who is an employee of Jalkal Department, Nagar Nigam, Prayagraj has assailed the order dated 5.8.2021 passed by the General Manager of the Jalkal Department, Nagar Nigam, Prayagraj, namely, respondent no. 5 on the ground that the order has been passed dispensing with the services of the

petitioner which is a major penalty without holding regular disciplinary proceedings as prescribed for under the relevant rules and regulations inasmuch as enquiry report that has been relied upon by the disciplinary authority dated 6.4.2021 was never supplied to the petitioner.

3. It is pleaded in the writ petition that initially petitioner was suspended vide order dated 22nd October, 2019 by the then General Manager Ratan Lal, Jalkal Department, Nagar Nigam, Prayagraj on four charges which were quite vague in nature and the present General Manager Mr. Harish Chandra Balmiki was appointed as an enquiry officer. The charge sheet was served upon the petitioner on 5.11.2019 with four charges without there being any copy of the complaint annexed with the chargesheet in support of the charges. The petitioner submitted a detail reply on 25.11.2019 to the enquiry officer, but nothing proceeded further in the matter.

4. Sri Ratan Lal, the then General Manager came to be transferred by the State Government from Prayagraj to Nagar Nigam, Meerut vide order dated 29th April, 2020 and Sri Harish Chandra Balmiki who was enquiry officer in the matter of departmental enquiry against the petitioner came to be promoted and given the charge of General Manger of the Jalkal department Nagar Nigam Prayagraj (hereinafter referred to as General Managaer). Mr. Harish Chandra Balmiki soonafter taking the charge of General Manager passed an order dated 2nd May, 2020 cancelling all the orders of previous General Manager Ratan Lal and this included letter no. 205 dated 28.4.2020 whereby petitioner was reinstated in service pending enquiry. Thus, petitioner was reverted to the position of suspension. Petitioner wrote a letter to the present General Manager on 1st July, 2020 and requested that his suspension order dated 22nd October, 2019 be cancelled and he may be reinstated in service pending enquiry. Suddenly on 12th July, 2021 petitioner was served with a show cause notice with as many as ten charges and with proposed punishment of dismissal from service and the petitioner was required to submit his reply within 15 days. Petitioner vide letter dated 24th July, 2021 sought further time to submit reply, however, instead of granting time to enable petitioner to file reply as is pleaded in the writ petition, respondent no. 5 passed an order on 5.8.2021 dismissing the petitioner from service on the basis of recommendation made by the enquiry officer in his report dated 6.4.2021. Thus, it is further pleaded in the writ petition that entire proceeding was a farce as no procedure prescribed for was followed, inasmuch petitioner was never served with any chargesheet to submit reply and if any enquiry had been conducted, it had been on the back of the petitioner.

5. It is submitted that he was never served with copy of the enquiry report, nor afforded opportunity of hearing to contest the matter as sufficient plea has been taken by the petitioner regarding non compliance of the procedure prescribed for while imposing major penalty of dismissal from service. It is necessary here to go through the relevant provisions of the U.P. Nagar Mahapalika Sewa Niyamawali, 1962) (hereinafter referred to as Rules, 1962. Part III of the Rules, 1962 deal with punishment and appeals and Rule 27 thereof runs as under:

"27. Punishment- Subject to the provisions of section 110 of the Act, the following penalties may, for good and

sufficient reasons and as therein after, provided, be imposed upon the servants of the Mahapalika by the authority which is competent to make such appointment under section 107 of the Act, notwithstanding that such an appointment in any particular case may have been made under Section577 (f)(2) of the Act, namely:-

(i) fine in case of servants belonging to the inferior service only:
Provided that the total amount of the fine shall not ordinarily exceed half month's pay of the servant concerned and it shall be deducted from his pay in instalments not exceeding one-quarter of this monthly salary;

(ii) censure;

(iii) withholding of increments including its stoppage at an efficiency bar;

(iv) recovery from pay of the whole or part of any pecuniary loss caused to the Mahapalika by negligence or breach of orders;

(v) suspension;

(vi) reduction to a lower post or time-scale, or to lower stage in a time scale;

(vii) removal from the service of the Mahapalika which does not disqualify from future employment.

(viii) dismissal from the service of Mahapalika which ordinarily disqualifies from future employment;

Explanation- The discharge-

(a) of a person appointed on probation during or at the end of the period of probation; or

(b) of a person appointed otherwise than under contract to hold a temporary appointment on the expiration of the period of the appointment or at any time in accordance with the terms of appointment; or

(c) of a person engaged under contract in accordance with the terms of his contract; does not amount to removal or dismissal within the meaning of this rule."

(emphasis added)

6. Rule 27 (viii) prescribes "Dismissal' from service of Mahapalika, a punishment that would ordinarily disqualify such an employee from future employment. Thus it is the maximum punishment under the Rules, 1962 that can be inflicted upon an employee, and is, therefore, a major penalty.

7. Rule 31 lays down procedure for disciplinary proceedings and Rule 32 provides for conclusion of disciplinary proceeds drawn against an employee. Both Rules 31 and 32 are reproduced hereunder:

31. Procedure for disciplinary proceedings,- (1) ***No order*** *(other than an order based on facts which have led to his conviction on a criminal charge)* ***of dismissal, removal or reduction in rank*** *(which includes reduction to a lower post or time-scale or a lower stage in a time scale but excludes the reversion to a lower post of a person- who is officiating in a higher post)* ***shall be passed on any servant of the Mahapalika unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself.*** *The grounds on which it is proposed to take action shall be reduced in the form of a definite charge or charges which shall be communicated to the person charged and which shall be so clear and precise as to give sufficient indication to the charged servant of the facts and circumstance against him. Ae shall be required with in a reasonable time,to put in a written statement of his defence and to state whether he desires to*

be heard in person. If he so desires or if the authority concerned so directs an oral enquiry shall be held in respect of such of the allegations as are not admitted. At that inquiry such oral evidence will be heard as the inquiring officer considers necessary. The person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witness called as he may wish, provided that he officer conducting the inquiry may for sufficient reason to be recorded in writing refuse to call a witness. Neither the Mahapalika nor the servants of the Mahapalika shall be entitled to be represented by a counsel. ***The proceedings shall contain a sufficient record of the evidence and statement of the finding and the grounds thereof. The officer conducting the enquiry may also separately from these proceedings make his own recommendation regarding the punishment to be imposed on the charged servant.***

(2) This rule shall not apply where the person concerned has absconded or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may for sufficient reasons to be recorded in writing be waived,where there is difficulty in observing exactly the requirements of the rule and those requirements can in the opinion of the inquiring officer be waived without injustice to be person charged.

(3) This rule shall also not apply where it is proposed to terminate the employment of either a temporary servant, or of a probationer whether during or at the end of the period of probation. In such cases a simple notice of termination,which in the case of temporary servant, must conform to the condition of his service, will be sufficient.

32 . (1) After an inquiry against a servant has been completed and after the punishment authority has arrived at provisional conclusions in regard to the penalty to be imposed,the servant charged shall, if penalty proposed is dismissal, removal or reduction in rank be supplied with a copy of the proceedings prepared under Rule 31 excluding the recommendations, if any in regard to punishment made by the officer conducting the inquiry and asked to show cause by a particular date, which affords him reasonable time, why the proposed penalty should not be imposed on him.

Provided that if for sufficient reasons the punishing authority disagrees with any part or whole of the proceeding prepared under Rule 31, the point or points of such disagreement, together with a brief statement of the grounds thereof, shall also be communicated to the officer or servant charged along with the copy of the proceedings under Rule 31.

(2) Every order of dismissal, removal or reduction in rank shall be in writing and shall specify the charge or charges brought, the defence, if any, and the reasons for the order.

(emphasis added)

8. The order impugned in the writ petition clearly indicates that General Manager Mr. Balmiki has impugned penalty of dismissal from service in exercise of his power vested under Rule 27 (iii) on the basis of enquiry report dated 06.04.2021 of the enquiry officer Mr. Mushir Ahmad, the Additional Municipal Commissioner and of course, after issuing a show cause notice dated 12.07.2021. Thus as per the impugned order, there has been absolute compliance of the procedure prescribed for under Rule 31 and 32 of the Rules, 1962 for taking an action of imposing major penalty of dismissal from service under Rule 27 (viii) of the Rules,

1962. However, since pleading raised in writ petition has been that no enquiry was held, no enquiry report was supplied and so none of the procedures prescribed for conducting disciplinary proceedings was followed, this Court summoned the original records of disciplinary proceedings in question vide order dated 23.02.2022.

9. I have gone through the entire original records relating to the proceedings that have resulted in passing of the order by respondent no. 5 dispensing with services of the petitioner and I find that in the matter of enquiry pursuant to the suspension order and the chargesheet served upon the petitioner in the year 2019 the then enquiry officer Harish Chandra Balmiki who was later on promoted as General Manager, was removed as enquiry officer and in his place one Sri Santosh Kumar Dwivedi, Assistant Engineer, Zone 1 Jalkal Department Nagar Nigam Prayagraj was appointed as an enquiry officer vide letter no. 219 dated 29.04.2020. This order with letter number was cancelled by the newly appointed General Manager Harish Chandra Balmiki on 02.05.2020. There is of course, one letter addressed to Municipal Commissioner dated 05.05.2020 written by Accounts Officer, Sujit Kumar which was marked to the Additional Municipal Commissioner Mr. Mushir Ahmad by the Mayor, Prayagraj to conduct enquiry and submit report.

10. Mr. Mushir Ahmad writes to Mr. Harish Chandra Balmiki the then officiating General Manager asking him to send the details of enquiry till that time conducted by Mr. Balmiki vide his letter dated 05.05.2020. Mr. Balmiki replied to the letter vide his letter dated 12.05.2020 that original file was available in the office of Nagar Nigam and so he was unable to submit report. Municipal Commissioner Mr. Ravi Ranjan, the Municipal Commissioner also wrote to General Manager, Jalkal Department, Mr. Balmiki on 11.06.2020 to make available entire evidence/documents without which enquiry was not being proceeded with. This time Mr. Balmiki wrote to the enquiry officer Mr Mushir Ahmad a detailed letter on 18.062020 that entire records had been made available to him vide office letter no. D/346/Jalkal Vibhag/20 dated 15.05.2020 and that letters written for recording evidence and statement of witnesses were available on record, but the enquiry officer wrote him back that in connection with chargehseet dated 05.11.2019 issued to the delinquent employee, no evidence was available on record. He wrote that there was some reference to the police report and drawing of some proceedings against the delinquent employee but in connection with the chargesheet dated 05.11.2019 the evidence be made available so that enquiry might be concluded . Vide letter dated 21.07.2021. Mr. Balmiki reiterated that evidence were available in original in the records in the office of Nagar Nigam and there was no further evidence and so accordingly enquiry be concluded. Enquiry Officer gave last opportunity to Mr. Balmiki to make available requisite documents/ evidence and to cooperate in the enquiry vide his letter dated 23.07.2020. Mr. Balmiki, the General Manager this time, writes back to enquiry officer on 30.07.2020 reiterating his previous stand and asks the enquiry officer to conclude enquiry as per the charges contained in the chargesheet. Having found no records available, the enquiry officer Mr. Mushir Ahmad virtually dropped the enquiry proceedings on the ground that in connection with the charges, no evidence was got recorded before him and so the

enquiry proceedings could not be continued for want of evidence. This letter addressed to Municipal Commissioner dated 15.09.2020 is reproduced hereunder:

"नगर आयुक्त महोदय,

आपसे वार्ता हुई। महाप्रबन्धक-जलकल द्वारा अब तक जलकल विभाग के निलम्बित कर्मचारीगण श्री विनोद कुमार पटेल, खलासी एंव श्री दिलीप चन्द्र, खलासी के जांच प्रकरण में आरोपित आरोपों के सम्बन्ध में कोई भी साक्ष्य अधोहस्ताक्षरी को उपलब्ध नहीं कराया गया है, अतएव साक्ष्य के अभाव में दीर्घकालीन अवधि तक अनुशासनिक कार्यवाही गतिमान रखने का कोई औचित्य नहीं है। तदनुसार महाप्रबन्धक-जलकल को निर्देशित करना चाहें।

अपर नगर आयुक्त।"

11. However, it seems when above letter was not replied to by General Manager, the Enquiry Officer decided to drop enquiry proceedings on the ground that no one was giving evidence against the delinquent employee who was in jail pursuant to police report dated 25.12.2020. This report of enquiry officer is titled as "Enquiry Report' and seems to have been taken as one prepared under Rule 31(1) of the Rules, 1962. In order to appreciate this enquiry report it is reproduced hereunder:

"जांच आख्या

मेरे द्वारा श्री हरिश्चन्द्र बाल्मीकि, महाप्रबन्धक जलकल विभाग प्रयागराज की आख्या दिनांक - 05.03.2021 का अवलोकन किया गया। आख्या से स्पष्ट है कि श्री दिलीप चन्द्र भारतीया, खलासी द्वारा दिनांक - 25.12.2020 को महाप्रबन्धक श्री हरिश्चन्द्र बाल्मिकी पर जानलेवा हमला किया गया जिसकी प्रथम सूचना रिपोर्ट, थाना खुल्दाबाद प्रयागराज में दर्ज कराई गयी एंव पुलिस विवेचना के उपरान्त कानूनी कार्यवाही के तहत अपराधी कर्मचारी श्री दिलीप चन्द्र भारतीया वर्तमान में जेल मे निरूद्ध है। कर्मचारी का यह अपराधिक कृत्य कर्मचारी आचरण नियमावली के विपरीत व अपने अधिकारी के प्रति घोर अनुशासनहीनता व मिसकण्डेक्ट है।

पूर्व में भी श्री दिलीप चन्द्र भारतीय, खलासी द्वारा अपने कर्मचारी साथियों के साथ जलकल विभाग मुख्यालय खुशरूबाग में अधिकरियों व कर्मचारियों के बीच भय व आतंक फैलाकर जलकल विभाग के कार्यों में व्यवधान उत्पन्न करने के लिए आरोपित रहे हैं। श्री दिलीप चन्द्र भारतीया खलासी इतने दबंग व प्रभावशाली अपराधी हैं कि इनके विरूद्ध कोई भी अधिकारी व कर्मचारी साक्ष्य/गवाही देने की हिम्मत नहीं कर पाता है जिसका प्रमाण यह है कि जलकल विभाग के कार्यालय पत्र संख्या डी० 1291/ म०प्र०/ ज०क०वि०/19-20 **दिनांक 05/11/2019 के द्वारा पूर्व में आरोपी कर्मचारी को आरोप-पत्र दिया गया था जिसके उत्तर में अपराधी कर्मचारी ने जलकल विभाग के अभियन्तागण को ही प्रत्यक्षदर्शी बनाकर घटना की जानकारी लिए जाने का अनुरोध किया जिसके क्रम में जांच अधिकरी/अधोहस्ताक्षरी द्वारा अभियन्तागण से ब्यान लिया गया किन्तु अभियन्तागण उक्त कर्मचारी के भय व आतंक से इतने ज्यादा प्रभावित थे कि वे उसके समक्ष घटना से ही मुकर गये।**

इस प्रकार आरोपी कर्मचारी के कथन/उत्तर पर मौखिक सुनवाई भी की गई। तद्नुसार श्री दिलीप चन्द्र भारतीया खलासी उदण्ड, अनुशासनहीन व अपराधिक प्रवृत्ति का कर्मचारी है। कर्मचारी की सत्यनिष्ठा संदिग्ध है। आये दिन जलकल विभाग में भय एंव आतंक का माहौल पैदा करने का आदी **है। कर्मचारी की अपराधिक प्रवृत्ति के कारण व्यवहारिक जांच किया जाना संम्भव नहीं है। आख्या प्रेषित है।**

(मुशीर अहमद)
अपर नगर आयुक्त/ जांचअधिकारी "
(emphasis added)

12. Upon perusal of the above, I find that the recommendations made by Mushir Ahmad to drop the enquiry on 06.04.2021 neither amounts to a formal enquiry report itself worth its name as such, nor even on the basis of any such enquiry report a disciplinary authority could have proceeded to impose order of punishment in the nature of major penalty.

13. The same day while the alleged enquiry report was submitted by Additional Municipal Commissioner Mushir Ahmad he made yet another recommendation on 06.04.2021, which is reproduced hereunder:

" <u>नगर आयुक्त महोदय</u>,

कृपया गत् पृष्ठ संख्या-8 पर श्री हरिश्चन्द्र बाल्मीकि, महाप्रबन्धक जलकल-प्रयागराज की आख्या दिनांक-05.03.2021 पर अपने आदेश दिनांक-09.03.2021 का अवलोकन करने का कष्ट करें। मेरे द्वारा महाप्रबन्धक-जलकल विभाग की आख्या का अवलोकन किया गया, जिससे स्पष्ट है कि श्री दिलीप चन्द्र भारतीय, खलासी व अन्य हिस्ट्रीशीटर अपराधियों द्वारा दिनांक- 25.12.2020 को श्री हरिश्चन्द्र बाल्मीकि, महाप्रबन्धक-जलकल पर जानलेवा हमला किया गया। इस सम्बन्ध में पुलिस विभाग थाना खुल्दाबाद में प्रथम सूचना रिपोर्ट सं0 635/2020 दर्ज करायी गयी है। श्री दिलीप चन्द्र भारतीय (खलासी) जलकल विभाग का यह आपराधिक कृत्य कर्मचारी आचरण नियमावली के विपरीत है। इस प्रकार कर्मचारी द्वारा अपने उच्चाधिकारी के विरुद्ध घोर अनुशासनहीनता व मिसकन्डक (कदाचार) किया गया है। **दोषी कर्मचारी के विरुद्ध अबतक कोई अनुशासनिक कार्यवाही गठित नहीं की गयी है और न ही आरोप पत्र प्रस्तुत किया गया है।**

महाप्रबन्धक-जलकल विभाग के कर्मचारियों के नियुक्ति प्राधिकारी व दण्डाधिकारी है नियुक्ति प्राधिकारी/दण्डाधिकारी को स्वतः संज्ञान लेकर मामले में कार्यवाही की जानी चाहिए।

अतः महाप्रबन्धक जलकल विभाग को निर्देश देना चाहे कि वे मामले/घटना के सम्बन्ध में दोषी कर्मचारी श्री दिलीप चन्द्र भारतीय (खलासी) के विरुद्ध नियमानुसार अनुशासनिक कार्यवाही तथा आरोप-पत्र गठित कर कार्यवाही करें।

मुशीर अहमद)
अपर नगर आयुक्त ।"
"(emphasis added)

14. The above letter contains recommendation to the effect that proper disciplinary proceedings be drawn against Dilip Chandra, namely the petitioner by formally framing charges. Notings upn the above recommendation show that Secretary, Nagar Nigam, made an endorsement for initiating disciplinary proceedings against suspended employees not naming the petitioner at all. This recommendation of the Municipal Commissioner dated 06.04.2021 further carries an endorsement of an officer addressed to Secretary, to initiate disciplinary proceedings as per recommendation. So I do not find there to be any enquiry report available on record to enable General Manager to pass order of dismissal from service. There being only report dropping enquiry proceedings and a letter of recommendation by Mushir Ahmad, Additional Municipal Commissioner to initiate disciplinary proceedings by framing charges and thereby issuing chargesheet, such earlier enquiry report or recommendation cannot be said to be a recommendation of enquiry officer to dismiss the petitioner from service. How the General Manager Mr. Balmiki treated the enquiry report dropping the enquiry and recommendations made for framing charges as an enquiry report is questionable. Surprisingly he, instead of instituting enquiry afresh, has proceeded to take action of imposing punishment as disciplinary authority. Records do not reveal any disciplinary enquiry being instituted upon recommendation of Additional Municipal Commissioner dated 06.04.2021. The court also fails to understand as to why enquiry officer , Mr. Mushir Ahmad, if in his wisdom had rightly dropped enquiry for want of evidence and yet made recommendation for disciplinary action. Here report should have been taken to mean for instituting a proper formal enquiry as contemplated under Rule 31 of the Rules, 1860. An enquiry officer can only hold a delinquent employee guilty of the charges by conducting a formal enquiry as a consequence thereof and then additionally he can recommend for a punishment as per rules but without conducting a formal enquiry showing his inability to hold enquiry, he could not have made recommendations for an action for inflicting punishment upon the delinquent employee. Here I may refer the case of **A.N.D'Silva v. Union of India, AIR 1962 SC 130**, wherein it was held : *"In the*

communication addressed by the Enquiry Officer the punishment proposed to be imposed upon the appellant if he was found guilty of the charges could not properly be set out. The question of imposing punishment can only arise after enquiry is made and the report of the Enquiry Officer is received. It is for the punishing authority to propose the punishment and not for the enquiry authority."

15. Thus, it is clear that no enquiry as such was ever ordered against the petitioner except the one that was instituted pursuant to the chargesheet dated 5.11.2019. The order impugned does state that petitioner was suspended on 22nd October, 2019 and in the enquriy conducted in the matter petitioner was held guilty but no such enquiry report is traceable, instead there is a report of enquiry officer dropping the enquiry dated 15.09.2020 and then a report dated 06.04.2021 showing his inability to hold enquiry.

16. It further transpires from the record that there has been some issue between earlier General Manager and the present one and the employees have been made to be victimized because of the internal politics. It can only be termed as unfortunate that order of dismissal from service has come to be passed on serious charges without holding any enquiry and referring to such enquiry report, which by no stretch of imagination can be treated as formal enquiry report within the meaning of Rule 31 (1) of the Rules, 1962.

17. Still further, though very unfortunate but the records reveal that while an officer was appointed as an enquiry officer in the matter of enquiry pursuant to the chargesheet issued to the petitioner, such officer did not initiate any step to ensure that disciplinary enquiry instituted is brought to its logical end and surprisingly no sooner did he acquired the position of disciplinary authority as General Manager, he proceeded to pass order against the petitioner. First enquiry officer appointed was Mr. Harish chandra Balimiki and as he did not conclude the enquiry, the then General Manager Ratan Lal proceeded to reinstate the petitioner vide letter no. 205 dated 28.04.2020 and appointed Santosh Kumar Dwivedi, Assistant Engineer, Zone-I to conclude enquiry within 15 days and the moment enquiry officer Mr. Harish Chandra Balimiki got promoted as General Manager, he cancelled the letter no. 205 reverting the petitioner to the stage of suspension and also cancelled letter no. 219 dated 29.04.2020 whereby Sri Santosh Kumar Dwivedi, Assistant Engineer, Zone-I was appointed as an enquiry officer. Similarly again while Additional Municipal Commissioner Mr. Mushir Ahmad was appointed as an enquiry officer, he showed his inability to proceed with enquiry as Mr. Harish Chandra Balimiki did not supply the requisite papers as has come to be recorded in the order of the then Municipal Commissioner dated 11th June, 2020 directing the General Manager to supply the papers and while for non supply of papers, the enquiry officer virtually proceeded to drop the enquiry vide his letter dated 15.05.2020 and later on even concluded that enquiry could not be held vide report dated 06.04.2021 and yet at the same time accused the petitioner as responsible for the same. How the enquiry officer who earlier held General Manager responsible for not producing documentary evidence to proceed with enquiry suddenly turned the table to petitioner"s side to demonstrate that petitioner was responsible for insufficient evidence and so action be

taken against him. The records do not disclose that enquiry officer fixed any date to hold enquiry. No records of formal enquiry proceedings are available at all except internal departmental communications mostly between the enquiry officer and the General Manager. It is this report dated 06.04.2021 that became a tool in the hands of General Manager to pass the order impugned. It is very unfortunate that officers of the level of Additional Municipal Commissioner of a Municipal Corporation like Prayagraj and General Manager of the Jalkal department of Nagar Nigam are playing with law and rules to mould it in the manner it suits them. In my considered view meeting the norms of Natural justice in administrative action is sine qua non. Public servants/ public officials while exercising power/ authority must ensure fairness in action. Their act and conduct must pass the test of Article 14 of the Constitution that envisages fairness and not arbitrariness in action by public authorities. I must quote here what **Professor Wade** and **Professor Christopher** discuss about natural justice in administrative law relying upon certain authorities, in their celebrated treatise **Administrative Law** *"In its broadest sense natural justice may mean simply 'the natural sense of what is right and wrong, and even in its technical sense it is now often equated with 'fairness'*

But in administrative law natural justice is a well-defined concept which comprises two fundamental rules of fair procedure: that a man may not be a judge in his own cause; and that a man's defence must always be fairly heard. In courts of law and in statutory tribunals it can be taken for granted that these rules must be observed. But so universal are they, so 'natural', that they are not cofined to judicial power. They apply equally to administrative power, and sometimes also to powers created by contract. Natural justice is one of the most active departments of administrative law.

There are both broad and narrow aspects to consider. The narrow aspect is that the rules of natural justice are merely a branch of the principle of ultra vires. ***Violation of natural justice is then to be classified as one of the varieties of wrong procedure, or abuse of power, which transgress the implied conditions which Parliament is presumed to have intended. Just as a power to act ' as he thinks fit' does not allow a public authority to act unreasonably or in bad faith, so it does not allow disregard of the elementary doctrines of fair procedure. As Lord Selborne once said.***

There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice."

(Administrative law by Professor Wade and Professor Christopher, 10th edition, page No. 372)

(emphasis added)

18. Applying the above principles to the facts of this case, I find that in the present case no formal enquiry was held, at all as per the procedure prescribed under Rule 31 of the Rules, 1962. Rule 31(1) prescribes preparation of chargesheet with definite charges, person charged shall be given a reasonable time to put in his written statement of his defence, if hearing is pressed then oral enquiry, recording of oral evidence, opportunity to cross examine the departmental witness if charged employee so desires. Enquiry proceedings shall contain record of evidence and statement of findings and the grounds thereof. Rule 32 provides if punishment to be awarded is in

the nature of dismissal, removal or reduction in rank, then servant charged shall be provided with the proceedings prepared under Rule 31 giving him reasonable time to submit reply. The disciplinary authority, the General Manager, though in this case issued a show cause notice to the petitioner on 12.07.2021 but it neither refers to the charges that were in the chargesheet nor, accompanies the alleged enquiry report dated 06.04.2021. The show cause notice contains new set of charges and explanation was invited in respect thereof which should have been meant for initiating a disciplinary proceedings afresh and not for imposing major penalty.

19. In view of the above, the act and conduct of the respondents and the procedure followed by them in utter defiance to the rules framed for such purposes, cannot be countenanced under any circumstances.

20. Looking to the facts and circumstances of this case, it seems difficult to expect justice to the employees of Nagar Nigam at the end of these authorities. They need to mend their ways of working so that congenial atmosphere is created in the local body concerned which is constituted for public service.

21. Sri J.Nagar, learned Senior Advocate assisted by Sri Pratik J. Nagar appearing on behalf of respondent no. 5,6 and 7 as well as learned Standing Counsel appearing for State respondent nos. 1 and 2 could not place any rule or regulation under which such procedure to dismiss an employee from service has been prescribed.

22. From the perusal of the original records and the discussions made above, the Court comes to an inevitable conclusion that earlier enquiry pursuant to the chargesheet dated 25.11.2019 stood dropped on 06.04.2021 and there is nothing on record to demonstrate that the enquiry officer's decision has not able to hold enquiry dated 06.04.2020 in the form of enquiry report, was ever set aside, inasmuch as Mushir Ahmad has only recommended for initiation of fresh enquiry by framing charges and issuing chargesheet, and in so far as the order of the punishment of dismissal of petitioner from service is concerned, it is without any enquiry being held at all. The show cause notice based upon certain charges issued afresh on 12.07.2021 can only be meant for instituting a disciplinary proceeding against the petitioner and merely on that basis, even if it remained unresponded, major penalty of dismissal could not have been inflicted. The disciplinary authority issued the said show cause notice not on the basis of any disagreement to the enquiry report, containing points of disagreement together with the brief statement of grounds thereof as contemplated under the proviso to rule 32(1) of the Rules, 1960.

23. Further the show cause notice was served upon the petitioner while he was in jail and so he sought time to submit reply after he would be released vide letter dated 24.07.2021. This letter of the petitioner is not on record. Even under these circumstances institution of a fresh disciplinary enquiry upon the charges set out in the show cause notice was a must under Rule 31(1) of the Rules, 1962.

24. It is not disputed that petitioner is a permanent and confirmed employee and there is a procedure prescribed for to institute disciplinary proceedings, if there are charges against such an employee and,

therefore, in the absence of any chargesheet and the enquiry report, procedure followed to impose major penalty of dismissal from service cannot be approved of under any circumstances. Thus conclusion drawn by Mr. Mushir Ahmad in his report dated 06.04.2021 does not amount to a finding as an outcome of any formal enquiry proceeding and cannot be treated an enquiry report as such and so resultant action by the disciplinary authority under the order impugned in the matter is unsustainable and deserves to be quashed.

25. In view of the above, writ petition succeeds and is allowed and the order of dismissal from service dated 05.08.2021 is hereby quashed.

26. As I have already observed that records do reveal that nothing proceeded further in the matter of enquiry pursuant to the chargesheet dated 05.11.2019, and that enquiry proceeding stood actually dropped vide enquiry officer's report dated 06.04.2021 (*supra*), petitioner cannot be retained under suspension and, therefore, order of suspension of the petitioner dated 22.10.2019 is also set aside.

27. Petitioner shall be reinstated in service with all consequential benefits. Liberty rests with the respondents to proceed afresh, if they so desire, strictly in accordance with law.

(2022) 9 ILRA 1232
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKRAM D. CHAUHAN, J.

Writ-C No. 17250 of 2022

Pallavi Singh Patel ...Petitioner
Versus
E.C.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Saroj Kumar Yadav, Sri Anil Kishore Sharma (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Ashutosh Mishra, Sri Rakesh Pande (Sr. Advocate)

Civil Law- The Constitution of India,1950- Article 324-The Representation of Peoples Act, 1951- Sections 33A & 125A- Clause 5(v) of The circular dated 24th August, 2021 issued by the Election Commission of India providing procedure to deal with the complaint of violation of Section 33-A - Post election Inquiry into complaints by the Returning Officer/the Sub-Divisional Magistrate- Any complaint of false affidavit received by any other officer after the nomination exercise is over, is required to be referred to the Chief Electoral Officer, if such a complaint is supported by some document/evidence. The Chief Electoral Officer further shall be required to make a scrutiny of the supporting evidence/documents and shall ask for the affidavit of the complainant before forwarding the complaint to the Election Commission. Clause 5(v) of the circular dated 24th August, 2021 (which is statutory in character), clearly provides that such forwarded complaints shall be dealt by the Election Commission on case-to-case basis and the Commission may seek comments of the appropriate officer while dealing with the complaint.

The circular dated 24th August, 2021 issued by the Election Commission of India is statutory in nature and provides the procedure to deal with the complaint of violation of Section 33-A and mandates that the Chief Electoral Officer shall forward the complaints received after the nomination process to the Election Commission.

Civil Law- The Representation of Peoples Act, 1951- Sections 33A & 125A- Clause 5(v) of The circular dated 24th August, 2021 - **The Sub-Divisional Magistrate, who was the Returning Officer in the elections to the Member of Legislative Assembly held in February and March, 2022, had no jurisdiction to deal with the complaints after the nomination exercise much less after the election was over. The action of the District Election Officer/the District Magistrate, Kaushambi in forwarding the complaints to the Returning Officer/the Sub-Divisional Magistrate, Sirathu, Kaushambi instead of referring the complaints to the Chief Electoral Officer, U.P., is in clear violation of Clause 5(ii) of the circular dated 24th August, 2021 issued by the Election Commission of India. Both the notices dated 18th May, 2022 and 25th May, 2022 are, thus, liable to be set aside being outcome of an illegal action of the District Election Officer/the District Magistrate, Kaushambi-Once the complaint was sent to the Chief Electoral Officer, U.P., he was required to follow the procedure prescribed in Clause '5' of the aforesaid circular, only after completion of these three steps in the scrutiny of the genuineness of the complaint, at the ends of the Chief Electoral Officer, the matter was required to be forwarded to the Election Commission with his report in accordance with Clause 5(iv)-In the process of scrutiny of the complaint in accordance with Clause '5' of the circular issued by the Election Commission, the Sub-Divisional Magistrate, Sirathu, Kaushambi or the Returning Officer had no role to play- The District Magistrate/the District Election Officer has, thus, committed a glaring illegality in directing the Returning Officer/the Sub-Divisional Officer, Sirathu, Kaushambi to deal with the complaint. The notice dated 3rd June, 2022 issued by the Sub-Divisional Officer, Sirathu, Kausuambi being the result of illegal action of the District Magistrate/the District Election Officer, Kaushambi is liable to be set aside.**

It was incumbent upon the District Electoral Officer/ District Magistrate to forward the complaints after the election was over, to the Chief Electoral Officer and the Returning Officer/ Sub-Divisional Officer had no role to play in the process mandated in the circular dated 24th August, 2021-thus the notices issued by the Returning Officer/the Sub-Divisional Officer were wholly without jurisdiction.

Writ Petition allowed. (E-3)

Judgements/Case law relied upon:-

1. Kamlesh Vs Mukhya Nirwachan Ayukt, 2006 (3) ILR (All) 1157

2. Shambhu Singh Vs State, AIR 2001 Allahabad 39

3. B. Ramamoorthy Vs The Chief Election Commission of India & ors., W.P. No. 14260 of 2021

4. U.O.I. Vs Association for Democratic Reforms & anr., (2002) 5 SCC 294

5. Resurgence India Vs Election Commission of India & anr., (2014) 14 SCC 189

6. Dubbaka Narsimha Reddy Vs Election Commission of India & ors. (W.P No. 12066 of 2014)

7. People's Union For Civil Liberties (PUCL) & anr. Vs U.O.I. & anr., (2003) 4 SCC 399

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri Anil Kishore Sharma learned Senior Advocate assisted by Sri Saroj Kumar Yadav learned counsel for the petitioner, Sri Rakesh Pande learned Senior Advocate assisted by Sri Ashutosh Mishra learned counsel for the Election Commission of India and Sri J.N. Maurya learned Chief Standing Counsel for the State respondents.

2. By means of the present writ petition, the petitioner herein seeks to challenge the notice dated 18.5.2022 issued by the respondent no. 4 namely the Sub-Divisional Magistrate, Sirathu, Kaushambi as also the reminder notices dated 25.5.2022 and 3.6.2022 issued by him. The prayer is to quash the entire proceedings initiated by the respondents with the aforesaid notices.

3. The brief facts of the case are that the petitioner herein is an elected representative of the people to the State assembly, Member of Legislative Assembly of the State, from the Constituency No. 251, Sirathu, District Kaushambi. In the elections notified on 1.2.2022, the petitioner herein had filed her nomination paper on 8.2.2022, polling took place on 27.2.2022 and in the result declared on 10.3.2022, the petitioner herein was returned as a winner.

4. It is stated in the writ petition that during the nomination process, certain objections were raised alleging suppression of material facts by the petitioner as required to be declared in Form-26, the affidavit submitted along with the nomination paper, describing her criminal antecedents. The contention is that the Returning Officer had examined the documents filed by the petitioner in light of the complaint and turning down the complaint, accepted the nomination papers as valid. The petitioner having won the election, took oath of the Member of Legislative Assembly in the house of Legislature and participated in the Budget Session in the fall of May, 2022.

5. It seems that an undated complaint was filed by a resident of the constituency namely Sirathu, alleging that the right of the ordinary voter of the constituency has been infringed as the petitioner did not disclose the criminal cases lodged against her in the affidavit appended with the nomination paper. The undated complaint filed by one Dileep Singh Patel was followed by another complaint of one Omkar Nath Gautam. Both the complaints are appended as Annexure '4' to the writ petition.

On these complaints, the notices impugned have been issued by the Sub-Divisional Magistrate, Sirathu, District Kaushambi. It is stated that two previous notices issued in the month of May were not served upon the petitioner and only after the service of the third notice dated 3.6.2022, she came to know about the said complaints. It is also stated in the writ petition that the Sub-Divisional Magistrate, Sirathu, District Kaushambi made an enquiry about the genuineness of the complaint and in the report submitted by the Revenue Lekhpal, Kshetra Nara, Sirathu, it was indicated that three persons in the name of Dileep Patel were met in the village. They were Dileep Singh Patel son of Indra Pal Singh, Dileep Singh son of late Ram Sewak Singh and Dileep Kumar Singh son of Sri Ram Singh, all residents of village Udahin Khurd, Sirathu, District Kaushambi and these three persons filed notarized affidavits before the District Magistrate/the District Election Officer that they did not file any complaint. The affidavits are appended as Annexure '7' to the writ petition.

A perusal of the copy of the complaint made by the complainant Sri Dileep Patel indicates that he did not disclose his parentage and it is not possible to identify him from the description therein.

6. It is brought on record of the writ petition that the Election Commission of

India by a communication dated 17th May, 2022 had forwarded the complaint lodged by Dileep Patel with the direction that appropriate proceeding be initiated in the matter in light of the circular dated 24th August, 2021 issued by it. On receipt of the same, by the letter dated 26th May, 2022, the Chief Electoral Officer, U.P. forwarded the complaint to the District Election Officer, Kaushambi with the direction to submit a report by making an enquiry on the point-wise issues raised in the complaint, in accordance with the Circular/letter of the Election Commission of India dated 24.8.2021.

7. A perusal of the impugned notices issued by the Sub-Divisional Magistrate, Sirathu, Kaushambi makes it evident that the notice dated 18th May, 2022 was directly issued by the Sub-Divisional Magistrate, Sirathu, Kaushambi on the complaint of Sri Dileep Patel, an elector/voter received in the office of the District Election Officer/the District Magistrate, Kaushambi and reminder was also sent on 25th May, 2022 on the same. Further, the District Magistrate, Kaushambi with his letter dated 1.6.2022 has forwarded the complaint with the letter dated 26.5.2022 sent by the Chief Electoral Officer, U.P. to the Sub-Divisional Magistrate, Sirathu, Kaushambi. Another complaint which was submitted by Sri Omkar Nath Gautam to the District Magistrate, Kaushambi was also sent alongwith the said letter and direction was issued to the Sub-Divisional Magistrate, Sirathu, Kaushambi to make an enquiry. The third notice dated 3rd June, 2022, as a reminder to the previous two notices dated 18.5.2022 and 25.5.2022, was then served upon the petitioner.

8. At this juncture, it is relevant to note that the record placed alongwith the writ petition makes it clear that the Sub-Divisional Magistrate, Sirathu, Kaushambi had issued two previous notices on the directions of the District Magistrate, Kaushambi, who is the District Election Officer, Kaushambi, on the undated complaint of Sri Dileep Patel, addressed to the District Election Officer/District Magistrate, Kaushambi, U.P. It further shows that the complaint made to the Election Commission of India by Dileep Patel was later forwarded to the Chief Electoral Officer, who in turn, had directed the District Election Officer, Kaushambi to make enquiry. The second complaint of Omkar Nath Gautam was also directly entertained by the District Election Officer/the District Magistrate, Kaushambi and on all these complaints, directions were issued by the letter dated 1.6.2022 to the Sub-Divisional Magistrate, Sirathu, Kaushambi to make enquiry, pursuant to which he had issued the third notice dated 3rd June, 2022.

9. The learned Senior Counsel for the Election Commission of India and the Chief Standing Counsel appearing for the State-respondents do not dispute the sequence of events as narrated in the writ petition and noted above, leading to issuance of three notices which are subject matter of challenge herein.

10. The dispute in the present writ petition as raised by the learned Senior Counsel for the petitioner is that the Chief Electoral Officer, U.P., the District Election Officer/the District Magistrate, Kaushambi and the Returning Officer/the Sub-Divisional Magistrate, Sirathu, Kaushambi have no jurisdiction to inquire into the complaint relating to the election as they have become *functus officio* after declaration of the result of the election on 10.3.2022.

11. It is argued by the learned Senior Counsel for the petitioner that these authorities had transgressed their jurisdiction in instituting proceedings against the petitioner who is an elected representative of the people of the State. After election, any dispute relating to election can only be raised by way of an election petition, to be filed in accordance with the provisions of Section 80 of the Representation of the People Act, 1951 (In short as "the R.P. Act, 1951"), framed in the spirit of Article 329(b) of the Constitution of India. Three notices issued by respondent no. 4, the Returning Officer/the Sub-Divisional Magistrate, Sirathu, Kaushambi are liable to be quashed as such and the entire proceeding initiated by the District Election Officer, Kaushambi at his own ends and on the direction of the Chief Electoral Officer, U.P. are liable to set aside.

Reliance is placed on the decisions of this Court in **Kamlesh vs. Mukhya Nirwachan Ayukt** and **Shambhu Singh vs. State** to substantiate the above submissions.

Sri Rakesh Pande learned Senior Advocate assisted by Sri Ashutosh Mishra learned Advocate, has put in appearance on behalf of the Election Commission of India, the respondent no. 1. The State respondent nos. 2 to 4 are represented by Sri J.N. Maurya learned Chief Standing Counsel.

Both the counsels for the respondents are in sync in their arguments that the notices were issued by respondent no. 4 in light of the directions issued by the Election Commission of India to make an enquiry in accordance with its circular/letter dated 24.8.2021. The allegations in the complaints are of concealment/non-disclosure of the criminal antecedents of the petitioner in Form-26 prescribed under the Rule 4A of the Conduct of Elections Rules, 1961, the Form of affidavit to be filed at the time of delivering nomination paper in accordance with sub-section (1) of Section 33 of the R. P. Act, 1951. It is urged that it is mandatory for the candidate to provide correct and complete information in Form-26 while filling the details in all relevant columns including the details of pending criminal cases against the candidate. Any column of Form-26, if left blank, would result in rejection of the nomination paper by the Returning Officer.

In order to address the dispute with regard to the jurisdiction of the Returning Officer, the District Election Officer and the Chief Electoral Officer, U.P. in the matter of entertaining complaint, it is argued by the learned Senior Counsel for the Election Commission of India that the Election Commission of India had issued a circular dated 24th August, 2021 to the Chief Electoral Officers of all States, with reference of its earlier letter dated 26.4.2014 that the complaints of false declaration or concealment in the affidavit in Form-26 by a candidate shall be entertained by the Returning Officer and enquiry on case-to-case basis shall be conducted. The reference has been given to the Press Note dated 16.6.2020 issued by the Election Commission of India in the aforesaid circular dated 24th August, 2021 that in the matter of lodging of complaint under Section 125A of the R.P. Act, 1951, equal opportunity should be provided to all concerned and each complaint of the elector shall be examined and the case would be referred to the concerned Investigating Officer on case-to-case basis. It is argued that the said circular dated 24th August, 2021 also referred to the order dated 14.7.2021 passed by the Division Bench of the Madras High Court in **B.**

Ramamoorthy vs. the Chief Election Commission of India and others, wherein it was directed that all complaints of violation of Section 33-A of the Act shall be examined by the Election Commission of India and the notice to the relevant candidate is to be issued before closing the matter by a reasoned order, if the explanation is found suitable or satisfactory.

The observations in paragraph '13' of the judgment and order dated 14.7.2021 passed by the Madras High Court in **B. Ramamoorthy** (supra) has been placed before us to argue that the Election Commission of India is bound to pursue the matter for lodging complaint under Section 125A of the R.P. Act, 1951 against the candidate, if the explanation of the relevant candidate is not found satisfactory.

The submission, thus, is that the impugned notices were issued by the Returning Officer/the Sub-Divisional Magistrate, Sirathu, Kaushambi under the directions issued by the Election Commission of India to make an enquiry in accordance with the circular dated 24th August, 2021. No exception, therefore, can be taken to the jurisdiction of respondent no. 4, the Returning Officer/the Sub-Divisional Magistrate, Sirathu, Kaushambi to issue notice to the petitioner calling her explanation in the enquiry to be conducted, under the direction of the District Election Officer/the District Magistrate, Kaushambi, who in turn, was directed by the Chief Electoral Officer to submit a report in light of the directions issued by the Election Commission of India by the letter dated 17.5.2022 forwarding the complaint.

It is further vehemently argued by the learned Senior Counsel for the Election Commission of India that Section 33A and Section 125A were introduced by the Act No. 72 of 2002 w.e.f. 24.8.2002 in light of the decision of the Apex Court in **Union of India vs. Association for Democratic Reforms and another**, wherein it was held by the Apex Court that to maintain the purity of elections and in particular to bring transparency in the process of election, the Commission has to ask for a disclosure by a candidate with regard to his criminal antecedents, assets, liabilities and educational qualification, in order to strengthen the voters in taking appropriate decision of casting their votes. It is argued that it was held therein that the citizen's right to know about the candidate who represent him in Parliament/Assembly will constitute a fundamental right under the Constitution of India. The voter's right to know about the antecedents of his candidate has been held to be a fundamental right under Article 19(1)(a) of the Constitution, akin to the right to freedom of speech and expression. It was held therein that release of the information about the candidate to be selected is must as casting of vote by misinformed and non-informed voter or a voter having one-sided information only, is bound to affect the democracy seriously.

The decision of the Apex Court in **Resurgence India vs. Election Commission of India and another** has been placed before us to argue that the ultimate purpose of filing of the affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Article 19(1)(a) of the Constitution. The citizens are supposed to have the necessary information at the time of filing of nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information. Filing of affidavit with blank particulars, by concealment of material particulars, will render the

affidavit nugatory. It is, therefore, the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the "right to know" of the citizens. It was held therein that if a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. The Apex Court in the said case has held that filing of the affidavit with blanks will be directly hit by Section 125A(i) of the R.P. Act, 1951.

Section 125A(i) of the R.P. Act, 1951 was then placed before us to vehemently argue that failure to furnish information relating to her criminal antecedents by the petitioner as mandated by Section 33A of the R.P. Act, 1951 would entail the punishment provided therein, the penalty of filing false affidavit, an imprisonment for a term extended to six months or with fine or with both.

The decision of the Andhra Pradesh High Court in **Dubbaka Narsimha Reddy vs. Election Commission of India & others (Writ Petition No. 12066 of 2014)** dated 9.7.2014 has been placed before us to argue that it is the duty of the Election Officer to take steps for initiating criminal proceeding under Section 125A on the complaint received by him while disposing of the same in light of the circular issued by the Election Commission of India to all the Chief Electoral Officer of all States and Union Territories in the matter of filing of false affidavit in Form-26.

12. With the aid of the said decision, it is argued by Sri Rakesh Pande learned Senior Counsel for the Election Commission of India that the guidelines issued by the Election Commission of India have got statutory force and have to be followed by all concerned officials as the statue does not require expressly, an officer appointed thereunder, as to who has duty or power coupled with duty to take action and the Court has no power to mandate as to who can do so.

It is vehemently argued by the learned Senior Counsel for the Election Commission of India that Section 125A clearly provides penal measure for filing affidavit giving false information or concealing information. The circular dated 24th August, 2021 issued by the Election Commission of India providing procedure to deal with the complaint of violation of Section 33-A, shall, therefore, prevail and the concerned officer of the district concerned namely the Sub-Divisional Magistrate, Sirathu, Kaushambi would be justified in making enquiry.

The contention is that the District Election Officer of the District concerned and the Chief Electoral Officer of the State are the officers designated or nominated by the Election Commission India in accordance with Section 13A and Section 13AA of the Representation of People Act, 1950 (In short as "the R.P. Act, 1950") and they are the officers permanently deputed by the Election Commission of India to coordinate and supervise all work in connection with the preparation, revision and correction of all electoral rolls in the State, all parliamentary, assembly and council constituencies within the district; respectively. Sub-section (4) of Section 13AA has been placed before us to argue that the District Election Officer is authorized to perform such other functions as entrusted to him by the Election Commission and the Chief Electoral Officer. It is urged that the Returning Officer/the Sub-Divisional Officer, Sirathu, Kaushambi had initiated enquiry by

issuance of the notices under challenge, calling upon the petitioner to submit his explanation under the directions issued by the District Election Officer. No plausible objection with regard to the jurisdiction of the Returning Officer/the Sub-Divisional Magistrate, Sirathu, the respondent no. 4 can be taken in view of the circular dated 24th August, 2021 issued by the Election Commission of India.

13. It is argued by the learned counsels for the respondents that in view of the direction issued by the Madras High Court in **B. Ramamoorthy** (supra), the explanation of the candidate/petitioner herein against whom the complaint was filed was required to be called, in order to complete the enquiry, to decide as to whether the criminal complaint under Section 125A of the R.P. Act, 1951 is to be lodged against the candidate/petitioner herein.

It is further argued that the notices under challenge are merely show cause notices which do not threaten or contemplate any penal action. They are the notice simplicitor calling for the explanation of the petitioner failing which ex-parte action will be taken. No prejudice has been caused to the petitioner nor any legal right of the petitioner has been violated by issuance of the notices. Nothing has been stated by the petitioner in the writ petition about the merits of the allegations made in the complaint. In view of the decision of the Apex Court on the subject, the disclosure on affidavit was important and needed to be there. It was made important to see that no person having criminal antecedents escape the notice of the voters who have a right to take an informed decision having knowledge of the background of the candidate. It is argued that in the enquiry instituted by the Election Commission, the petitioner was called upon to submit her explanation with a view to avoid harassment and prejudice to her because of any exparte decision. The mode of enquiry adopted by the Election Commission of India, in any case, cannot be challenged.

14. The submissions made by Sri Rakesh Pande learned Senior Counsel for the Election Commission of India about the power and jurisdiction of the Sub-Divisional Magistrate, Sirathu, Kaushambi as also the District Election Officer and the Chief Electoral Officer to conduct enquiry in the matter have been adopted by the learned Chief Standing Counsel appearing on their behalf.

15. In sum and substance, the arguments of both the learned counsel for the respondents are that the impugned notices cannot be quashed for the reason that it is mandated by the R.P. Act, 1951 that in case of any false affidavit within the meaning of Section 125A(i) to (iii), penal action has to be initiated against the candidate concerned.

16. Considering the submissions of the learned counsel for the parties and perused the record, we find that the controversy revolves around Section 33A and Section 125A of the R.P. Act, 1951 which had been introduced by Act No. 72 of 2002 w.e.f. 24.8.2002. Sub-section (1) of Section 33A casts an obligation upon a candidate to furnish the information as required under Clause (i) and (ii), as the case may be, in his nomination paper delivered under sub-section (1) of Section 33, about his criminal antecedents, if any. Section 125A provides for penal action for failure on the part of the candidate in

furnishing information relating to sub-section (1) of Section 33-A, for giving a false information which he knows or has a reason to believe to be false; or concealment of any information, in his nomination paper delivered under sub-section (1) of Section 33 or in his affidavit which is required to be delivered under sub-section (2) of Section 33-A, as the case may be.

17. Before proceeding further, we would like to go, in brief, to the legislative history for insertion of the aforesaid two provisions in the Representation of People Act, 1951.

A question arose before the Apex Court in **Union of India vs. Association for Democratic Reforms** (supra) as to whether, before casting votes, voters have a right to know relevant particulars of their candidates. While deliberating on the issue, it was held therein that the right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy. Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voters' speech or expression in case of election would include casting of votes, that is to say that voter speaks out or expresses by casting his vote. For this purpose, information about the candidate to be selected is a must. Voter's right to know antecedents including criminal past of his candidate contesting election for representation of people in the Parliament or Legislative Assembly is much more fundamental and basic for survival of democracy.

18. Considering the legal and constitutional position with regard to elections and the role of the Election Commission of India, it was held therein that the jurisdiction of the Election Commission of India is wide enough to include all powers necessary for smooth conduct of elections and the word "elections" is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps. The limitation on plenary character of power is when the Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election. The Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in its infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing necessary directions, the Commission can fill the vacuum till there is legislation on the subject.

The Election Commission of India was directed therein to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein information on the following aspects:-

"(1) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past, if any, whether he is punished with imprisonment or fine.

(2) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence

punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the Court of law. If so, the details thereof.

(3) The assets (immovable, movable, bank balances etc.) of a candidate and of his/her spouse and that of dependants.

(4) Liabilities, if any, particularly whether there are any over dues of any public financial institution or Government dues.

(5) The educational qualifications of the candidate."

It was concluded that the Election Commission of India has from time to time issued instructions/orders to meet the situation where the field is unoccupied by the legislation. Hence, the norms and modalities to carry out and give effect to the aforesaid directions should be drawn up properly by the Election Commission as early as possible.

After the said decision of the Apex Court dated 2nd May, 2022, the Act No. 72 of 2002 for insertion of Section 33A and Section 125A of the R.P. Act, 1951 was promulgated.

19. The validity of the Representation of the People (Amendment) Ordinance, 2002 promulgated by the President of India on 24.8.2002 was subjected to challenge before the Apex Court in **People's Union For Civil Liberties (PUCL) and another vs. Union of India and another**. It was observed therein that the foundation of a healthy democracy is to have well-informed citizens-voters. The reason to have right of information with regard to the antecedents of the candidate is that voter can judge and decide in whose favour he should cast his vote. It is voter's discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted to indulge in unjustified means for accumulating wealth. In any case, for having free and fair election, information to voters is a necessity. It was further held that the right to information provided for by Parliament under Section 33A in regard to the pending criminal cases and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voters/citizen. However, there is no good reason for excluding the pending cases in which cognizance has been taken by the Court from the ambit of disclosure.

It was finally held that the Apex in the case of **Union of India vs. Association for Democratic Reforms** (supra) has determined the ambit of fundamental right of information to a voter.

In **Resurgence India vs. Election Commission of India and another** (supra), the prayer was to issue specific directions to effectuate meaningful implementation of the judgments rendered by this Court in **Union of India vs. Association for Democratic Reforms** (supra) and **People's Union for Civil Liberties (PUCL)** (supra) by issuing directions to the respondents/Commission to make it compulsory for the Returning Officers to ensure that the affidavits filed by the contestants are complete in all respects and to reject the affidavits having blank particulars.

While deliberating, the Apex Court had noted the observations made in its earlier judgment in **Union of India vs. Association for Democratic Reforms** (supra) about the right of voter and information which could be asked by the

Commission from the candidates to maintain the purity of elections and in particular to bring transparency in the process of election. It was noted that in order to recognize the ultimate right of the voter to know full particulars of a candidate who is to represent him in the Parliament or the State Legislature, Section 33A of the R.P. Act was enacted by Act no. 72 of 2002 with effect from 24.08.2002. The purpose of the Act no. 72 of 2002 was to effectuate the right contemplated in **Union of India vs. Association for Democratic Reforms** (supra). It was mandated for all the candidates to disclose their criminal antecedents under Section 33A by filing an affidavit as prescribed along with the nomination paper filed under Section 33(1) of the R.P. Act so that the citizens must be aware of the criminal antecedents of the candidate before they can exercise their freedom of choice by casting of votes as guaranteed under the Constitution of India. As a result, at present, every candidate is obligated to file an affidavit with relevant information with regard to his criminal antecedents, assets and liabilities and educational qualifications. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizen under Article 19(1)(a) of the Constitution of India. It was held that when a candidate files affidavit with blank particulars, it renders the affidavit itself nugatory.

While dealing with the power of the Returning Officer to reject the nomination paper at the time of scrutiny, it was held that paragraph '73' of the decision in the judgment of **People's Union For Civil Liberties (PUCL)** (supra) nowhere contemplates a situation where it bars the Returning Officer to reject the nomination paper on account of filing affidavit with particulars left blank. It was clarified that the observations made in the said paragraph will not come in the way of the Returning Officer to reject the nomination paper if the said affidavit is filed with blank columns. Noticing Section 125A of the R.P. Act, it was further held that filing of affidavit with blank space will be directly hit by Section 125A(i) of the R.P. Act. It was finally held that it is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the right to know of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. It was further observed that the power of the Returning Officer to reject the nomination papers must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

20. Noticing the above decisions, we may record that the Representation of People Act, 1951 is a complete Code for the conduct of elections by the Election Commission of India in accordance with Article 324 of the Constitution which provides for superintendence, direction, control of the Commission for conduct of elections to Parliament and to the Legislature of every State. The jurisdiction of the Election Commission of India is wide enough to issue directions/orders/circulars, whether by specific or a general order, for smooth conduct of elections, in its plenary character of power under Article 324 of the Constitution of India for the avowed purpose of having free and fair election. There is no limitation on the power of the Election Commission of India except in case of a valid law in relation to or in connection with election made by the

Parliament or the State Legislature where in such cases, the Commission is required to act in conformity with the said provisions. The Commission in its own right as a creature of the Constitution may issue orders/directions to deal with variety of situations that may emerge from time to time in the conduct of elections as every contingency cannot be foreseen or anticipated by the enacted law or the Rules.

21. In its own right and having jurisdiction to deal with the complaint relating to filing of false affidavit in Form-26, the Election Commission of India had issued the Circular dated 24th August, 2021 addressed to the Chief Electoral Officers of all States/Union Territories reiterating the Press Note dated 16.6.2020 that each complaint received for filing a false affidavit by the candidate in Form-26, shall be dealt with on case-to-case basis and the matter be referred to the competent Investigating Officer for further action after taking cognizance of the said complaint.

Paragraph '3' of the said circular extracts para 6.6.1 of the Returning Officer handbook, which contains the directions as to how the Returning Officer would deal with the objections/complaints while making scrutiny of the nomination paper.

Paragraph '4' of the circular extracts Paragraph '13' of the decision of the Madras High Court dated 14.7.2021 **(B. Ramamoorthy vs. the Chief Election Commission of India)**, as relied by the learned Senior Counsel for the Election Commission of India.

Paragraph '5', however, deals with the situation where the complaint of false affidavit has been received after completion of the nomination exercise.

Relevant paragraph '5' of the circular dated 24th August, 2021 is to be extracted hereunder:-

"5. नाम-निर्देशन प्रक्रिया के बाद गलत शपथ-पत्र की किसी शिकायत पर निम्नलिखित तरीके से कार्रवाई की जानी चाहिए:-

(1) किसी पर्याप्त दस्तावेज/साक्ष्य के बिना गलत शपथ-पत्र की शिकायत उचित आदेश के साथ उपयुक्त रूप से निपटाई जानी चाहिए तथा यह सुझाव भी दिया जाना चाहिए कि यदि जरूरत हो तो वे सक्षम न्यायालय से स्वयं सम्पर्क कर सकते हैं/ सकती हैं।

(II) समर्थक दस्तावेज/साक्ष्य के साथ प्रस्तुत गलत शपथ-पत्र की शिकायत राज्य/संघ राज्य क्षेत्र के सीईओ को संदर्भित की जाएगी, जो जांच के उपरांत मामले में आयोग के निर्देशों के अनुसार कार्य करेगा।

(III) समर्थक दस्तावेज की जांच के बाद, सीईओ गंभीर चूक या कृत्य वाले ऐसे मामलों को मामला-दर-मामला आधार पर आयोग को भेजेंगे जिनमें वे आयोग के निदेश प्राप्त करना उचित समझेंगे।

(IV) 5(ii) और 5(iii) के मामला में, शिकायतकर्ता से यह सुस्पष्ट रूप से कहते हुए एक शपथ-पत्र दायर करने के लिए कहा जाएगा कि उसकी शिकायत और उसके साथ संलग्न किए गए समर्थक दस्तावेजों में किए गए सभी प्रकथन सही और वास्तविक हैं।

(V) सीईओ द्वारा इस तरह अग्रेषित किए गए संदर्भों को मामला-दर-मामला आधार पर कार्रवाई की जाएगी और आयोग उन मामलों को पूछताछ/टिप्पणियों के लिए उपयुक्त प्राधिकारी को भेज सकता है।"

22. In the last para of the circular, the direction is that the Chief Election Officers shall bring the aforesaid guidelines to the notice of the District Election Officers and Returning Officers for their guidance. There cannot be a dispute that the circular having statutory flavour was required strict compliance by all these officers.

23. A careful reading of Clause '5' extracted above, indicates that after completion of the Nomination exercise, on

receipt of the complaint of filing false affidavit, if filed with the supporting documents/evidence, the said complaint shall be forwarded to the Chief Electoral Officer of the State who after making an enquiry into the documentary evidences shall send the matter to the Election Commission on case-to-case basis and the direction of the Commission be sought in such cases. It also states that on the complaint filed with the supporting documents/evidence, the complainant shall be asked to file his affidavit deposing therein that all the averments in the complaint and the enclosed supporting documents were true and correct. It further provides that in all such cases forwarded to the Commission by the Chief Electoral Officer, the proceeding shall be conducted on case-to-case basis and the Commission may send the matter to call for the report/comment of the appropriate officer.

24. Having noted the directions contained in Clause 5 of the circular dated 24th August, 2021, it seems to us that the said circular had been issued as a guideline to the District Election Officers and the Returning Officers to deal with the complaints of filing false affidavit in Form-26 received by them during the nomination exercise and after the nomination exercise is over, but during the course of the election.

25. Insistence of the learned Senior Counsel for the Election Commission of India, however, is that the said guideline will operate even in case of any complaint received after the elections are over, as Section 125-A merely provides penal measures for filing affidavit giving false information or concealing information and it nowhere confers duty or power to a particular authority/officer to take any action.

26. The submission is that the above noted circular issued by the Election Commission of India to all the Chief Electoral Officers of all States and Union Territories, being the guidelines issued by the Election Commission of India has got statutory force and has to be followed by all the concerned officials, in absence of any other statutory provision holding the field. It was further argued that while making enquiry, it was incumbent upon the concerned officer to issue notice to the candidate against whom the complaint is made, in view of the directions issued by the Madras High Court in its judgment and order dated 14.7.2021, as extracted in paragraph '4' of the said circular.

The contention, thus, is that the action of the Sub-Divisional Magistrate, Sirathu, Kaushambi in issuing notices to the petitioner to call for his explanation cannot be said to suffer from any error of law.

27. Before deliberating on the action of the officers in the present case, certain statutory provisions laying down the powers and duty of three officers, relevant for us, are to be taken note of. The Chief Electoral Officer is an officer appointed under Section 13A of the R.P. Act, 1950, who is an officer of the Government, designated or nominated by the Election Commission in consultation with the Government concerned. He acts under the superintendence, direction and control of the Election Commission and the work and duty assigned to him under sub-section (2) of Section 13-A is to supervise the preparation, revision and correction of all electoral rolls in the State under the R.P. Act, 1950. As per Section 20 of the R.P. Act, 1951, the general duties of the Chief Electoral Officer is to supervise the conduct of all elections in the State. The District Election Officer is a designated or

nominated officer of the Government of the State in accordance with the Section 13-AA of the R.P. Act, 1950, who acts under the superintendence, direction and control of the Chief Electoral Officer to coordinate and supervise all work in the District or in the area within his jurisdiction in connection with the preparation and revision of the electoral rolls.

28. As per the R.P. Act, 1951, the general duties of the District Election Officer is to coordinate and supervise all work in connection with the conduct of all elections to Parliament and the Legislature of the State, in the district or in the area within his jurisdiction. The District Election Officer shall also perform such other functions as may be entrusted to him by the Election Commission and the Chief Electoral Officer.

29. The Returning Officer as per Section 21 of the R.P. Act, 1951 is an officer of Government or of a local authority, designated or nominated by the Election Commission in consultation with the Government of the State. The general duty of the Returning Officer at any election is to do all such acts and things as may be necessary for effectually conducting the election in the manner provided by the Act and Rules or Orders made thereunder.

30. Section 28A of the R.P. Act, 1951 provides that the Returning Officer including the Assistant Returning Officer appointed under Part IV for the conduct of elections shall be deemed to be on deputation to the Election Commission for the period commencing on and from the date of the notification calling for such election and ending with the date of declaration of the results of such election and accordingly, such officer shall, during that period, be subject to the control, superintendence and discipline of the Election Commission.

31. From the above provisions, it is evident that though the Chief Electoral Officer and the District Election Officers are designated or nominated officers for preparation, revision and correction of electoral rolls and their work as per their designation or nomination is perpetual in nature but the appointment of the Returning Officer under Section 21 of the R.P. Act, 1951 Act has a shelf-life, as he is on deputation to the Election Commission for the period of election from the date of notification for election till the date of declaration of the result. It is settled that the "election" commences from the initial notification and culminates in the declaration of the return of a candidate, Section 28A of the Representation of the People Act provides that the Returning Officer is an officer appointed under the said Act on deputation for the conduct of election during the period commencing on and from the date of the notification calling for such election and ending with the date of declaration of the results of such election. In view of the clear language of the aforesaid provisions, with the declaration of the result, the Returning Officer becomes *functus officio* and cannot act in any of the matter relating to or concerning the elections.

It seems that for this reason, in the circular dated 24th August, 2021, the direction to make inquiry in the matter of filing of false affidavit during the nomination process though was given to the Returning Officer, but once the nomination exercise is over, such complaints are directed to be referred to the Chief Electoral Officer, who is required to

seek instructions from the Election Commission. The District Election Officer, who acts under the superintendence, direction and control of the Chief Electoral Officer is also required to refer/forward the complaint to the Chief Electoral Officer in view of Clause 5 of the Circular.

32. Though there is no clarity in the circular dated 24th August, 2021 as to whether the procedure provided therein for dealing with such complaints of filing false affidavit in Form-26, in para '5', would also apply to the complaints received even after conclusion of the election, i.e. after the declaration of the result, but in view of the stand of the Commission as asserted by the learned Senior Counsel appearing on its behalf, it is evident that any complaint of false affidavit received by any other officer after the nomination exercise is over, is required to be referred to the Chief Electoral Officer, if such a complaint is supported by some document/evidence. The Chief Electoral Officer further shall be required to make a scrutiny of the supporting evidence/documents and shall ask for the affidavit of the complainant before forwarding the complaint to the Election Commission. Clause 5(v) of the circular dated 24th August, 2021 (which is statutory in character), clearly provides that such forwarded complaints shall be dealt by the Election Commission on case-to-case basis and the Commission may seek comments of the appropriate officer while dealing with the complaint.

33. In the instant case, as against the procedure laid down by the Election Commission in the above noted circular itself, on receipt of the complaint of a person named as Dileep Patel, whose identity cannot be ascertained from the description in the complaint, in the office of the District Election Officer, the Sub-Divisional Magistrate, Sirathu, Kaushambi had issued the notice dated 18.5.2022. Another complaint of Omkar Nath Gautam dated 20.5.2022 was also addressed to the District Election Officer, Kaushambi. The second notice dated 25th May, 2022 though does not refer to the second complaint but the third notice dated 3rd June, 2022 issued by the Sub-Divisional Magistrate, Sirathu, Kaushambi shows that the second complaint dated 20.5.2022 was also forwarded to the Sub-Divisional Magistrate, Sirathu, Kaushambi by the District Magistrate/District Election Officer, Kaushambi. The Sub-Divisional Magistrate, who was the Returning Officer in the elections to the Member of Legislative Assembly held in February and March, 2022, had no jurisdiction to deal with the complaints after the nomination exercise much less after the election was over. The action of the District Election Officer/the District Magistrate, Kaushambi in forwarding the complaints to the Returning Officer/the Sub-Divisional Magistrate, Sirathu, Kaushambi instead of referring the complaints to the Chief Electoral Officer, U.P., is in clear violation of Clause 5(ii) of the circular dated 24th August, 2021 issued by the Election Commission of India. Both the notices dated 18th May, 2022 and 25th May, 2022 are, thus, liable to be set aside being outcome of an illegal action of the District Election Officer/the District Magistrate, Kaushambi.

34. As regards the third notice dated 3rd June, 2022, we find that the said notice was issued as a reminder to the two previous notices dated 18.5.2022 and 25.5.2022 issued by the Returning Officer namely the Sub-Divisional Magistrate, Sirathu, Kaushambi who had no

jurisdiction to make any enquiry in the matter. It was argued by the learned counsels for the respondents that the third notice dated 3rd June, 2022 was issued pursuant to the letter dated 17th May, 2022 of the Election Commission of India directing the Chief Electoral Officer to initiate proceeding in accordance with the circular dated 24.8.2021. The Chief Electoral Officer, as such, cannot be said to have committed any mistake in forwarding the complaint to the District Election Officer, his subordinate officer to make the enquiry. The District Election Officer in his own administrative capacity directed the Sub-Divisional Magistrate, who was the Returning Officer to make enquiry into the complaint following the circular dated 24.8.2021.

35. The arguments of the learned counsels for the respondents suffer from inherent fallacy. The letter dated 17th May, 2022 of the Election Commission addressed to the Chief Electoral Officer, U.P. simply says that the complaint was to be examined and the proceeding be conducted in accordance with the directions contained in the circular dated 24.8.2021. Meaning thereby, once the complaint was sent to the Chief Electoral Officer, U.P., he was required to follow the procedure prescribed in Clause '5' of the aforesaid circular, the first step as per Clause 5(ii) to examine was as to whether the complaint was supported by documents/evidence so as to entertain it. The second step was to examine the supporting documents and third to summon the complainant to file his affidavit in support of the complaint and the supporting documents deposing that the contents thereof are true and correct. Only after completion of these three steps in the scrutiny of the genuineness of the complaint, at the ends of the Chief Electoral Officer, the matter was required to be forwarded to the Election Commission with his report in accordance with Clause 5(iv). While making such enquiry/scrutiny, it was, however, open for the Chief Electoral Officer, U.P. to delegate the matter to the District Election Officer to make the necessary enquiry at the District Level and to submit his report. In any case, in the process of scrutiny of the complaint in accordance with Clause '5' of the circular issued by the Election Commission, the Sub-Divisional Magistrate, Sirathu, Kaushambi or the Returning Officer had no role to play.

36. In light of the above, a perusal of the letter dated 26th May, 202 of the Chief Electoral Officer shows that he had directed the District Election Officer, Kaushambi to make an enquiy in accordance with the directions contained in the circular dated 24.8.2021 and submit his report. The appropriate action of the District Magistrate, Kaushambi/the District Election Officer, Kaushambi should have been to go through the circular and make an enquiry on three points as per Clause 5(ii), (iii), (iv) of the circular and submit his report to the Chief Electoral Officer. Instead of making enquiry/scrutiny in accordance with the directions contained in the Circular issued by the Election Commission, the District Magistrate, Kaushambi/the District Election Officer had forwarded the complaint to the Returning Officer, in a casual manner, by misreading the directions contained in the Circular dated 24th August, 2021. The District Magistrate/the District Election Officer has, thus, committed a glaring illegality in directing the Returning Officer/the Sub-Divisional Officer, Sirathu, Kaushambi to deal with the complaint. The notice dated 3rd June, 2022 issued by the Sub-Divisional Officer, Sirathu, Kausuambi

being the result of illegal action of the District Magistrate/the District Election Officer, Kaushambi is liable to be set aside.

The contention of the learned counsels for the respondents that the said notice had been issued under the directions of the Election Commission of India by the letter dated 17th May, 2022 is found misconceived and hence liable to be rejected.

37. It is, however, kept open for the Election Commission of India to make an enquiry so as to satisfy itself as to whether the allegations in the two complaints make out a case for institution of the proceedings for imposing penalty for filing false affidavit under Section 125A of the R. P. Act, 1951. The said enquiry, in the instant case, has to be conducted by an officer not below the rank of the Deputy Election Commissioner.

38. As from the undated complaint filed by one Dileep Patel, it is not possible to ascertain the identity of the complainant and the allegation in the writ petition is that three persons named as Dileep Patel, the electors of the constituency, had given affidavits to the District Election Officer, Kaushambi that they did not file any complaint against the petitioner, an enquiry into the genuineness of both the complaints allegedly filed by one Dileep Patel and another Omkar Nath Gautam is to be conducted so as to first ascertain the genuineness/veracity of the complaints, before initiating any further action upon the complaints. It goes without saying that once the identity of the complainants is determined, the complainants be asked to file their own affidavits in support of their complaints and only after completing the procedure as prescribed in Clause '5' of the circular dated 24th August, 2021, the matter be proceeded with by the Deputy Election Commissioner.

39. In the said enquiry into the genuineness of the complaints, it would be open for the Deputy Election Commissioner to ask for the assistance of the Chief Electoral Officer, who in turn, in his administrative capacity, may ask the District Election Officer to make enquiry into the identity of the complainants and submit his report. In that case, the Chief Electoral Officer shall forward his report to the Deputy Election Commission, without making any further efforts to enquire on the merits of the complaints.

40. In case, the Deputy Election Commissioner reaches at the conclusion that there is substance in the complaints, he may call for the relevant records to record his prima facie satisfaction on the merits of the complaints, to propose penal action against the petitioner and in that eventuality, the petitioner be given an opportunity to show cause through a notice and action for lodging of the complaint under Section 125A of the R.P. Act, 1951 can only be taken after consideration of the explanation of the petitioner. A reasoned and speaking order in accordance with law shall be passed for bringing the matter to its logical conclusion.

With the above observations and directions, the writ petition is **disposed of.**

(2022) 9 ILRA 1248
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.04.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ-C No. 28103 of 2021

Giri Kristain Csiszar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vineet Kumar Singh, Sri Rahul Kumar Sharma

Counsel for the Respondents:
A.S.G.I., Sri Arvind Nath Agrawal, C.S.C.

Civil Law - The Constitution of India, 1950- Article 9- The Citizenship Act, 1955- Section 6(1)- Citizenship Rules, 2009- Citizenship of India by naturalisation as per the provisions en-grafted under Section 6(1) of the Citizenship Act, 1955 (hereinafter referred to as the Act of 1955)- Application under Section 6(1) of the 1995 Act read with Rule 10(1) (a) being Form (VIII) of the Citizenship Rules, 2009 (hereinafter referred to as 2009, Rules)- Needless to point out that neither Article 9 of the Constitution of India nor the provisions contained under the Citizenship Act, 1955 or the Citizenship Rules, 2009 contemplate a situation whereby whereinunder any person may not be citizen of any of the nation either the citizen of a foreign country or a citizen of a country where he seeks to be a citizen. Bearing in mind said amendment has been sought to be made in the Third schedule appended to Section 6(1) of the Citizenship Act, 1955 pertaining to qualification for naturalisation whereby w.e.f. 3.12.2004 by virtue of Act no.6 of 2004, the pre-requisite condition to renounce the citizenship of a foreign country has been dispensed with and its place undertaking to renounce the citizenship has been engrafted.

As per the amendment of the Third schedule appended to Section 6(1) of the Citizenship Act, 1955 the pre-requisite condition for renouncing the citizenship of a foreign country has been dispensed with hence only filing of an application for grant of citizenship by naturalisation with undertaking to renounce the citizenship of the foreign country, in the event of application for Indian citizenship being accepted, would suffice. (Para 24)

Writ Petition disposed of with directions. (E-3)

Case law/Judgements relied upon:-

Rakesh Singh Vs Sonia Gandhi 2011 (85) ALR 384

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Learned Standing Counsel has filed counter affidavit on behalf of respondents 3 to 5 which is taken on record.

2. This is a petition at the instance of a Finnish national seeking citizenship of India by naturalisation as per the provisions en-grafted under Section 6(1) of the Citizenship Act, 1955 (hereinafter referred to as the Act of 1955).

3. As per the pleadings worded in the petition, the petitioner claims himself to be a citizen of Republic of Finland, who was born on 29.12.1981. According to the petitioner in the year 1983, he visited India at the age of 2 years along with his parents and stayed in India for approximately two months. Subsequently, from 1985 to 1990, the petitioner went to Australia in order to pursue his studies and thereafter in the year 1990 again he came back to India and lived in the birth place of Lord Sri Krishna i.e. Vrindavan for approximately six months. In the meantime, from 1990 to 1996, the petitioner pursued his education upto High School level and thereafter from 1997 to 2000, he pursued his studies in Computer Mechanic from Finland. As per the pleading the petitioner had spiritual bent of mind and he got attracted towards the preaching and the aura of Lord Krishna so he came to India and in the month of August, 2001 and he joined one of the Ashram in Vrindavan in the State of Uttar Pradesh and become the disciple of Narayan Goswami Maharaj Ji.

4. Petitioner has come up with a case that he is living in India since 2001 and he

has renounced the materialistic possession of the wordily life and had inculcated the India cultural and spiritual preaching and he in his inner heart is attracted towards to the life so led by Lord Krishna and he has made up his mind to live his rest of the life in Vrindavan Mathura i.e. in India.

5. In the aforesaid backdrop, the petitioner preferred an application under Section 6(1) of the 1995 Act read with Rule 10(1) (a) being Form (VIII) of the Citizenship Rules, 2009 (hereinafter referred to as 2009, Rules) after completing the requisite formalities as provided therein before the competent authority seeking grant of citizenship by naturalisation on 8.4.2015.

6. As per the provisions contained under the 1955 Act and the Rules, 2009 framed therein under a notice was published in widely circulated newspapers seeking response/objection from an objector as to why the application so preferred by the petitioner for grant of citizenship by naturalisation be not acceded with. A report was also called upon by Additional District Magistrate (Administration) Mathura from Superintendent of Police, Mathura to which a report was submitted by the latter before the former on 6.5.2013 recommending the case of the petitioner for grant of citizenship by a naturalisation.

7. On 6.7.2016 the respondent no.3 recommended the case of the petitioner for grant of citizenship by naturalisation by virtue of letter no.737/Chh.Vi-3-2016-30M/15 dated 06/07/2016 before the respondent no.1. Eventually, respondent no.1 on 15.12.2016 sent a letter to the respondent no.3 providing as under:-

"To
The Secretary
Government of Uttar Pradesh
Home (Visa-2) Department
Lucknow-226001

Subject:-Grant of Indian Citizenship by Naturalization under section 6(1) of the Citizenship Act, 1955-Case of Giri Kristian Csiszar S/O Istvan Csiszar, a/an Finland national.

Sir,

I am directed to refer to the State Government's letter No.737/Chh.Vi-3-2016-30M/15 dated 06/07/2016 on the subject cited above.

2. The Government of India have decided to register the above mentioned applicant as a citizen of India under Section 6(1) of the Citizenship Act, 1955, keeping in view the verification of eligibility and suitability and recommendation made by the State Government vide their letter referred to above. The applicant would be formally registered as a citizen of fulfillment of the following requirements:-

i. The applicant may be asked to renounce his present nationality by making an application to the concerned Mission of is country in India in accordance with the law of that country.

ii. Deposit the fee prescribed for such registration viz. Rs.13750- Per application creditable to the Ministry of Home-Affairs receipt head No '0070-Other Administrative Services-Other Services-receipt under Citizenship Act' in the State Bank of India through treasury Challan which will be adjustable by the Pay & Accounts Officer/Ministry of Home Affairs.

3. The documentary evidence regarding renunciation of present foreign nationality, payment of fee (both in original), three copies of recent passport size colored photographs (duly attested on the reverse by a Magistrate (Gazetted Officer), typed personal particulars

indicated in Form-xii of Schedule-1 to the Citizenship Rules 2009 and three specimen signatures (or thumb impression) on a plain paper, may be obtained from the applicant and forwarded to this Ministry for further action.

Yours faithfully
(S.C. Solanki)
Under Secretary to the Govt. of India."

8. It has come on record that the petitioner deposited the prescribed fee for registration i.e. Rs.13750/-. The petitioner had also approached the Embassy of Finland at New Delhi for the purposes of renouncing his Finnish nationality. However, on 29.12.2016 the Second Secretary, Administration and Consular Affairs issued a certificate which reads as under:-

"FINNISH CITIZENSHIP: RELEASE

TO WHOM IT MAY CONCERN

This is to certify that Mr. Giri Kristian CsiSZAR (born 29th of December 1981 in Kangasala, Finland) has informed the Finnish Embassy in New Delhi that he is applying to become citizen of India.

As India does not approve dual citizenship Mr. Csiszar has decided to release from Finnish citizenship.

He has presented the necessary documents (application release the Finnish citizenship) at the Embassy of Finland in New Delhi on Thursday 29th of December, 1981.

The documents will be sent to the competent authority in Finland. The Finnish Immigration Service (www.migri.fi). As Mr. Csiszar has not yet received the Indian citizenship Mr. Csiszar will be first released from Finnish citizenship upon condition. The release will take effect once he will provide proof within a specified time of having become the citizen of another state.

Should you have any further questions do not hesitate to contact us.

Yours sincerely,
Tina-Rinne-Aguilar
Second Secretary
Administration and Consular Affairs"

9. On 14.6.2018 on the application so preferred by the petitioner for renouncing nationality of Finland, Inspector General, Finnish Immigration Center accorded following decision:-

"Finnish Immigration Service has decided to release the applicant from Finnish citizenship as of the date when he receives Indian citizenship. This decision will enter into force only if the applicant, within two years from the entry into force of this decision, presents Finnish Immigration Service with proof of receipt of Indian citizenship, Finnish Immigration Service will Issue a certificate of compliance with the condition."

10. In the meantime, in pursuance of the Rule 15(1) and 16(1) of the Citizenship Rules, 2009, the Government of India, Ministry of Home-affairs issued certificate of nationalisation.

11. It has further come on record that on 6.11.2019, the respondent no.1 issued a letter to the respondent no.3 returning the papers so transmitted by respondent 3 to respondent no.1 off line while asking the respondent no.3 to again remit papers by on line mode. However, on 29.1.2021 a decision has been taken by the respondent no.1 marking it to respondent no.3 providing as under:-

"The Secretary (Home)
Government of Uttar Pradesh
Subject:-Grant of Indian Citizenship by registration/naturalisation under Section 6(1) of the Citizenship Act, 1955 case of Sh. Giri Kristian Csiszar a Finland national.
Madam/Sir,
In reference to the MHA File No.2015080133 Dated 08/04/2015 and this Ministry's Acceptance letter dated 15/12/2016 on the above subject, on the scrutiny it has been found that the following documents have not been made available:-
(i) The applicant has submitted a letter from the Finnish Immigration Service dated 14/06/2018 along with its English version instead of renunciation certificate. As per English version of the letter, Finnish Immigration Service has decided to release the applicant from Finnish citizenship as of the date when he receives Indian Citizenship. This decision will enter into force only if the applicant, within two years from the entry into force of this decision, presents Finnish Immigration Service with proof of receipt of Indian citizenship. Finnish Immigration service will issue a certificate of compliance with the condition.
(ii) As per English version of the Finnish Immigration Services letter referred above, the applicant will remain citizen of Finland till the Indian citizenship is granted whereas the applicant was asked to renounce his present nationality vide this Ministrys Acceptance letter No.26018/133/2015-IC.II dated 15.12.2016. He has also given his country in the event of his application being sanctioned. Moreover, the Constitution of India does not allow dual citizenship. Hence renunciation certificate is mandatory to furnish. If the applicant fails to submit renunciation certificate, whereby his foreign nationality has clearly been ceased within six months from the date of issue of this letter, his citizenship application will be liable to be rejected.
The State Government is requested to get the above information/documents uploaded online.
This Ministry's file number given above may be cited invariably in all future correspondence.
Yours faithfully
Ashutosh Anand
Under Secretary/Assistant Secretary"

12. On 10.3.2021 the respondent no.1 has again sent letter to the respondent no.3 further providing is as under:-

"To,
The Secretary
Government of Uttar Pradesh
Home (Visa-2) Department
Lucknow-226001
Subject:- Grant of Indian Citizenship by Naturalization under section 6(1) of the Citizenship Act, 1955-case of MAKSYMLARCHENKO s/o VLADIMIR LARCHENKO, an Ukraine national.
Sir,
I am directed to refer to the State Government's letter No.114/6-Visa-32020-10M/18 dated 09/07/2020 on the subject cited above.
2. The Government of India has decided to register the above mentioned applicants as a citizen of India under Section of the Citizenship Act, 1955 keeping in view of the verification of eligibility and suitability and recommendation made by the State Government vide letter referred to above. The applicant would be formally registered as a citizen of India subject to fulfillment of the following requirements:-

(i) The applicant may be asked to renounce his present nationality by making an application to the concerned Mission of his country in India in accordance with the law of the country.

(ii) If Renunciation Certificate has not been issued by the Embassy in case of expired passport the applicant may file an Affidavit before the authority prescribed under Rule 38 of the Citizenship Rules 2009 that may be considered in lieu of Renunciation Certificate. The applicant (s) have to deposit their expired Passport to Collector/district Magistrate/Deputy Commissioner Office with other documents in terms of the Ministry's letter No.26030/266/2014-IC.II dated 17.11.2014.

(iii) Deposit the fee prescribed for such registration viz. Rs.100/- Per application creditable to the Ministry of Home-Affairs receipt head no.0070-Other Administrative Services-Other Services-receipt under Citizenship Act in the State Bank of India through treasury Challan which will be adjustable by the Pay & Accounts Officer, Ministry of Home-Affairs or deposit the fee through e-payment options available on the citizenship website "http://indiancitizenshiponline.nic.in.

3. The documentary evidences regarding renunciation of present foreign nationality may be obtained in original and uploaded against the online file of the applicant in online citizenship module. The applicant has to upload documents in support of payment of fee, and also upload photographs & signature and fill Form XII on MHA website http://indiancitizenshiponline.nic.in against his application file number. Originals of these documents have to be obtained from the applicant and filed in the office of the District Collector/Magistrate concerned for future reference."

13. A counter affidavit has been filed by respondent no. 1 and 2 sworn on 22.1.2022 wherein in paras 3 and 5 the following averments have been made:-

3. That his above application was received in the Ministry through the State Government of Uttar Pradesh. The Ministry examined his aforementioned application and issued in-principal Acceptance Letter dated 15.12.2016 and asked the applicant renouncing his present nationality, Fee Challan of Rs.13,750/-, From-XII of Schedule I to the Citizenship Rules, 2009, three copies of recent passport size colored photographs (duly attested on the reverse by a Magistrate/Gazetted Officer) and three specimen signatures (or thumb impression) on a plain paper.

5. That it is to state dual citizenship is not allowed in terms of Article 9 of the Constitution of India read with Section 9 of the Citizenship Act, 1955. In terms of Rule 10 of the Citizenship Rules, 2009 applicant gives an undertaking in writing that he shall renounce the citizenship of his country in the event of his application being sanctioned. The applicant has also declared vide para 21 of his citizenship application that he shall renounce the citizenship of his country in the event of his application being sanctioned. Therefore, the applicant has to submit renunciation certificate whereby his foreign nationality has clearly ceased.

14. On 29.11.2021 this Court while entertaining the present writ petition proceeded to pass the following orders:-

"The petitioner is a citizen of Finland and is residing at Mathura since long. He has moved an application for grant of Indian citizenship in which he has made a solemn declaration of his intention

to make India a permanent home and has also undertaken to renounce the citizenship of his previous country, in the event, such application is sanctioned. The application has remained pending for several years. The respondents, however, have called upon the petitioner to renounce his citizenship of earlier nationality and unless such renunciation certificate is furnished, his application shall be rejected.

Learned counsel for the petitioner points out the application Form, dated 9.4.2015, in which the declaration required by virtue of clause 8, only requires the intend to renounce the citizenship of previous country when Indian citizenship is sanctioned. It is submitted that the format contained under the Citizenship Act, 1955 itself takes care of renunciation of citizenship of the previous country, if the citizenship is offered in India and, therefore, the insistence on part of authorities to renounce the citizenship of earlier country as a precondition for consideration of his application for grant of citizenship, is wholly arbitrary. It is also urged that if the respondents' instructions were followed, the petitioner would seize to be a national of any country and that is not the intend of law.

Prima facie, we find substance in the contention advanced by the petitioner. In view of the clear recital of the petitioner's intend to renounce the citizenship of Finland, if his application for grant of Indian citizenship is accepted, there appears to be no further requirement of offering renunciation of citizenship at this stage.

Sri Arvind Nath Agarwal, counsel appearing for Union of India and the concerned authorities shall obtain instructions from the respondents, who shall be at liberty to revisit the matter in the light of the above observations and the provisions of law.

Post as fresh once against on 20th December, 2021. "

15. Heard Sri Vineet Kumar Singh, learned counsel for the petitioner, Arvind Nath Agrawal, learned counsel for the respondents no. 1 and 2 and learned Standing Counsel for the respondents no. 3 to 5.

16. The core question, which needs to be adjudicated in the present proceedings, is with regard to the fact as to whether for the purposes of processing and grant of citizenship by naturalisation, the applicant (foreign national) in order to be a citizen of India has to renounce the citizenship of the country which he possessed at the time of filing of the application for grant of citizenship by naturalisation or not and whether an undertaking to renounce the citizenship of the foreign country in the event of his application for Indian citizenship being submitted processed.

17. In order to delve into the said issue, the relevant statutory provisions are at least need to be noticed.

18. The Parliament in exercise of his powers so conferred therein enacted an Act by the name in the nomenclature of the Act of 1955 which received the assent of the President on 30.12.1955 in order to provide for classification and determination of Indian citizenship.

19. Section 3 of the Act of 1955 provides for citizenship by birth, Section 4 citizenship by descent, Section 5 citizenship by registration followed by citizenship by naturalisation Section 6-A special provisions as to citizenship of persons covered by the Assam Accord, 6-B special provisions as to citizenship of person covered by proviso to clause (b) of sub-section (1) of Section 2 and Section 7 citizenship by incorporation of territory etc.

20. So far as the present controversy is concerned, the same revolves around citizenship by naturalisation contained under Section 6 of the 1995 Act which reads as under:-

"6. Citizenship by naturalisation.—(1) Where an application is made in the prescribed manner by any person of full age and capacity 3 [not being an illegal migrant] for the grant of a certificate of naturalisation to him, the Central Government may, if satisfied that the applicant is qualified for naturalisation under the provisions of the Third Schedule, grant to him a certificate of naturalisation:

Provided that, if in the opinion of the Central Government, the applicant is a person who has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress generally, it may waive all or any of the conditions specified in the Third Schedule.

(2) The person to whom a certificate of naturalisation is granted under sub-section (1) shall, on taking the oath of allegiance in the form specified in the Second Schedule, be a citizen of India by naturalisation as from the date on which that certificate is granted."

21. The Third Schedule under Section 6(1) of the 1995 Act provides for the qualifications for naturalisation which reads as under:-

THE THIRD SCHEDULE
[See section 6(1)]
QUALIFICATIONS FOR NATURALISATION

The qualifications for naturalisation of a person 1 are—

(a) that he is not a subject or citizen of any country where citizens of India are prevented by law or practice of that country from becoming subjects or citizens of that country by naturalisation;

(b) that, if he is a citizen of any country, [he undertakes to recounce the citizenship of that country in the event of his application for Indian citizenship being accepted];

(c) that he has either resided in India or been in the service of a Government in India or partly the one and partly the other, throughout the period of twelve months immediately preceding the date of the application;

[Provided that if the Central Government is satisfied that special circumstances exist, it may, after recording the circumstances in writing, relax the period of twelve months up to a maximum of thirty days which may be in different breaks.]

(d) that during the 4 [fourteen years] immediately preceding the said period of twelve months, he has either resided in India or been in the service of a Government in India, or partly the one and partly the other, for periods amounting in the aggregate to not less than 5 [eleven years];

[Provided that for the person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community in Afghanistan, Bangladesh or Pakistan, the aggregate period of residence or service of Government in India as required under this clause shall be read as "not less than five years" in place of "not less than eleven years".]

(e) that he is of good character;

(f) that he has an adequate knowledge of a language specified in the Eighth Schedule to the Constitution; and

(g) that in the event of a certificate of naturalisation being granted to him, he intends to reside in India, or to

enter into, or continue in, service under a Government in India or under an international organisation of which India is a member or under a society, company or body of persons established in India:

Provided that the Central Government may, if in the special circumstances of any particular case it thinks fit,—

(i) allow a continuous period of twelve months ending not more than six months before the date of the application to be reckoned, for the purposes of clause (c) above, as if it had immediately preceded that date;

(ii) allow periods of residence or service earlier than 7 [fifteen years] before the date of the application to be reckoned in computing the aggregate mentioned in clause (d) above.

22. In exercise of the powers conferred by Section 18 of the 1995 Act, the Central Government framed Rules being the Citizenship Rules, 2009 which came into the effect from 25.2.2009. Relevant extract of **Rules 10, 15 and 16** of the Rules, 2009 is being quoted herein-under:-

"10. Application for grant of citizenship by naturalisation under sub-section (1) of section 6.- An application from a person for naturalisation as a citizen of India under sub-section (1) of section 6 shall not be entertained unless - (a) the application is made in Form VIII; (b) he gives an undertaking in writing that he shall renounce the citizenship of his country in the event of his application being sanctioned; and (c) the application is accompanied with - (i) a duly stamped affidavit verifying the correctness of the statements made in the application alongwith two affidavits from Indian citizens testifying the character of the applicant; and (ii) a certificate depicting that the applicant has adequate knowledge of one of the languages specified in the Eighth Schedule to the Constitution of India. Explanation 1.- The applicant shall be considered to have adequate knowledge of the concerned language if he can speak or read or write that language. Explanation 2.- The certificate may either be issued by a recognised educational institution or a recognised public organization or from two persons of the locality or district of the applicant who are citizens of India.

15. Grant of certificate of naturalization.- (1) Every person who by naturalisation is made a citizen of India under sub-section (1) of section 6 shall be issued a certificate of naturalisation in Form XII signed by an officer not below the rank of Under Secretary to the Government of India. (2) A copy of the certificate of naturalisation issued under this rule, shall be preserved for the purposes of record by the issuing authority.

16. Oath of allegiance for naturalization.- (1) The oath of allegiance, under sub-section (2) of section 6 by a person to whom the certificate of naturalisation is granted, shall be subscribed in Form XII and the oath of allegiance so subscribed shall be endorsed on the certificate of naturalisation to which it relates. (2) The oath of allegiance under sub-rule (1) shall be subscribed within a period of three months from the date of grant of certificate of naturalisation to which it relates, or within such extended period as the authority granting the certificate may permit, and in case the oath is not taken within the said period, the certificate shall be of no effect: Provided that no permission shall be given under this sub-rule unless a statement to that effect is endorsed on the certificate and signed by

the officer authorised under rule 15 to sign the certificate of naturalisation. (3) The oath of allegiance required under sub-rule (1) shall be registered by such person and in such place as the authority granting the certificate may direct. (4) When the oath of allegiance is registered in accordance with any direction given under sub-rule (3), the authority, which registers it shall cause a copy of the oath and the certificate of naturalisation to which it relates to be sent to the Secretary to the Government of India in the Ministry of Home Affairs."

FORM VIII

[See rule 10 (1) (a)]

The Citizenship Rules, 2009

APPLICATION FOR NATURALIZATION AS A CITIZEN OF INDIA UNDER SECTION 6(1) OF THE CITIZENSHIP ACT, 1955

Note: Please write/print in BLOCK LETTERS

PART I 1. Full name of the applicant:.....
....If commonly known by another name, enter such name here:.....

2. Present address .....
..

3. (a) Sex:.....

(b) Occupation:.....

(c) If in service, address of employer:.....

(d) Mark of identification:.....
....

3A. Do you belong to one of the minority communities from Afghanistan, Bangladesh and Pakistan, namely Hindus, Sikhs, Budhists, Jains, Parsis and Christians? Yes/No If, yes, Please specify
.....

4. Place and date of birth:.....
.....

5. Nationality by birth:.....
.....

6. Present nationality, if different:.....

7. (a) Marital Status:.....
(b) If married, give date and place of marriage and nationality of the spouse .....
(c) Husband's or wife's name:.....

8. Father's full name is.....
resident of.....
and he was born at (with Tehsil, District, State and Country).....on.....
.....and is a citizen of.....

9. Mother's full name is..... resident of.....and he was born at (with Tehsil, District, State and Country).....on .....and is a citizen of.....
PHOTOGRAPH

10. Whether the applicant is a subject or citizen of any country where an Indian citizen is prevented by law or practice of that country from becoming a subject or citizen of that country by naturalization. :.....

11. Principal languages of India known and extent of knowledge thereof with evidence :.....

12. Details of residence in India:

(a) Date of entry in India ....

(b) I have resided inIndia continuosly for a period of twelve months

immediately preceding the date of application. Yes/No

(c) During the fourteen years immediately preceding the said period of twelve months, I have resided in India for a period amounting in the aggregate to not less than eleven years

S.No.	*Details with address of residence in India for the last fourteen years*	*From*	*To*	*Years Months*
1	*2*	*3*	*4*	*5*

13. Reasons for which applicant wishes to acquire Indian citizenship: ....

14. Passport particulars: (a) Country:..... (b) Number:.....

15. Visa valid up to:..... .

16. Details of family members who are staying in India with the applicant:

Sl. No.	*Name*	*Present Address*	*Relationship*	*Age*
1	*2*	*3*	*4*	*5*

17. Details of criminal proceedings, if any:

Sl. No.	*Nature of the criminal proceedings*	*Date and place of registering the case*	*Present status of the case*	*Judgement of the court*
1	*2*	*3*	*4*	*5*

18. Names and addresses of at least two persons whose affidavits testifying to the character of the applicant and the correctness of the statements made in this application are attached herewith: .....

PART II

19. I have/have not previously renounced or been deprived of the citizenship of India. (If the applicant has renounced his Indian citizenship, here state the date on which the declaration of renunciation was made; or if he has been deprived of his citizenship, state the date on which and the authority by whom, the order of deprivation was made.)

20. I have/have not previously applied for naturalization as a citizen of India and the application has/has not been rejected.

21. I declare that my intention is to make India as permanent home and I undertake that I shall renounce the citizenship of my country in the event of my application being sanctioned.

22.

I,.....do solemnly and sincerely declare that the foregoing particulars, stated in this application are true, and I make this solemn declaration conscientiously believing the same to be true.

Date: .....

Signature:.....

*Affidavit to accompany the application for a certificate of naturalization under the Citizenship Act, 1955.**

In the matter of the application for a certificate of naturalization under the Citizenship Act, 1955, I.....son of ..... residing at .....make oath and do solemnly and sincerely affirm that the statements contained in my application here unto annexed are true to the best of my knowledge and belief. If, at any time before a certificate is issued to me, the accuracy of any of the foregoing

particulars is affected by an alteration in circumstances, I undertake to inform the Secretary to the Government of India in the Ministry of Home Affairs in writing forthwith.

Station.....

Signature.....

*Date ..... **

Affidavits to be attested by Notary/Oath Commissioner/Magistrate.

Affidavits testifying the character of the applicant and the correctness of the statements made in the application.

(vide item 18)

In the matter of an application for a certificate of naturalisation under the Citizenship Act, 1955, made by ..... I..... aged.....years, by occupation.....son of .....residing at .....make oath and do solemnly and sincerely affirm that I am an Indian citizen otherwise than by naturalization; that I am a householder; that I am not a solicitor or agent of .....that I have personal knowledge of, and intimate acquaintance with, the said .....for.....years; that the statements contained in his application for naturalization are true to the best of my knowledge and belief.

I support .....'s application for naturalization and I can vouch for his good character and loyalty.

Date .....

Signature.....

Name .....

Full postal address .....

. Copies of two issues (in triplicate) of a newspaper or newspapers circulating in the district in which the applicant resides each containing (clearly marked) an advertisement in the following form should accompany the application.

"Notice is hereby given that.....son/daughter/wife of.....is applying to the Secretary to the Government of India in the Ministry of Home Affairs for naturalization and that any person who knows any reason why naturalization should not be granted should send a written signed statement of the facts to the said Secretary."

(This form complete in all respects shall be e submitted in triplicate to the Collector/Deputy Commissioner/District Magistrate within whose jurisdiction the applicant is ordinarily resident for transmission to the Central Government through the State Government or the Union territory administration, as the case may be)

DOCUMENTS TO BE ATTACHED WITH THE APPLICATION BY THE APPLICANT

1. A copy of valid Foreign Passport.

2. A copy of valid Residential Permit.

3. [***]

4. One affidavit from self (applicant) and two affidavits from two Indians testifying to the character of the applicant in the prescribed language available in the application form.

5. Two language Certificates certifying the applicant's knowledge in any one of the Indian languages specified in the Eighth Schedule of the Constitution. (A language certificate from a recognized educational institutions or from a recognized organization or from two Indian citizens of the district of the applicant).

6. Two newspaper (circulating in the district in which the applicant resides) cuttings of different dates or of different

newspapers notifying his intention to apply for citizenship in the prescribed language in the application form.

23. The word naturalisation which finds its presence in the Citizenship Act, 1955 was interpreted in the case of **Rakesh Singh Vs. Sonia Gandhi 2011 (85) ALR 384** wherein this Court observed as under:-

11. Needless to mention that the naturalization is also a mode of acquiring citizenship like the "Green Card" in United States of America. The citizenship can finally be acquired either by having a "certificate of registration" or by a "certificate of naturalization", if the candidates fulfill the conditions of Section 5 or Section 6 of the Citizenship Act, 1955 as the case may. Naturalization is the mode for acquisition of the citizenship by somebody who was not a citizen of that country when he/she was born.

(a) As per the Oxford Dictionary the meaning of naturalization is "admit (a foreigner) to the citizenship of a country"; and

(b) as per the Law Lexicon (2nd Edition) the meaning of Naturalization is an act of adopting a foreigner, and clothing him with the privileges of a native citizen."

12. In general, basic requirement for naturalization is that the applicant hold a legal status as citizen of India provided he/she fulfills the required conditions including the stay for the minimum period of prescribed time and that the applicant promises to obey and uphold that country's laws, to which an oath or pledge of allegiance is sometimes added. Some countries also require that a naturalized national must renounce any other citizenship which he/she currently holds, forbidding dual citizenship, but whether this renunciation actually causes loss of the person's original citizenship will again depend on the laws of the countries involved.

13. The citizenship is traditionally based either on jus soli ("right of the territory"); or on jus sanguinis("right of blood"), although it now usually mixes both. Whatever the case may be, the massive increase in population flux due to globalization and the sharp increase in the number of migrants create an important class of non-citizen sometimes called denizens.

14. In India, Section 6 of the Citizenship Act, 1955 provides that where an application is made in the prescribed manner by any person of full age and capacity (not being an illegal migrant) for the grant of a certificate of naturalization to him, the Central Government may, if satisfied that the applicant is qualified for naturalization under the provisions of the Third Schedule, grant to him a certificate of naturalization. There is a separate form and procedure for applying the citizenship by naturalization as mentioned above.

15. In United State of America, the naturalization is also mentioned in the 14th Amendment. The Amendment states that " all persons born or naturalized in the United States and subject to the jurisdiction thereof shall be citizens of the United States and of the State in which they reside". To maintain the singular citizenship, the Naturalization Act, 1798 was passed in USA. Accordingly, in America, a foreigner can first of all have to acquire the "Green Card" (naturalization) and later full-fledged citizenship. Thus, the naturalization is one of the mode to acquire the citizenship. But in India, there is no such concept like "Green Card".

24. Needless to point out that neither Article 9 of the Constitution of India nor

the provisions contained under the Citizenship Act, 1955 or the Citizenship Rules, 2009 contemplate a situation whereby whereinunder any person may not be citizen of any of the nation either the citizen of a foreign country or a citizen of a country where he seeks to be a citizen. Bearing in mind said amendment has been sought to be made in the Third schedule appended to Section 6(1) of the Citizenship Act, 1955 pertaining to qualification for naturalisation whereby w.e.f. 3.12.2004 by virtue of Act no.6 of 2004, the pre-requisite condition to renounce the citizenship of a foreign country has been dispensed with and its place undertaking to renounce the citizenship has been engrafted.

25. Sri Vineet Kumar Singh, learned counsel for the petitioner has argued that the stands so taken by the respondents no. 1 and 2 on the basis of the letter dated 29.1.2021 issued by the respondent no.1 addressed to respondent no.3 that renunciation of foreign country is prerequisite for processing and grant of citizenship by naturalisation is contrary to the statutory enactment inasmuch as as per the Third Schedule under Section 6(1) of 1995 Act relating to qualification for naturalisation, the Clause-(b) stood substituted w.e.f. 3.12.2004 as now in view of the aforesaid substitution the condition that if the applicant seeking citizenship by naturalisation he/she need not renounce the citizenship of the foreign country as in view of the amendment only an undertaking to renounce the citizenship of the foreign country is required in the event the application for Indian citizenship being accepted.

26. According to learned counsel for the petitioner once there is no requirement under law to have renounced the citizenship of a foreign country at the time of filing of an application for grant of citizenship by naturalisation then undertaking to renounce the citizenship of the foreign country, in the event of his application for Indian citizenship being accepted would suffice.

27. Learned counsel for the petitioner has further sought to argue that he has fulfilled all the formalities as required under law being in the shape of 1955 Act and 2009 Rules and thus the condition so imposed by virtue of the letter dated 29.1.2021 is not legal and sustainable and further backed by statutory enactment.

28. Learned counsel for the respondents no. 1 and 2 has argued on the strength of the averments contained in paragraph 3 and 5 of the counter affidavit so filed by him dated 22.2.2022 so as to contend that as per Article 9 of the Constitution of India read with Section 9 of the 1955 Act duel citizenship is not allowed. However, in view of Rule 10 of the 2009 Rules in case the petitioner gives an undertaken in writing that he shall renounce the citizenship of his country in the event his application being accepted, he would be granted citizenship of India in this regard.

29. Learned counsel for the petitioner in rejoinder has argued that petitioner has right from the very inception was maintaining the consistent stand that in case citizenship of India is being offered to him then he would renounce his citizenship of Finland and he had already completed formalities and submitted undertaking in this regard.

30. Learned counsel for the petitioner has drawn the attention of this Court

towards the certificate issued by the Second Secretary Administration and Consular Affairs of Finland dated 29.12.2016 and of Inspector General Finnish Immigration service dated 14.6.2018 so as to contend that the petitioner would be released from Finnish citizenship as of the date when he gets Indian citizenship and the said decision will enter into force only if the petitioner within two years from the entry into force of the said decision presents Finnish Immigration service with an approval of receipt of Indian citizenship.

31. Learned counsel for the respondents no. 1 and 2 on the basis of the averments contained in paragraph 3 and 5 of the counter affidavit as well as instructions so received by him has not disputed the statutory provisions with respect to the grant of citizenship by naturalisation as contained under Section 6 of 1955 Act read with Third schedule appended to it in particular clause (b) which underwent amendment on 3.12.2004 whereby condition of renouncing of citizenship of foreign country stands dispensed with and in its place, stood substituted by the condition precedent being that the petitioner has to furnish undertaking to renounce the citizenship of the foreign country, in the event that the application for Indian citizenship being accpeted.

32. Learned counsel for the respondents no. 1 and 2 has further made a statement at bar that the present writ petition may be disposed of with a direction that the petitioner may approach the competent authority along with the certified copy of the order within a period of four weeks from today and complete necessary formalities so required theirin then the competent authority will consider the claim of the petitioner for garnt of citizenship of India within further period of three weeks in accordance with law.

33. Resultantly the present writ petition is being disposed of with following directions:-

(a) Petitioner shall approach the competent authority within four weeks from today along with certified copy of this order;

(b) Competent Authority shall apprise the petitioner with the formalities which are yet to be completed as per the provisions contained under the Citizenship Act, 1955 and the Rules of 2009 as amended from time to time; and

(c) After completion of the formalities the competent authority shall consider the matter and pass a reasoned and speaking order in the light of the observation so made herein before for the grant of citizenship of India by naturalisation.

(2022) 9 ILRA 1262
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.09.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-C No. 36350 of 2019

Priyanka ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Birendra Pratap Singh

Counsel for the Respondents:
C.S.C., Sudhir Kumar Singh

Civil Law - Essential Commodities Act, 1955- Section 3/7 - Fair Price Shop licensee- license of fair price shop cancelled-Appeal rejected- Right of subsequent allottee -Respondent No.6 has the right to hold shop only in case the license of the petitioner is cancelled.

Otherwise, she has no right with the dispute between the petitioner and the State. In the present case, a conditional license was given to the respondent No.6 which does not create any independent right in favour of respondent No.6 and, therefore, respondent No.6 cannot oppose the present writ petition. Mere participation of respondent no.6 at the appeal stage will also not confer any such legal right.

Settled law that mere grant of conditional license in favour of the subsequent allottee and her participation in the appeal cannot confer any independent right to her.

Civil Law - Indian Evidence Act, 1872- Section 92- When the documentary evidence is available, oral statement cannot be relied - Sub Divisional Magistrate shows that he has wrongly relied upon the statements made by the villagers in the inquiry. On the basis of oral statements of some persons, he has held that stock registers are incorrect. The same cannot be held to be a proper procedure. Once, the oral statements against a documentary evidence is being relied upon by the authority concerned, it must specifically state the circumstance and the reason as to why the authority is proceeding to disbelieve the documentary evidence - In the entire judgment, there is no reference of the documents and reply submitted by the petitioner - The appellate court while referring to the submissions of the counsel for parties, without even considering the case of petitioner, has again relied upon the oral statements - The appellate court has also not given any reason as to why the appellate court has relied upon the oral statements against the documentary evidence. It merely states that there is no reason to interfere with the order of Sub Divisional Magistrate as there is a difference between the statement given by the villagers and the submissions and record submitted by the petitioner which is not believed by the Sub Divisional Magistrate. The same cannot be said to be a finding of facts in accordance with law. There is no consideration of the case of petitioner, again in the appellate order.

Where documentary evidence is available then it is incumbent upon the Authority to rely upon the same , instead of relying on the oral evidence hence, no finding of fact can be recorded by relying solely upon oral evidence and ignoring the documentary evidence. (Para 9, 13)

Writ Petition allowed. (E-3)

Case Law/Judgements relied upon:-

1. W.P. No.24684 (M/S) of 2021; "Smt. Gudiya Devi Vs St. of U.P.. Thru. Principal Secretary Food and Civil Supplies Lko. & ors., dated 27.10.2021 (cited)

2. Civil Appeal No.9363-9364 of 2014 Sumitra Devi Vs. St. of U.P.; dt. 08.10.2014 (cited)

3. Poonam Vs. St. of U.P. & ors. (2016) 2 SCC 779

4. W.P No. 1063 (M/S) of 2020 Putti Lal Vs. St. Of U.P. Thru Prin.Secy. Food & Supplies Lucknow & ors. dt. 06.09.2021

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Mr. Abhishek Singh, Advocate holding brief of Mr. Birendra Pratap Singh, learned counsel for the petitioner, learned Standing Counsel for respondent no. 1 to 5 and Mr. Sudhir Kumar Singh, learned counsel for respondent no.6.

2. The petitioner, who is a fair price shop licensee, has approached this Court challenging the order dated 03.10.2019 passed by respondent no.3, whereby her appeal is rejected, and order dated 31.01.2017 passed by respondent no.4 by which license of her fair price shop was cancelled.

3. Learned counsel for respondent no.6 claims that respondent no.6 was

granted license after the license of petitioner was cancelled. He submits that he has a right to oppose the present writ petition as now he is holding a license for the area concerned. He further submits that petitioner could not have been granted the license as she is not competent to hold license and, thus, raised a preliminary objection.

4. Opposing the same, learned counsel for petitioner submits that respondent no.6 was granted permission only as an alternative arrangement, till the dispute with regard to license of the petitioner is decided. Reference is made to the letter dated 02.06.2016 of the Sub Divisional Magistrate, Tehsil Mahsi whereby permission was granted to respondent No.6. Perusal of the said letter shows that the permission to respondent No.6 was granted in reference to Government Order dated 26.11.2016 in the public interest as an alternative arrangement which would be subject to decision of the appeal and in case the appellate authority decides the matter in favour of the petitioner, no claim of respondent No.6 would be accepted.

5. A bare perusal of the letter dated 02.06.2016 clearly demonstrates that respondent No.6 was granted permission to distribute the ration in the area concerned only as an alternative arrangement to petitioner whose license was in dispute at that time. The said letter itself clarifies that in case the claim of petitioner is accepted, the new allottee, respondent No.6, would not have any claim whatsoever. Therefore, from the reading of the said letter itself it is clear that respondent No.6 was granted permission to distribute ration only till the matter with regard to petitioner is decided. Learned counsel for respondent No.6 has referred to following judgments in support of his case:-

(i) Writ Petition No.24684 (M/S) of 2021; ''Smt. Gudiya Devi Vs. State of U.P. Thru. Principal Secretary Food and Civil Supplies Lko. & Ors, dated 27.10.2021;

(ii) Civil Appeal No.9363-9364 of 2014 Sumitra Devi Vs. State of U.P.; dated 08.10.2014

6. In the judgment passed in case of ***Sumitra Devi (supra),*** it is noted that, appellant in the case was a subsequent allottee as he was granted license on 20.02.2008. From the said judgment it is not clear as to whether the said license was a temporary license or an absolute. From the reading of the judgment it appears that the license was an absolute license granted in favour of the subsequent allottee and the license was not subject to the decision of the earlier allottee. Therefore, the facts of the said case, being different from the facts of the present case, are of no help to respondent No.6. Further, the Supreme Court was moved by the fact that subsequent allottee has filed an application for impleadment and without deciding the said impleadment application the High Court had finally decided the writ petition. In the said background the matter was remanded back. The Supreme Court while remanding the matter also stated "we make it clear that on merits of the case, we have expressed no opinion." Thus, the facts of the said case are of no help to respondent No.6.

7. So far as the judgment passed in case of **Smt. Gudiya Devi (supra)** is concerned, the same is absolutely silent with regard to rights of subsequent allottee. The said issue was not even raised before

the Court. Since, no law is settled in case **of Smt. Gudiya Devi (supra),** the same is no help to respondent No.6.

8. On the other hand, learned counsel for petitioner has placed reliance upon the decision of the Supreme Court passed in case of **Poonam Vs. State of U.P. & Ors. Reported in (2016) 2 SCC 779.** Paragraphs 49 to 53 are relevant for our purposes which read as follow:-

"49. In the instant case, Shop No. 2 had become vacant. The appellant was allotted the shop, may be in the handicapped quota but such allotment is the resultant factor of the said shop falling vacant. The original allottee, that is, the respondent, assailed his cancellation and ultimately succeeded in appeal. We are not concerned with the fact that the appellant herein was allowed to put her stand in the appeal. She was neither a necessary nor a proper party. ***The appellate authority permitted her to participate but that neither changes the situation nor does it confer any legal status on her. She would have continued to hold the shop had the original allottee lost the appeal. She cannot assail the said order in a writ petition because she is not a necessary party. It is the State or its functionaries who could have challenged the same in appeal. They have maintained sphinx like silence in that regard. Be that as it may, that would not confer any locus on the subsequent allottee to challenge the order passed in favour of the former allottee. She is a third party to the lis in this context.***

50. The decisions which we have referred to hereinbefore directly pertain to the concept of necessary party. The case of Kailash Chand Mahajan [State of H.P. v. Kailash Chand Mahajan, 1992 Supp (2) SCC 351 : 1992 SCC (L&S) 874 : (1992) 21 ATC 528] makes it absolutely clear. We have explained the authority in J.S. Yadav [J.S. Yadav v. State of U.P., (2011) 6 SCC 570 : (2011) 2 SCC (L&S) 140] and opined that it has to rest on its own facts keeping in view the declaratory relief made therein, and further what has been stated therein cannot be regarded as a binding precedent for the proposition that in a case of removal or dismissal or termination, a subsequently appointed employee is a necessary party. ***The said principle shall apply on all fours to a fair price shop owner whose licence is cancelled.*** *We may hasten to add, this concept will stand in contradistinction to a case where the land after having vested under any statute in the State has been distributed and possession handed over to different landless persons. It is because of such allotment and delivery of possession in their favour, that is required under the statute, rights are created in favour of such allottees and, therefore, they are necessary parties as has been held in Ram Swarup v. S.N. Maira [Ram Swarup v. S.N. Maira, (1999) 1 SCC 738] . The subtle distinction has to be understood. It does not relate to a post or position which one holds in a fortuitous circumstance. It has nothing to do with a vacancy. The land of which possession is given and the landless persons who have received the pattas and have remained in possession, they have a right to retain their possession. It will be an anarchical situation, if they are not impleaded as parties,* ***whereas in a case which relates to a post or position or a vacancy, if he or she who holds the post because of the vacancy having arisen is allowed to be treated as a necessary party or allowed to assail the order, whereby the earlier post holder or allottee succeeds, it will only***

usher in the reverse situation -- an anarchy in law.

51. In this context, reference to the judgment in Ramesh Hirachand Kundanmal v. Municipal Corpn. of Greater Bombay [Ramesh Hirachand Kundanmal v. Municipal Corpn. of Greater Bombay, (1992) 2 SCC 524] would be fruitful. The two-Judge Bench was dealing with the concept of dominus litis which relates to the plaintiff. The Court analysed the provision contained in Order 1 Rule 10 and various sub-rules. The subject-matter in the case pertained to a dispute between the petitioner and Respondent 1 which centred on the demolition and unauthorised construction by the competent authority under the Bombay Municipal Act. Respondent 2 was the lessee in possession of the service station. The Municipal Corporation had not issued any notice to the said respondent. It was contended before the Court that Respondent 2 was instrumental in the initiation of the proceeding by the Municipal Corporation against him. The Court addressed to the issue whether the said respondent is a necessary or proper party. In the said case, the appellant had instituted a case against the third respondent for declaration that she was the lawfully married wife of the third respondent who had entered context and admitted the claim. An application for impleadment was sought by Respondents 1 and 2 on the ground that they were respectively the wife and son of the third respondent and they were interested in denying the appellant's status as wife and the children as the legitimate children of the third respondent. The trial court had allowed the application and the said order was confirmed by the High Court in its revisional jurisdiction.

52. This Court referred to the authority in Razia Begumv.Anwar Begum[Razia Begum v. Anwar Begum, AIR 1958 SC 886] and came to hold that there is a clear distinction between suits relating to property and those suits in which the subject-matter of litigation is a declaration as regards status or legal character. The Court observed that in the former category, the rule of personal interest is distinguished from the commercial interest which is required to be shown before a person may be added as a party and accordingly held: (Ramesh Hirachand case [Ramesh Hirachand Kundanmal v. Municipal Corpn. of Greater Bombay, (1992) 2 SCC 524] , SCC p. 531, para 14)

"14. ... The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer i.e. he can say that the litigation may lead to a result which will affect him legally, that is, by curtailing his legal rights."

And again: (SCC p. 531, para 14)

"14. ... It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in Amon v. Raphael Tuck & Sons Ltd. [Amon v. Raphael Tuck & Sons Ltd., (1956) 1 QB 357 : (1956) 2 WLR 372 : (1954) 1 All ER 273] , wherein after quoting the observations of Wynn-Parry, J. in Dollfus Mieg et Compagnie SA v. Bank of England [Dollfus Mieg et Compagnie SA v. Bank of

England, (1950) 2 All ER 605 at p. 611] , that their true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject-matter of the action if those rights could be established, Devlin, J. has stated: (Amon case [Amon v. Raphael Tuck & Sons Ltd., (1956) 1 QB 357 : (1956) 2 WLR 372 : (1954) 1 All ER 273] , QB p. 371)

"... the test is "May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?""

Eventually, the Court unsettled the order passed by the trial court as well as by the High Court.

53. ***We have referred to the said decision in Ramesh Hirachand case [Ramesh Hirachand Kundanmal v. Municipal Corpn. of Greater Bombay, (1992) 2 SCC 524] in extenso as there is emphasis on curtailment of legal right. The question to be posed is whether there is curtailment or extinction of a legal right of the appellant. The writ petitioner before the High Court was trying to establish her right in an independent manner, that is, she has an independent legal right. It is extremely difficult to hold that she has an independent legal right. It was the first allottee who could have continued in law, if his licence would not have been cancelled. He was entitled in law to prosecute his cause of action and restore his legal right. Restoration of the legal right is pivotal and the prime mover. The eclipse being over, he has to come back to the same position. His right gets revived and that revival of the right cannot be dented by the third party"***

9. The legal position, thus, is settled by the Supreme Court. In view of the aforesaid circumstances, respondent No.6 has the right to hold shop only in case the license of the petitioner is canceled. Otherwise, she has no right with the dispute between the petitioner and the State. In the present case, a conditional license was given to the respondent No.6 which does not create any independent right in favour of respondent No.6 and, therefore, respondent No.6 cannot oppose the present writ petition. Mere participation of respondent no.6 at the appeal stage will also not confer any such legal right. Even otherwise, the issue being raised by the respondent No. 6, that, whether petitioner is entitled to hold a license or not, is not an issue in the present proceedings. In the present writ petition, petitioner has challenged the order of cancellation of her license which is passed on certain grounds. Respondent No.6 cannot enlarge the scope of the proceedings by adding an entirely fresh issue to the dispute that license granted to the petitioner is bad, which would cause a review of the license given to the petitioner. Therefore, even on merits, the issue being raised by respondent No.6 cannot be looked into by this Court and is rejected.

10. Coming back to the merits of the case with regard to cancellation of license of the petitioner, a fair price shop license was granted to the petitioner on 05.05.2011. After an inquiry a charge-sheet was given to the petitioner on 20.03.2013 and on 25.03.2013 license of petitioner was canceled by an ex-parte order. Petitioner submitted her reply with the recall application and by an order dated 02.04.2013, Sub Divisional Magistrate recalled his earlier order dated 25.03.2013. The Gram Pradhan of the village filed an appeal before the Commissioner, Devi Patan against the order of recall whereupon the

Commissioner partly allowed the said appeal setting aside both the order dated 02.04.2013 as well as 25.03.2013 and remanded the matter to respondent No.4 with a direction to pass fresh order on merits. On 05.06.2014 a fresh charge-sheet was issued to the petitioner calling for an explanation to which a reply was submitted by the petitioner. On 27.06.2014, petitioner's license was suspended and a detailed explanation was called for. Petitioner submitted her detailed reply along with evidences and affidavit in support of her case. By an order dated 28.09.2014 the Sub Divisional Magistrate closed the proceedings with the fine of Rs.1000/- upon the petitioner and a warning. On 10.07.2015, the Sub Divisional Magistrate again issued a show cause notice to the petitioner. On 28.08.2015 the license of petitioner was again suspended. Petitioner again submitted her explanation before respondent No.4 with regard to the charges. Respondent No.4 asked for original records such as distribution/receipt register of last three months as well as distribution certificate issued by the nominated distribution officer. All records were placed before the Sub Divisional Magistrate. Against the suspension order, petitioner filed an appeal before the Commissioner. The appeal of petitioner was rejected on 27.02.2016 with a direction to Sub Divisional Magistrate to decide the matter on merits within a period of one month. By order dated 11.04.2016 the Sub Divisional Magistrate passed a final order canceling the license of the petitioner. Petitioner preferred an appeal before the Deputy Commissioner which was partly allowed by judgment and order dated 20.10.2016 and the matter was again remanded back to the Sub Divisional Magistrate. On 31.01.2017, the Sub Divisional Magistrate again passed an order canceling the license of the petitioner. Petitioner preferred an appeal which was also rejected by an order dated 03.10.2019 and, hence, the present writ petition is before this Court challenging both the orders dated 31.01.2017 and 03.10.2019.

11. Learned counsel for the petitioner submits that the proceeding held against the petitioner is not in accordance with law. The same is decided only on the basis of oral statements of some persons. In the order of the Sub Divisional Magistrate the reply of the petitioner is nowhere considered. There is no discussion in the entire order of the Sub Divisional Magistrate as to why and how he believed the oral statements of the villagers and has held the documents to the contrary, to be false. The Sub Divisional Magistrate was also wrongly influenced because a complaint against the petitioner was lodged under Section 3/7 of the Essential Commodities Act, 1955. There is no adverse order ever passed by any competent court against the petitioner and mere pendency of the case should not have influenced the authority concerned. He further submits that even the appellate court has failed to consider the case of petitioner and has rejected the appeal only by looking upon the statements of villagers, without considering the reply of the petitioner. Petitioner has strongly relied upon the Government Order dated 22.04.2004 and states that the same provides comprehensive guidelines with regard to the procedure of inquiry and the same is not followed while conducting the inquiry.

12. On the other hand learned Standing Counsel submits that orders passed by the authorities concerned are detailed and exhaustive and the concurrent

finding of facts should not be interfered by this Court.

13. When the documentary evidence is available, oral statement cannot be relied. The law in this regard is well settled by this court in **Writ Petition No. 1063 (M/S) of 2020 Putti Lal V. State Of U.P. Thru Prin.Secy. Food & Supplies Lucknow & Ors.** by judgment dated 06.09.2021. Paragraph 8 and 9 of the said judgment reads as below:

"8. It goes without saying that once there is documentary evidence to prove certain facts, it is incumbent upon the authority concerned to take the same into consideration. The oral evidence against such documentary evidence should not be accepted, unless circumstances for the said purpose are duly explained. The said aspect of law is reiterated in the aforesaid Government Order dated 16.10.2014. A perusal of the impugned orders clearly shows that this aspect of the matter is totally ignored while passing the impugned orders. Both the courts have proceeded only on the basis of oral statements given by the complainants. The authority concerned never asked the complainants to produce their ration cards. The petitioner had submitted his Registers, which have been ignored on frivolous reasons.

9. The authority concerned should be more particular in cases where they are disbelieving the record submitted by the shop owner, to verify the correct facts from the record of the complainants."

13. A bare perusal of the order of the Sub Divisional Magistrate shows that he has wrongly relied upon the statements made by the villagers in the inquiry. On the basis of oral statements of some persons, he has held that stock registers are incorrect. The same cannot be held to be a proper procedure. Once, the oral statements against a documentary evidence is being relied upon by the authority concerned, it must specifically state the circumstance and the reason as to why the authority is proceeding to disbelieve the documentary evidence. In the order of the Sub Divisional Magistrate, there is nothing to indicate as to why he is relying upon the oral statements and disbelieving the records. Even otherwise, in the entire judgment, there is no reference of the documents and reply submitted by the petitioner. Thus, the manner in which the order dated 31.01.2017 is passed by Sub Divisional Magistrate is contrary to settled principles of law and cannot stand. The appellate court while referring to the submissions of the counsel for parties, without even considering the case of petitioner, has again relied upon the oral statements. The appellate court has also not given any reason as to why the appellate court has relied upon the oral statements against the documentary evidence. It merely states that there is no reason to interfere with the order of Sub Divisional Magistrate as there is a difference between the statement given by the villagers and the submissions and record submitted by the petitioner which is not believed by the Sub Divisional Magistrate. The same cannot be said to be a finding of facts in accordance with law. There is no consideration of the case of petitioner, again in the appellate order.

15. Thus, both the impugned orders dated 31.01.2017 and 03.10.2019 cannot stand and are set aside.

16. Writ petition is ***allowed***.

(2022) 9 ILRA 1270
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2022 & 16.09.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Bail Application No. 53 of 2021

Satish Sachan ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Dheeraj Kumar Dwivedi, Sri Agni Pal Singh, Sri Lalit Singh Tomar

Counsel for the Respondents:
G.A., Sri Meraj Ahmad Khan

Criminal Law - Code Of Criminal Procedure, 1973 (2 of 1974) - Sections 437 (1) (ii) & 439 - Bail - Special power of High Court regarding Bail to an accused previously convicted - Section 437 (1) (ii) provides that an accused shall not be so released on bail if he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more - however, in view of Second Proviso appended to sub-section (1) of Section 437, Courts are not absolutely barred from granting bail to a person if he had been previously convicted, if the Court is satisfied that it is just and proper so to do for any special reason - Section 439 of the Cr.P.C. confer special powers on High Courts and Session Courts, & is a provision of a special character whereas Section 437 contains a general provision regarding grant of bail in non-bailable offences - a special provision take precedence over and override a general provision of law - provision contained in Section 439 of the Code will take precedence over Section 437 of the Code and the bar contained in Section 437 (1) (ii) of the Code will not limit the special powers of the High Court under Section 439 of the Code (Para 11, 12)

There is a dispute between the parties regarding a piece of agricultural land as both the applicant & informant claim rights in respect of same piece of land - Informant lodged an F.I.R. on 05.10.2020 at 20:36 hrs against applicant, alleging that the applicant assaulted them with sharp-edged weapons, resulting in simple injuries - applicant lodged N.C.R. on 05.10.2020 at 23:38 hrs - accused/applicant also suffered simple injuries in the incident - applicant has a criminal history of six cases, in five cases he has already been acquitted and the appeal filed against the conviction in the sixth case has been admitted and the order of sentence has been suspended by this Court - present case, prima facie appears to be a cross case and it is yet to be ascertained as to who was the aggressor - Bail Application Allowed (Para 19)

Allowed. (E-5)

List of Cases cited:

1. Sanjay Chandra Vs CBI, (2012) 1 SCC 40

2. Dataram Singh Vs St. of U.P., (2018) 3 SCC 22

3. Emperor Vs H. L. Hutchinson AIR 1931 All 356

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Agni Pal Singh, the learned counsel for the applicant, Sri Dinesh Kumar Srivastava, the learned Additional Government Advocate, Sri Meraj Ahmad Khan, the learned counsel for the informant and perused the record.

2. The instant application has been filed seeking release of the applicant on bail in Case Crime No. 481 of 2020, under Sections 147, 148, 149, 307, 452, 324, 504, 506 IPC, Police Station Ghatampur, District

Kanpur Dehat during pendency of the trial in the Court below.

3. The aforesaid case has been registered on the basis of an F.I.R. lodged on 05.10.2020 at 20:36 hours against the applicant - Satish Sachan and three other named accused persons (1) Uttam Tiwari (2) Ravi Sachan and (3) Bauwa Sachan and six unknown persons alleging that all the accused persons had abused the informant's father and uncle and the applicant had assaulted the informant's uncle on the chest with a Barchchi (a sharped edged weapon). It is alleged that co-accused Uttam Tiwari had assaulted on the head of the informant's father with an axe. The medico legal examination report of both the accused persons mentions that both of them had suffered only simple injuries.

4. In the affidavit filed in support of the bail application, it has been stated that the applicant has been falsely implicated in the present case. The incident took place because of a dispute between the parties regarding a piece of agricultural land. The affidavit contains an undertaking that if the applicant is released on bail, he will not misuse the liberty and will not tamper with the evidence.

5. It has further been stated that the applicant is a recorded tenure holder of land bearing Gata No. 242 Kh and the informant and some other persons of his side were ploughing the applicant's field and when the applicant resisted it, they had beaten up the applicant and one Gore Sachan. On the same day i.e. on 05.10.2020, the applicant had lodged a Non Cognizable Report at 23:08 hours against the informantRaja Singh, his father Dinesh Singh and his uncle Sumant Singh complaining about the aforesaid incident. The medico legal examination reports of the applicant and Gore Sachan have been annexed with the affidavit, which indicate that both of them had suffered multiple injuries of simple nature.

6. Although in the affidavit it has been stated that the applicant has no criminal history, but when it was pointed out that this statement is wrong, a supplementary affidavit has been filed on behalf of the applicant, in which the following criminal history of the applicant has been stated: -

(i) Case Crime No. 173 of 2005 under Sections 302/34 IPC, in which the applicant has been acquitted by means of an order dated 25.01.2011 passed by the Trial Court.

(ii) Case Crime No. 214 of 1995, under Section 214/95, in which the applicant has been acquitted by means of an order dated 11.03.2008.

(iii) Case Crime No. 1562 of 2008under Sections 323, 325, 504 IPC, in which the applicant has been acquitted by means of an order dated 01.09.2008.

(iv) The applicant has been convicted in the judgment dated 21-06-2007 passed by the Additional Sessions Judge / Fast Track Court No. 2, Kanpur Nagar in Session Trial No. 1547, 1547A, 1546 and 1546 A of 1990 of offences under Section 307/34, I.P.C. and 25 Arms Act, for which he has been sentenced to imprisonment for 7 years and 3 years respectively and he has challenged the aforesaid judgment and order by filing Criminal Appeal No. 5608 of 2007, which has been admitted by this Court by means of an order dated 14-09-2007 and the execution of sentence has been suspended by this Court.

(v) Case Crime No. 84 of 2008 under Sections 147, 148, 307/149 IPC, in which the applicant has been acquitted by means of a judgment and order dated 25.08.2009 passed by the trial court.

(vi) In case crime No. Nil/1996 under Sections 41/411 I.P.C>, the applicant has been acquitted by means of the judgment and order dated 18-02-2020 passed by the Judicial Magistrate Ghatampur in Case No. 620 of 2009.

Copies of the aforesaid orders have been annexed with the supplementary affidavit.

7. The applicant is languishing in jail since 07.10.2020 whereas co-accused person Uttam Tiwari has been granted bail by means of an order dated 01.02.2021 passed by this Court in Criminal Misc. Bail Application No. 48365 of 2020.

8. Per contra, the learned Additional Government Advocate and Sri Meraj Ahmad Khan, the learned counsel for the informant have opposed the prayer for grant of bail. The learned counsel appearing for the informant has submitted thatthe applicant has already been convicted and he is not entitled to be granted bail in view of the specific provision contained in Section 437 (1) (ii). He has next submitted that the applicant has not approached this Court with clean hands as in Paragraph No. 24 of theaffidavit filed in support of the bail application, it has been stated that the applicant is neither a previous convict nor does he have any criminal history.

9. Section 437 of Crimial Procedure Code provides as follows: -

*"**437. When bail may be taken in case of non-bailable offence.**-- (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought b**efore a Court other than the High Court or Court** of Session, he may be released on bail, but--*

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

* * *

10. It becomes manifest on a bare reading of Section 437, that this provision does not apply to applications seeking bail under Section 439 of the Code filed before the High Court and it even does not apply to the bail applications filed before the Session Court.

11. Moreover, even the Courts to which the provisions of Section 437 apply,

are not absolutely barred from granting bail to a person if he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years, as the Second Proviso appended to sub-section (1) of Section 437 provides that a person referred to in clause (ii) may be released on bail if the Court is satisfied that it is just and proper so to do for any other special reason.

12. The power of the High Court and even the Court of session to grant bail are "special powers' provided under Section 439 of the Code, which provides as follows: -

*"**439. Special powers of High Court or Court of Session regarding bail**.-- (1) A High Court or Court of Session may direct- -*

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice:"

* * *

13. Section 439 of the Code contains a reference to Section 437 thereof only to the extent that if the offence is of the nature specified in sub-section (3) of Section 437, while granting bail to the accused, the High Court or Court of Session may impose any condition which it considers necessary for the purposes mentioned in that sub-section. Section 439 of the Criminal Procedure Code conferring special powers of High Courts and Session Courts, is a provision of a special character whereas Section 437 contains a general provision regarding grant of bail in non-bailable offences. It is a well-established rule of interpretation, that a special provision will take precedence over and override a general provision of law. Therefore, the provision contained in Section 439 of the Code will take precedence over Section 437 of the Code and the bar contained in Section 437 (1) (ii) of the Code will not limit the special powers of the High Court under Section 439 of the Code. I, therefore, reject the submission of counsel for the respondent based on Section 437 of the Code.

14. Now I come to the second objection raised by the learned Counsel for the informant that it has been falsely stated in para 24 of the affidavit filed in support of the bail application that the applicant has no criminal history, which indicates that the applicant has not come before this Court with clean hands and the bail application is liable to be rejected on this ground. In this regard, it has to be noticed that the applicant is languishing in jail since 07.10.2020 and the affidavit has been filed

by one Beena Devi wife of Ravi Shankar, who is a house-wife and who is the sister-in-law of the applicant and she has verified the contents of para 24 of the affidavit to be true on the basis of her personal knowledge. Neither the applicant has signed the affidavit nor has he provided any false information regarding his criminal history to the deponent of the affidavit. Upon the applicant's criminal history being pointed out, his wife has filed a supplementary affidavit mentioning the details of the facts regarding the cases in which the applicant has been implicated and in that supplementary affidavit, it has specifically been averred that the applicant is convicted and that the appeal against the order of conviction has been admitted by this Court and sentence passed against the applicant has been suspended by means of an order dated 14.09.2007 passed in Criminal Appeal No. 5608 of 2007. Therefore, I do not find the second objection of the learned Counsel for the informant to be tenable.

15. The law regarding grant of bail has been explained in numerous decisions of the Hon'ble Supreme Court and it will be apt to refer to a few of those judgments.

16. In **Sanjay Chandra v. CBI**, (2012) 1 SCC 40, the Hon'ble Supreme Court has observed that:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

17. In the case ofDataram Singhv.State of Uttar Pradesh,(2018) 3 SCC 22, the Hon'ble Supreme Court was pleased to reiterate the law of bail in the following words:--

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until

found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

** *

5. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in Nikesh Tarachand Shah v. Union of India[(2018) 11 SCC 1] going back to the days of the Magna Carta. In that decision, reference was made toGurbaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565] in which it is observed that it was held way back inNagendra v. King-Emperor [AIR 1924 Cal 476] that bail is not to be withheld as a punishment. Reference was also made toEmperorv.Hutchinson[AIR 1931 All 356] wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days."

18. In **Emperor v. H. L. Hutchinson** AIR 1931 All 356, this Court had held that an accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

19. Having considered the submissions made by the learned Counsel for the parties in light of the law explained in the above referred judgments and gone through the record, I find the following factors to be relevant for deciding the application for grant of bail to the applicant: -

(i) The applicant claims himself to be a recorded tenure holder of a certain piece of land and the incident took place because the informant and some other persons of his side also claim rights in respect of the same land;

(ii) The applicant had lodged a Non Cognizable Report of the incident promptly on the same day i.e. on 05.10.2020, at 23:08 hours against the informantRaja Singh, his father Dinesh Singh and his uncle Sumant Singh complaining about the incident;

(iii) The medico legal examination reports of the applicant and Gore Sachan indicate that both of them had suffered injuries in the incident;

(iv) The present case prima facie appears to be a cross case and it is yet to be ascertained as to who was the aggressor;

(v) The F.I.R., alleges assaults made by sharp edged weapons by the applicant as by the co-accused Uttam Tiwari and the assaults made by both of them are said to have resulted in simple injuries to two brothers, and the co-accused Uttam Tiwari has already been granted bail by means of

an order dated 01.02.2021 and the case set up against the applicant is similar to that set up against the co-accused Uttam Tiwari;

(vi) Although the applicant has a criminal history of six cases, in five cases he has already been acquitted and the appeal filed by the applicant against the conviction in the sixth case has been admitted by this Court and the order of sentence has been suspended by this Court;

(vii) The affidavit filed in support of the bail application contains an undertaking that if the applicant is released on bail, he will not misuse the liberty and will not tamper with the evidence and nothing has been said in the counter affidavit so as to raise a reasonable doubt against this undertaking ;

(viii) As the applicant is claiming title to the land which appears to be the root cause of the incident, there appears to be no reasonable probability of his absconding, in case he is released on bail.

20. In light of the preceding discussion and without making any observation on the merits of the case, the instant bail application is **allowed.**

21. Let the applicant **Satish Sachan** be released on bail in Case Crime No. 481 of 2020, under Sections 147, 148, 149, 307, 452, 324, 504, 506 IPC, Police Station Ghatampur, District Kanpur Dehat on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below, subject to the following conditions:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

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

22. In case of breach of any of the above condition, the prosecution shall be at liberty to move an application before this Court seeking cancellation of the bail.

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 53 of 2021

Applicant :- Satish Sachan

Opposite Party :- State of U.P.

Counsel for Applicant :- Dheeraj Kumar Dwivedi,Agni Pal Singh,Lalit Singh Tomar

Counsel for Opposite Party :- G.A.,Meraj Ahmad Khan

Hon'ble Subhash Vidyarthi,J.

Order on the Correction Application

The learned counsel for the applicant is permitted to correct the prayer as well as the memo of the bail application.

The correction application is allowed.

The words 'Kanpur Nagar' be substituted in place of words ' Kanpur Dehat' in the second paragraph and twenty first paragraph of the order dated 12-09-2022.

This order shall be treated as part of the order dated 12-09-2022 and the earlier order passed by the Court has been corrected accordingly. A certified copy of this order shall be issued along with the copy of the order dated 12-09-2022.

(2022) 9 ILRA 1277
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Bail Cancellation Appl. No. 463 of 2021

Shefali Kaul ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Ms. Katyayini, Sri Pankaj Shukla

Counsel for the Opp. Parties:
G.A., Anuj Srivastava, Sri Syed Imran Ibrahim

Criminal Law - Code Of Criminal Procedure, 1973 (2 of 1974) - Section 439 (2) - Bail Cancellation - High Court power to entertain an application for cancellation of bail is not taken away merely because of pendency of an application u/s 482 Cr.P.C. challenging an order passed by the Sessions Judge holding that the bail cancellation application ought to be filed before the Magistrate (Para 9)

Bail order was passed keeping in view the fact that the accused persons and the informant had entered into a settlement as per which the accused persons paid Rs. 40 lacs to the informant, in part performance of the settlement and they issued post dated cheques of the balance amount to the informant - accused persons categorically stated before court that they would follow the terms of settlement - bail cancellation application filed as the cheques which had been given by the accused persons were dishonored for the reason that payment had been stopped by the drawer Held - accused persons' subsequent conduct in issuing instructions to their bank for stopping payment of the cheques amounts to the accused persons resiling from the conditions which formed the basis of the bail order - subsequent conduct of the opposite party in trying to go to Bahrain and threatening the informant, is a clear violation of the conditions incorporated in the bail order that the accused persons will not go outside the boundaries of the country and they will not influence the witnesses - Accused respondents, bail cancelled they were directed to surrender before the Court concerned (para 15, 16, 18)

Allowed. (E-5)

List of Cases cited:

1. Sanjay Chandra Vs CBI, (2012) 1 SCC 40

2. Satender Kumar Antil Vs Central Bureau of Investigation 2022 Scc OnLine SC 825

3. Emperor Vs H. L. Hutchinson AIR 1931 All 356

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Ms. Katyayni and Sri Pankaj Shukla, the learned counsel for the applicant, Sri Dinesh Kumar Srivastava, the learned Additional Government Advocate, Sri Syed Imran Ibrahim, the learned counsel for the accused - respondents and perused the record.

2. The present application has been filed seeking cancellation of the order dated 21.10.2020 passed by the learned Additional Sessions Judge, Court No.1, Mathura in Bail Application No. 2832 of 2020 whereby the accused ? respondent nos. 2 to 7 have been granted bail in Case Crime No.312 of 2020, under Sections 406, 420, 467, 468, 120-B IPC, Police Station-Nauhjheel, District Mathura.

3. The aforesaid order states that the accused persons were produced before the Court from jail and they had given an application stating that they had taken the money in question from the applicant in the year 2016; that they had entered into a settlement / MOU with the informant; that

they had paid a sum of Rs. 40 lacs only to the informant in part performance of the settlement and they had issued post dated cheques to the informant in respect of the balance amount and they further stated that they would follow the terms of the settlement. The order further records that the informant also gave an application stating that she was satisfied with the settlement made by the applicants and the cheques given by them and she had no objection to the bail being granted. The Court further recorded that a perusal of the documents indicated that the accused persons had issued a promissory note stating that ten cheques have been issued to the informant and a compromise has been arrived, a settlement has been entered into between the parties and the MOU had been executed and the accused persons stated that they would follow the terms of the MOU. The Court further recorded that the informant had also filed an application stating that she was satisfied by the promise made by the applicant and she had no objection against grant of bail to the accused person.

4. After noting the aforesaid facts, the learned Additional Sessions Judge observed that keeping in view the facts and circumstances of the case and without going into merits of the case, there was sufficient ground for granting bail to the applicant. After the aforesaid narration and discussion, the Court proceeded to write the operative portion of the order stating that the applicants be released on bail on furnishing a personal bond of Rs. 02 lacs and two sureties of the same amount and an undertaking be obtained from them that during trial they will not go outside the boundaries of the country, they will not influence the witnesses and will remain present in the Court.

5. On 24.12.2021, the present application has been filed seeking cancellation of the order dated 21.10.2020. In the affidavit filed in support of the bail application, it has been stated that the accused persons have not complied with the conditions mentioned in the order passed by the court below, as the cheques which had been given by the accused persons were presented to the bank and same were dishonored for the reason that payment had been stopped by the drawer.

6. On the aforesaid allegations, the applicant filed an application before the learned Additional Sessions Judge, Court No.1, Mathura praying for cancellation of the bail granted to the accused persons. However, the aforesaid application has been rejected by means of an order dated 08.09.2021 holding that the offences with which the accused persons have been charged, are all triable by a Magistrate and the trial was not pending before the Sessions Court. The Court further held that the only conditions imposed in the bail order were that the accused persons will not go outside the boundaries of the country, they will not influence the witnesses and they will remain present on the dates fixed in the trial. The court held that the conditions imposed in the bail order are not related to the Court of Sessions but are related to the Court of Magistrate and, therefore, the application for cancellation of bail on the ground of non compliance with the conditions would lie before the concerned court.

7. At the outset, Sri Ibrahim, the learned counsel for the accused - respondents has raised a preliminary objection that the applicant has challenged the aforesaid order by means of filing an application under Section 482 Cr.P.C. No.

20896 of 2021 before this Court, which is still pending. During pendency of the aforesaid application, the applicant has filed the present application for cancellation of the bail and, therefore, the present application seeking cancellation of bail is not maintainable.

8. Refuting the aforesaid submission, the learned counsel for the applicant has submitted that in view of the provision contained in Section 439 (2) Cr.P.C., only a High Court or a Court of Sessions may direct that any person who has been released on bail, be arrested and be taken into custody and a Magistrate does not have jurisdiction to entertain such an application. He has submitted that the application under Section 482 Cr.P.C. has been filed only against the direction given by the Learned Additional Sessions Judge in the order dated 08.09.2021 to the effect that the application for cancellation of bail would lie before the Magistrate.

9. Having considered the aforesaid submissions, and keeping in view the provision contained in Section 439 (2) Cr.P.C., I am of the view that this Court has power to entertain the application for cancellation of bail and this power is not taken away merely because of pendency of an application under Section 482 Cr.P.C. challenging the order dated 08.09.2021 passed by the Sessions Judge holding that the application ought to be filed before the Magistrate. Therefore, I find no force in the preliminary objection raised by the learned counsel for the accused - respondents and the same is turned down.

10. The learned counsel for the applicant has submitted that the order dated 21.10.2020 granting bail to the accused - respondents had been passed without going into the merits of the application, merely taking into consideration the application filed by the accused - respondents stating that they have entered into a settlement with the informant; that they have already paid Rs. 40 lacs to her and they have issued post dated cheques in respect of the balance amount and also keeping in view the fact that the informant had filed an application stating that she was satisfied with the promise made by the applicants and by the cheques given by them. The accused ? respondents have violated the aforesaid settlement by issuing a direction to the Bank to stop payment of the cheques given under the settlement and, therefore, the order dated 21.10.2020 is liable to be cancelled.

11. Per contra, the learned counsel for the accused - respondents has submitted that the bail order was passed only subject to the conditions that the applicant will furnish a personal bond of Rs. 02 lacs and two sureties of the like amount; that they will not leave the country and and that they will not influence the witnesses and also they will appear before the Trial Court on the date fixed. He has further submitted that there is no allegation that the accused persons have violated any of the conditions imposed on the applicant in the bail order. He has submitted that it was not a condition of bail that the accused persons will pay the balance amount of the settlement, regarding which they had issued cheques to the informant.

12. It is a fundamental principle of law that any document, be it a statute, a judgment or order of the Court, a pleading, a contract, has to be read as a whole and an order passed by a Court cannot be read in a piece - meal manner by picking up a passage and reading it by isolating it from

the other part, which forms the foundation of passing the order.

13. The order dated 21.10.2020 contains a narration that the accused persons had filed an application stating that they had entered into a settlement with the informant, they had paid Rs. 40 lacs to the informant as part of the settlement amount and they have issued post dated cheques for the balance amount and they have stated that they would follow the terms of the settlement. The informant has also filed an application expressing her satisfaction with the terms of settlement and the Court has passed an order for granting bail to the to the accused respondents keeping in view the aforesaid facts and circumstances. It cannot be said that the terms of the MOU are not relevant for deciding the application for cancellation of bail on the ground that its terms had not been incorporated in the operative part of the bail order. In fact, the terms of the settlement / MOU form the basis of the order dated 21.10.2020.

14. In the rejoinder affidavit filed on behalf of the applicant, it has been stated that although a condition has been imposed in the bail order that the accused persons will not leave the country during pendency of the trial, the opposite party no.7 tried to flee the country. He was trying to depart to Bahrain from Indira Gandhi International Airport, New Delhi by Flight No. AL-939 on 22.01.2021 and an intimation to this effect has been sent to the applicant by the immigration department through an SMS, a print out whereof has been annexed as annexure no. RA-1 to the rejoinder affidavit. It has further been stated in the rejoinder affidavit that the opposite party no.7 has assaulted the applicant for threatening him for not pursuant the case and an FIR bearing Case Crime No. 1054 of 2021 has been lodged by the informant in Police Station-Phase-3, District Gautam Budh Nagar in this regard, a copy whereof has been annexed as annexure no. RA-2. The learned counsel for the applicant has stated that accused ? respondent nos. 6 and 7 have been arrested in pursuance of Case Crime No. 1054 of 2021.

15. Having considered the aforesaid facts and circumstances, I am of the view that the order dated 21.10.2020 was passed keeping in view the fact that the accused persons and the informant had entered into a settlement as per which the accused persons had paid Rs. 40 lacs to the informant and they had issued cheques or payment of the balance amount, and the accused persons had categorically stated that they would follow the terms of settlement. The accused persons' subsequent conduct in issuing instructions to their bank for stopping payment of the cheques amounts to the accused persons resiling from the conditions which formed the basis of the order dated 21.10.2020. Moreover the subsequent conduct of the opposite party no.2 in trying to go to Bahrain and the conduct of the accused persons in threatening the informant, is a clear violation of the conditions incorporated in the order dated 21.10.2020 that the accused persons will not go outside the boundaries of the country and they will not influence the witnesses.The aforesaid conduct of the accused persons subsequent to grant of bail to them shows that they have shown least regard to the process of law, which makes this an exceptional case warranting cancellation of the bail order dated 21.10.2022 passed by the Sessions Court.

16. In view of the aforesaid discussion, I find it to be a fit case for

exercising the powers of this Court under Section 439 (2) of the Code of Criminal Procedure to cancel the order dated 21.10.2020 and I direct that the accused respondents, who had been released on bail by means of the order dated 21.10.2020 passed by the Additional Sessions Judge, Court No. 01, Mathura in Bail Application No. 2832 of 2020 be arrested and committed to custody.

17. The learned counsel for the applicant states that the accused respondents no. 6 and 7 have already been arrested in connection with Case Crime No. 1054 of 2021.

18. The other accused ? respondents no. 2 to 5 are directed to surrender before the Court concerned within a period of three weeks from today failing which the court below shall take steps to ensure the compliance of the orders.

(2022) 9 ILRA 1281
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Bail Appl. No. 47278 of 2021

Pawan Kumar Verma ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Shishir Tandon, Sri Gopal Swaroop Chaturvedi(Sr. Adv.)

Counsel for the Respondents:
G.A., Sri Krishna Mohan Garg, Sri Rajesh Gupta, Sri Rajeev Sawhney

Criminal Law - Code Of Criminal Procedure, 1973 (2 of 1974) - Section 439 - Bail - Both the accused and the informant were claiming ownership of an immovable property, regarding which there was a civil litigation pending between the parties - Although several photographs taken from the C.C.T.V. footage was annexed with counter affidavit, but there was no photograph from which it can be inferred that the applicant assaulted the injured persons - present case arose out of a sudden quarrel and scuffle - applicant assaulted the injured persons with a saw and screw driver, which are not regular weapons of assault - it indicates that the applicant did not have any intention to cause the incident - all the injuries suffered by the injured persons were simple in nature, except two injuries - Accused/applicant & his son also suffered injuries in the incident, but none of the prosecution witnesses mentioned these injuries in their statements to the police, which prima-facie indicates that they are not truthful witnesses and are not reliable - On affidavit under taking was given that in case the applicant is granted bail, he will not abscond and he will abide by all the conditions imposed on him by the Court - State or the informant did not presented any facts or circumstances that would suggest that the accused/applicant would abscond or not appear for trial if released on bail - Given these factors, the court granted bail to the accused.

Allowed. (E-5)

List of Cases cited:

1. Sanjay Chandra Vs CBI, (2012) 1 SCC 40

2. Satender Kumar Antil Vs Central Bureau of Investigation 2022 Scc OnLine SC 825

3. Emperor Vs H. L. Hutchinson AIR 1931 All 356

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Gopal Swaroop Chaturvedi, Senior Advocate, assisted by

Sri Shishir Tandon Advocate, the learned counsel for the applicant, Sri Dinesh Kumar Srivastava Advocate, the learned AGA for the State, Sri Rajeev Sawhney Advocate, the learned counsel for the informant and perused the record.

2. The instant application has been filed by the applicant seeking his release on bail in Case Crime No.41 of 2021, under Sections 307, 436, 325, I.P.C. and Section 7 of the Criminal Law Amendment Act, Police Station Pheel Khana, District Kanpur Nagar.

3. The aforesaid case has been registered on the basis of an F.I.R. lodged by the informant Ashish Kumar Jain on 21.07.2021 at 14.44 hours against the applicant Pawan Kumar Verma and his son Anand Verma, alleging that both the accused persons had assaulted the informant's nephews Tarun Jain and Rahul Jain on the same day at 10.30 a.m. with sharp edged weapons with intention to kill them and the accused persons also tried to put their house on fire. The FIR further states that the nephews of the informant were admitted to a hospital by the police.

4. The injury report of Tarun Jain annexed with the affidavit filed in support of the bail application mentions six incised wounds and an abrasion. Five injuries were kept under observation and the injured was referred for C.T. Examination. Injury no.4 was found to have been caused with a hard & blunt object, whereas the other injuries were reported to have been caused by a sharp object. Injury no.6 was an incised would of size 0.3 X 0.3 X 1.0 C.M. in the chest cavity.

5. The injury report of Rahul Jain mentions a lacerated wound on left side of his forehead, a contused swelling, three incised wounds and an abrasion and the doctor has opined that injuries nos.1, 3, 4, & 5 were caused by some sharp object and the injuries nos.2 & 6 were simple in nature, caused by some hard and blunt object.

6. Supplementary medical examination report of the injured Tarun Jain issued by Madhuraj Hospital on 21.07.2021 mentions that he had undergone a surgical operation on 17.07.2021 and the doctor reported that injuries nos.1 & 2 were dangerous to life.

7. In the affidavit filed in support of the bail application it has been stated that the applicant's son Anand Verma, who is the co-accused in the present case, has purchased a property from a relative of the informant; that Rahul Jain and Tarun Jain have filed Suit No.639 of 2016, in the court of Civil Judge (Senior Division), Kanpur Nagar for seeking a declaration that the sale deed executed in favour of the co-accused is null and void and they also sought a perpetual injunction. It has further stated in the affidavit that a reply has been filed in the aforesaid suit and the trial court has rejected the application for temporary injunction by means of an order dated 28.07.2021; that the aforesaid order dated 28.07.2021 was challenged before this Court by filing F.A.F.O. No. 3321 of 2021 and on 18.05.2018 this Court has passed an order admitting the appeal and directing the parties to maintain status-quo with regard to the suit property.

8. It has further been stated in the affidavit that the applicant was in possession of the property in question and being aggrieved against this, Tarun Jain and Rahul Jain and some other co-accused

persons had attacked the applicant's son Anand Verma on 21.07.2021 at 9.30 a.m. when he was cleaning his shop; that hearing his hue and cry the applicant reached their and tried to save him upon which Tarun Jain and Rahul Jain and some other persons caused injuries to the applicant and his son Anand Verma; that the injuries of the applicant and his son were examined in the KPM Hospital, Kanpur Nagar on 21.07.2021 itself.

9. The injury report of the applicant's son Anand Verma states that he was examined on 21.07.2021 at 12.25 P.M. and multiple abrasions in an area of 13 cm. X 6 cm. on the left side of his chest; multiple abrasion in an area of 18 cm. X 10 cm. on the right side of the neck and shoulder of the applicant, a contusion of the size 6 cm. X 2 cm. on the right side of his chest were found on his body and all the injuries suffered by the injured were found to be simple in nature. The applicant's son Anand Verma (co-accused) was examined in the same hospital on 21.07.2021 at 12.50 p.m. and a lacerated wound of size of 1.5 cm. X 4.3 cm. on the left side of parietal region, a lacerated wound of size 1.0 cm. X 0.5 cm. over the left ring figure was found on his body and all the injuries were found to be simple in nature.

10. The affidavit also contains a narration that when the applicant tried to lodge a first information report of the incident, the police did not accept his report and rather it arrested the applicant and his son on the date of the incident itself. On 24.09.2021, the applicant's daughter Vandana Verma has filed an application under section 156 (3) Cr.P.C. before the Metropolitan Magistrate, Court No. 10 Kanpur Nagar, which application is still pending.

11. It has been contended in the affidavit that since the applicant is already in possession of the property in question, he did not have any motive to committee the offence; that the applicant is aged about 65 years; that it has been alleged that the applicant and his son had assaulted the injured persons with a saw and screw driver, which are not regular weapons of assault and it indicates that the applicant and his son were not having any intention to cause the incident.

12. In para-33 of the affidavit filed in support of the bail application, the applicant's criminal history of three cases has been disclosed -(i) in Case Crime No. 26 of 2015, under Sections 332, 333, 504, IPC, Police Station Moolganj, District Kanpur Nagar, the applicant has been granted bail by means of an order dated 24.02.2015, passed by the Metropolitan Magistrate, Court No. 5, Kanpur Nagar; (ii) in Case Crime No. 24C of 2004, under Sections 420, 427, 458, 506, IPC, Police Station Kotwali, District Kanpur Nagar, the applicant has been acquitted of the charges leveled against him, by means of judgment and order dated 24.01.2009, passed by the Metropolitan Magistrate, Court No. 4, Kanpur Nagar and (iii) in Case Crime No. 24 A of 2008, under Sections 307, 326 323, 504, 506, IPC, Police Station Moolganj, District Kanpur Nagar, the applicant has been granted bail by means of an order dated 17.06.2022, passed by the Additional Sessions Judge, Court No. 1, Kanpur Nagar.

13. It has been asserted in the affidavit that the applicant is innocent and he has been falsely implicated in the present and he is languishing in jail since 21.07.2021. The affidavit contains a categorical under taking that in case the

applicant is granted bail, he will not abscond and he will abide by all the conditions imposed on him by this Court.

14. A copy of the recovery memo filed alongwith the affidavit filed in support of the bail application mentions that the applicant's son had confessed that he had made assault with a saw used to cut iron and plastic and the applicant is alleged to have confessed that he had assaulted with a screw driver which is normally used to break ice. Both of them are alleged to have stated that they had thrown away the weapons in an open space in front of their house and both the weapons were recovered on their pointing out.

15. The injured Rahul Jain has filed a counter affidavit stating that a civil dispute is going on between the parties regarding the house in question and as the applicant could not get possession of the property in dispute, he lodged an FIR dated 23.04.2016 against the seller Rajesh Jain and Brijesh Jain, which is registered as Case Crime No. 66 of 2016, under Sections 420, 427, 468, 471, 406, 504, 506, IPC, in Police Station Feelkhana, District Kanpur Nagar. The counter affidavit further alleges that as the applicant and his son could not take possession of the property in dispute, they attacked Rahul Jain and Tarun Jain with a screw driver and a saw, causing serious injury to both of them and they also set the shop of Rahul Jain and Tarun Jain on fire after pouring petrol on the goods of the shop.

16. It has further been stated in the counter affidavit that the footage of a C.C.T.V. Camera shows that the applicant and his son had poured petrol on the goods of the shop and set it on fire. Several photographs have been annexed with the counter affidavit and it has been contended that the same show the applicant and his son pouring petrol on the goods of the shop of the victim and putting the same on fire. Several photograph of the injured Tarun Jain have also been annexed with the counter affidavit.

17. The State has also filed a counter affidavit stating that in the statements of the injured Tarun Jain and Rahul Jain recorded under Section 161 Cr.P.C., they have supported the FIR version and that during investigation, statements of several witnesses have been recorded and all of them have supported the prosecution version.

18. On 12.05.2022, this Court had passed an order directing the learned AGA to produce the photographs taken from the C.C.T.V. Footage of the alleged and the State has filed a compliance affidavit annexing there with copies of the photographs, which have already been annexed alongwith the counter affidavit filed on behalf of the informant.

19. Sri Gopal Swaroop Chaturvedi, the learned Senior Advocate appearing for the applicant, has submitted that the FIR alleges that the applicant and his son had assaulted the nephews of the informant with sharp edged weapon but it has not been specified as to which weapon was used by the applicant and, therefore, the FIR allegations are vague.

20. Sri Chaturvedi next submitted that all the injuries suffered by the injured persons are simple in nature, except two injuries suffered by Tarun Jain in his chest region, which could be dangerous to life. He has further submitted that the applicant and his son have also suffered several

injuries in the incident and their medico legal examination conducted on the same day in the same hospital promptly, at 12:25 and 12:50 p.m., indicates that no unnecessary time was lost in getting the medico legal examination of the applicant and his son conducted, so as to leave any probability to assume that the injuries could have been manufactured during the intervening period.

21. Sri Chaturvedi has also submitted that the applicant also tried to lodge an FIR of the incident, but the police acting hand in gloves with the family of the injured persons, he did not lodge their FIR and the applicant and his son both were taken into custody on 21.07.2021 and thereafter the applicant's daughter Vandana Verma has filed an application under section 156(3) Cr.P.C., which is still pending.

22. Sri Chaturvedi has further contended that although several witnesses, including both the injured persons and the informant have been examined by the police during investigation, none of them stated anything which may explain the injuries suffered by the applicant and his son, which indicates that the witnesses are hiding some relevant and material facts about the incident and they are not truthful witnesses and are not reliable.

23. The learned Senior Counsel for the applicant has submitted that the present case arises out of a sudden quarrel and scuffle, in which the weapons allegedly used were a screw driver and a saw and no regular weapon of assault was used and also keeping in view of the facts that except the two injuries suffered by the injured Tarun Jain, both the nephews of the informant as well as the applicant and his son have suffered numerous injuries.

24. Refuting the aforesaid submissions Sri Rajeev Sawhney, the learned counsel for the informant has submitted that all the witnesses examined during the investigation have fully supported the prosecution case, and there are no inconsistencies in their statements. He has submitted that both the injured persons Rahul Jain and Tarun Jain have suffered seven injuries, each, and Tarun Jain had to remain admitted to a hospital for 28 days and he had to undergo a surgical operation.

25. Sri Sawhney has submitted that this is actually not a cross case, in this case the applicant and his son were the aggressors and they had assaulted the informant's nephews, causing serious injuries to them and thereafter an application under section 156(3) Cr.P.C. has been filed on 24.09.2021 i.e. after more than two months. He has referred to a photocopy of a report submitted by the police to the Metropolitan Magistrate, Kanpur Nagar, stating that no application in this regard has been submitted in the police station and on the strength of the aforesaid report he has submitted that the application under section 156(3) Cr.P.C. has been filed on false assertions and since its filing, it is not being pursued, which indicates that there is no force in the application.

26. The learned counsel for the informant has further submitted that several civil disputes are going on between the parties and the applicant has filed a FIR against the seller, alleging that they did not handover possession of the property in dispute to the applicant, which indicates that the applicant had a motive to commit the offense. He has submitted that a screw driver and a saw were used by the applicant and his son deliberately in order to give it a

pretense of a sudden dispute. He has also submitted that the injuries shown on the body of the applicant and his son are manufactured injuries.

27. The learned counsel for the informant has next submitted that in the present case the applicant and his son are the aggressors and even if the injured persons have caused some injuries to them while exercising their right of self defense, the case cannot be labeled as a cross case.

28. I have given a thoughtful consideration to the rival submissions made on behalf of the learned counsel for the parties.

29. The FIR lodged in the present case alleges that the applicant and his son had made the assault with some unspecified "sharp edged weapon'. There is no allegation in the FIR or in the statements recorded under Section 161 Cr.P.C. that any hard and blunt object was used by the applicant and his son. However, Dr. D. K. Srivastava, Emergency Medical Hospital, KPN Hospital, has stated that the injury at sl. no. 4 was found to have been caused by a hard and blunt, for which there is absolutely no explanation in the prosecution case.

30. Moreover, the applicant and his son both have suffered injuries in the incident, which is established by their medico-legal examination, which was conducted promptly and none of the persons examined by the police have made any whisper about the injuries suffered by the applicant and his son, which prima-facie indicates that they have not come up with complete truth about the incident.

31. The learned counsel for the informant has made very elaborate submissions regarding the civil dispute going on between the parties. The background of civil dispute, in my opinion, has no bearing for considering the bail application of the applicant, as the parameters for considering an application for bail are totally different. Neither the civil rights are to be adjudicated by this Court while deciding an application for bail nor is the Court required to record a finding of innocence or guilt of the accused while deciding the bail application. Although several photographs have been annexed with the counter affidavit, claiming that those have been taken from the C.C.T.V. Footage in which the incident has been recorded, there is no photograph from which it can be inferred that the applicant and his son had assaulted the informant's nephews.

32. In **Satender Kumar Antil versus Central Bureau of Investigation** 2022 Scc OnLine SC 825, the Supreme Court has reiterated that: -

"11.The principle that bail is the rule and jail is the exception has been well recognised through the repetitive pronouncements of this Court."

33. The Supreme Court referred to a decision of this Court in **Emperorv.H. L. Hutchinson**AIR 1931 All 356 in which it was said that an accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

34. In**Sanjay Chandrav.CBI**,(2012) 1 SCC 40, the Hon'ble Supreme Court has observed that:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bailis to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bailis neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not loose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refusebail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refusebailto an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

35. Examining the farts of the present case in light of the law laid down in the aforesaid cases, we find that the accused is claiming ownership to the immovable property in question, regarding which civil litigation is also going on between the parties and no such facts and circumstances have been placed by the state or the informant which may give rise to a reasonable apprehension that in case the accused is released on bail, he would abscond and not he will not make himself available to face the trial.

36. Having considered the aforesaid facts and submissions and keeping in view the fact that no regular weapon is alleged to have been used in the present incident; that the medico-legal examination report of both the injured persons mentioned that the injuries suffered had been caused by a sharp object and by some hard and blunt object, and there is no allegation in the F.I.R. that any of the accused persons had used a hard and blunt object and even in the statements recorded under section 161 Cr.P.C. there is no allegation of any had and blunt object having been used by any of the accused persons; that the applicant and his son have also suffered injuries in the incident; that none of the persons giving statement before the police has made any whisper about the injuries suffered by the applicant and his son; that prima-facie at this stage it appears that those persons have not placed the complete and correct facts in their statement given before the police and also keeping in view of the facts that the applicant is languishing in jail since 27.07.2021, I am of the view that the applicant is entitled to be released on bail pending conclusion of the trial. The bail application is accordingly allowed.

37. Let the applicant - **Pawan Kumar Verma,** be released on bail in Case Crime

No. 41 of 2021, under Sections 307, 436, 325, I.P.C. and Section 7 of the Criminal Law Amendment Act, Police Station Feel Khana, District Kanpur Nagar, on his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned subject to following conditions:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the dates fixed, unless personal presence is exempted.

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

38. In case of breach of any of the above condition, the prosecution shall be at liberty to move an application bail before this Court seeking cancellation of bail.

(2022) 9 ILRA 1288
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 33 of 2020

Hakimuddin ...Appellant

Versus

State of U.P. ...Opp. Party

Counsel for the Appellant:
From Jail, Sri Vishesh Kumar (A.C.), Sri Ashish Kumar Gupta

Counsel for the Respondents:
A.G.A.

Criminal Law - Indian Penal Code, 1860 - Section 304-Appellant not mentally fit-undergoing treatment-fight between the deceased and the Appellant-he hit her and the deceased fell down-died-life sentence is excessive-offence on part of accused is not of murder-culpable homicide not amounting to murder-he assaulted in a heated St.-not in a fit mental St.-hit by spade-common in all agricultural households-no premeditation or intent-Life sentence substituted to sentence already undergone.

Appeal allowed in part. (E-9)

List of Cases cited:

1. Madhavan & ors. Vs St. of T. N., reported in (2017) 15 SCC 582

2. Gurmukh Singh Vs St. of Har. , reported in (2019) 15 SCC 635

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This jail appeal arises out of judgment and order dated 26.2.2011, passed by Additional Sessions Judge/Special Judge, Chandauli, in Sessions Trial No.84 of 2007 (State Vs. Hakimuddin), arising out of Case Crime No.221 of 2006, Police Station Mughalsarai, District Chandauli, convicting and sentencing the appellant under Section 304 IPC with life imprisonment and fine of Rs.10,000/- and in the event of default of payment of fine to undergo further additional rigorous imprisonment of two years.

2. Shorn of unnecessary details, the brief facts of the present case are that a

written report of first informant Jamaluddin (father-in-law of the deceased) was scribed by Anil Kumar Srivastava, as per which the marriage of son of first informant Hakimuddin (accused appellant) was solemnized about 08 years back with Yasmeen Bano, daughter of Mustaq Ahmed (deceased). Out of said wedlock two children were born. Son of the informant however was not in fit mental state and his treatment was being arranged by the first informant and the in-laws of the accused appellant. In the night of 22/23rd July, 2006 at 3.30 am there was a fight between son of the first informant and his daughter-in-law and abuses were heard whereafter the first informant rushed to intervene. All of a sudden, the son of the first informant hit his wife and from the injury so caused she fell. The accused appellant left. First informant called the neighbours and was in the process of arranging medical treatment by when his daughter-in-law died. On the basis of such information given, a first information report was registered at 8.30 am at Police Station Mughalsarai, District Chandauli on 23.7.2006. The place of incident is stated to be the marital house of the deceased.

3. On the basis of aforesaid information the Investigating Officer alongwith police party came to the place of occurrence and a panchayatnama was prepared at 9.40 am. Kamlesh Kanaujia PW-3, Mustaq Ahmed PW-4, Mohd. Naseem, Buddhu and Mahmood Alam were appointed the inquest witnesses. They found the deceased to be average built lady of 28 years and in their opinion her death was homicidal on account of injury caused to her by the accused appellant in a heated state on her head and that postmortem of the dead body be got conducted. The Investigating Officer agreed with the conclusion of the inquest witnesses and accordingly the dead body was sealed and was sent for postmortem.

4. The postmortem report is on record, as per which cause of death is Coma as a result of following head and brain injuries:-

"(1) An incised wound 9.00 cm x 0.5 cm x skin and muscle deep on left side of in front of neck, 8.00 cm above sternal notch and touching to midline.

(2) Abraded contusion 6.00 cm x 1.00 cm on right side in front of neck, 8.00 cm above sternal notch touching to midline.

(3) An incised chaped wound 9.00 cm x 0.5 cm x skull deep on left side of head, 6.00 cm above the left ear and 6.00 cm above left eye brow.

(4) On opening the skull:-

(a) A contusion 12.00 cm x 4.00 cm on head, 10.00 cm above the root of nose.

(b) Contusion 11.00 cm x 4.00 cm on left side head in parietal region, 8.00 cm above and behind the left ear."

5. The investigation revealed that head injury was caused to deceased by a Spade and the weapon of assault was also recovered on 12.8.2006 from the backyard of the accused's house, in respect of which a recovery memo (Ext. Ka-2) was prepared. The Spade was sent for chemical examination and the report of Chemical Examiner dated 23.7.2006 is also exhibited in which the blood found on the Spade was of the same group as that of the deceased. The investigation proceeded in the matter and after recording statement of witnesses under Section 161 Cr.P.C. the Investigating Officer filed a chargesheet against accused appellant on 8.11.2006. The concerned Magistrate took cognizance of the chargesheet and as offence was triable by

the court of Sessions committed the matter to the competent Court.

6. The court of Sessions framed solitary charge against the accused appellant under Section 304 IPC after noticing that the accused is not in fit mental state and in a heated state had assaulted the deceased and thereby has committed culpable homicide not amounting to murder, which is punishable under Section 304 IPC. The charge was read out to the accused, who denied it and demanded trial.

7. The prosecution in order to establish the charge has produced the first informant Jamaluddin (PW-1); Alauddin (PW-2) a witness to the recovery of weapon of assault; PW-3 Kamlesh Kanaujia, village pradhan and witness of inquest; PW-4 Mushtaq Ahmed, father of the deceased and witness of the inquest; PW-5 Ravi Kumar, witness to the recovery of weapon of assault; PW-6 Asgari Begum, mother of the deceased. The defence since had admitted the genuineness of police papers during the course of trial, as such none was adduced by the prosecution to establish such documents.

8. PW-1 Jamaluddin is aged 70 years, who had solemnized the marriage of deceased with his son (accused appellant) about 10 years back. He has stated that mental condition of his son was unstable for the last 3-4 years. PW-1 deposed that he was sleeping outside his house in Mandai and that the appellant had left the house 10-15 days prior to the incident. In his cross-examination he has stated that his eyesight is weak and that the villagers obtained his signatures on the blank paper for writing the written report and that he had not seen the appellant assaulting the deceased. He has reiterated that appellant was not present at the place of occurrence when the incident itself occurred. It is also stated that he had not gone to police station to lodge the report and cannot recognize his signatures on the written report. He further stated that the room in which dead body was found was locked from inside and it was opened with the help of others. He has further denied having given statement to the police of having seen any injury on the body of the deceased.

9. PW-2 is the witness of recovery of weapon of assault, who has turned hostile during the course of trial. Similarly PW-3, who is a witness of inquest has also turned hostile. PW-4 is the father of the deceased, who has deposed that his daughter got married to accused appellant and two children namely Azam aged 05 years and Ativa aged two years were born and that he received the information of the incident on Phone. He has further specifically stated that PW-1 informed him that it was the appellant who killed the deceased.

10. In the cross-examination PW-4 admitted that accused appellant was not in fit mental state and was undergoing medical treatment during the last six months. He has further stated that medical treatment was being provided to him by him and also by PW-1. He has specifically denied that the appellant was not in house from 8-10 days prior to the incident. He has also denied the suggestion that anyone else had committed the offence.

11. PW-5 is the witness of recovery of weapon of assault, who has denied the recovery of Spade and has stated that his signatures were obtained on blank papers.

12. PW-6 is the mother of the deceased, who has stated that PW-1

informed her about the incident. She further deposed that PW-1 informed her that accused appellant ran away after committing the crime and that two minor children of the deceased are with her. In her cross-examination she has clearly stated that PW-1 informed her that it was the accused appellant who assaulted the deceased with Farsa and that there had been a quarrel between the appellant and the deceased before the incident.

13. The accused in his statement under Section 313 Cr.P.C. has denied the accusations made against him and has stated that he was falsely implicated.

14. The trial court on the basis of above evidence lead by the prosecution came to the conclusion that the deceased died an unnatural death on account of injuries caused to her on her head by the accused appellant. The trial court has elaborately considered the statement of witnesses adduced during the course of trial and has returned a finding that PW-1 had made a false disclosure in order to save his son. 15. The trial court has relied upon the statements of PW-4 and PW-6 as also the materials placed on record during the trial to come to a conclusion that PW-1 was not a reliable witness and having made a correct disclosure earlier to police and to PW-4 and PW-6 but later retracted in order to save his son. Other witnesses also had turned hostile and did not support the prosecution case as they wanted to save the accused appellant.

16. Although an attempt on behalf of accused appellant is made to contend that the charge of culpable homicide not amounting to murder is not made out against the accused appellant, but having elaborately examined the statement of witnesses and the materials brought on record we find ourselves in absolute agreement with the conclusion drawn by the trial court that the fatal injury to the deceased was caused by the accused appellant and that the offence of culpable homicide not amounting to murder is established against him.

17. We may only add an additional reason for agreeing with the conclusion arrived at by the trial court. It is undisputed that the deceased was in her marital house and her dead body was found within the house. Apart from two minor children it is the accused appellant and PW-1, who were living in the house. Onus, therefore, was upon PW-1 and accused appellant to explain as to how the fatal injury was caused to the deceased. There is no satisfactory explanation put forth by PW-1 or the accused appellant about the manner in which the fatal blow was caused to the deceased. Presumption under Section 106 of the Indian Evidence Act would have to be drawn against the accused appellant and PW-1, since they have not been able to explain as to how the fatal blow was caused to the deceased. PW-4 and PW-6 have otherwise clearly deposed that they were informed by PW-1 that the appellant had assaulted the deceased after a fight between them, which caused the death of their daughter.

18. Upon a careful evaluation of the evidence placed on record we, therefore, endorse the view of the trial court that fatal injury was caused to the deceased by the accused appellant, who assaulted her with Spade. We may also notice that the Spade has been recovered and the report of Chemical Examiner shows that the blood found on Spade matches the blood group of the deceased which is a material evidence

supporting the conclusion of guilt of the accused appellant.

19. In light of the above discussions we reject the contention advanced on behalf of the accused appellant that charge of culpable homicide not amounting to murder is not proved against the accused appellant. We, accordingly, hold that prosecution has succeeded in establishing the charge of culpable homicide not amounting to murder against the accused appellant, beyond reasonable doubt, on the basis of evidence adduced by the prosecution.

20. The other ground which is strongly pressed by Sri Vishesh Kumar, who was earlier appointed Amicus Curiae to argue on behalf of accused appellant and Sri Ashish Kumar Gupta, Advocate, who has later been engaged as private counsel for the accused appellant is with regard to quantum of sentence. It is urged by learned counsels for the accused appellant that the material on record clearly proves that accused appellant was not in a fit mental state and was undergoing treatment for his disturbed mental condition. Statements of PW-1, PW-4 and PW-6 have been relied upon in order to submit that it is admitted even to the prosecution witnesses that accused appellant was not in a fit mental state and was receiving medical attention. It is submitted that although no evidence in the form of medical reports etc. exists on record but that would not be material since the charge framed against the accused appellant itself acknowledges that he was not in fit medical condition.

21. In order to consider the above submission it would be appropriate to reproduce the charge read out to the accused appellant by the court of Sessions:-

"प्रथम- यह कि दिनांक 23.07.2006 को समय 3.30 बजे रात ग्राम बहादुर महद् थाना मुगलसराय जिला चन्दौली में वादी मुकदमा के लड़के **आप अभियुक्त हकीमुद्दीन जिसकी मानसिक स्थिति ठीक नहीं है** ने अपनी पत्नी को आवेश में आकर अपनी पत्नी यासमीन पर हमला कर चोट पहुंचाया, जिसके इलाज की तैयारी करते समय ही उसकी मृत्यु हो गयी। इस प्रकार आपने हत्या की कोटि में न आने वाला आपराधिक मानव वध किया और उसके द्वारा आपने ऐसा अपराध किया जो भारतीय दंण्ड संहिता की धारा 304 के अधीन दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

एजद्द्वारा मैं निर्देशित करता हूँ कि आपका विचारण उपरोक्त आरोप पर इस न्यायालय द्वारा किया जायेगा।"

22. On behalf of the appellant it is submitted that trial court has not been just in imposing punishment of life sentence upon the accused appellant since the act of causing fatal injury was not on account of any premeditation or deliberate intent rather it was caused in a heated state at the spur of the moment. It is urged that it is common to find Spade in any agricultural household. Submission is that considering the admitted disturbed mental condition of accused appellant the punishment ought to have been lesser and the award of life sentence is excessive.

23. Learned AGA, on the other hand, submits that the charge of culpable homicide not amounting to murder since is established against the accused appellant, therefore, the punishment of life inflicted upon the accused appellant is fully justified.

24. We have considered the submission with regard to adequacy of punishment to be imposed upon the accused appellant in the facts of the present case. It would be worthwhile to notice the observation of the Supreme Court in the case of Madhavan and others Vs. State of Tamilnadu, reported in (2017) 15 SCC 582, where the principle to be applied for awarding sentence has been summarized in Para 11 to 13 of the judgment which are reproduced hereinafter:-

"11. Notably, the High Court has not considered the issue of quantum of sentence at all, but mechanically proceeded to affirm the sentence awarded by the Trial Court. From the factual position, which has emerged from the record, it is noticed that there was a pre-existing property dispute between the two families. The incident in question happened all of a sudden without any premeditation after PW1 questioned the appellants about their behavior. It was a free fight between the two family members. Both sides suffered injuries during the altercation.

The fatal injury caused to Periyasamy was by the use of thadi (wooden log) which was easily available on the spot. The appellants, on their own, immediately reported the matter to the local police alleging that the complainant party was the aggressor. No antecedent or involvement in any other criminal case has been reported against the appellants. Taking oral view of the matter, therefore, we find force in the argument of the appellants that the quantum of sentence is excessive.

12. We may usefully refer to the decision of this Court (one of us, Justice Dipak Misra speaking for the Court) in the case of Gopal Singh Versus State of Uttarakhand1 enunciated the necessity to adhere to the principle of proportionality in sentencing policy. In paragraphs 18 and 19 of the said decision, the Court observed thus:

"18. Just punishment is the collective cry of the society.

While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive.

The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasize, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a strait-jacket 1 (2013) 7 SCC 545 formula nor a solvable theory in mathematical exactitude.

It would be dependent on the facts of the case and rationalized judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be

allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.

19. A Court, while imposing sentence, has to keep in view the various complex matters in mind. To structure a methodology relating to sentencing is difficult to conceive of. The legislature in its wisdom has conferred discretion on the Judge who is guided by certain rational parameters, regard been had to the factual scenario of the case. In certain spheres the legislature has not conferred that discretion and in such circumstances, the discretion is conditional. In respect of certain offences, sentence can be reduced by giving adequate special reasons. The special reasons have to rest on real special circumstances. Hence, the duty of Court in such situations becomes a complex one. The same has to be performed with due reverence for Rule of the collective conscience on one hand and the doctrine of proportionality, principle of reformation and other concomitant factors on the other. The task may be onerous but the same has to be done with total empirical rationality sans any kind of personal philosophy or individual experience or any a-priori notion."

13. Considering the above and keeping in mind the facts of the present case, the nature of the crime, subsequent conduct of the appellants, the nature of weapon used and all other attending circumstances and the relevant facts including that no subsequent untoward incident has been reported against the appellants and the mitigating circumstances, we are inclined to modify the sentence period in the following terms:-

a) The sentence period awarded to appellant nos. 2 and 4 for offences punishable under Sections 147 and 334 respectively of IPC will stand reduced to period already undergone without disturbing the fine amount specified by the Trial Court and affirmed by the High Court.

b) The sentence period awarded to appellant nos. 1, 3 and 5 for offences punishable under Sections 304 part (2) r/w 149 and 304 part (2) of IPC respectively will stand reduced to five years each without disturbing the fine amount awarded by the Trial Court and affirmed by the High Court."

25. Reliance is also placed upon judgment of the Supreme Court in the case of Gurmukh Singh Vs. State of Haryana, reported in (2019) 15 SCC 635, in which the Supreme Court has observed as under in para 24 to 26:-

"24. The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives appropriate sentence, in other words, sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused.

25. When we apply the settled principle of law which has been enumerated in the aforementioned cases,

the conviction of the appellant under section 302 I.P.C. cannot be sustained. In our considered view, the accused appellant ought to have been convicted under section 304 Part II I.P.C. instead of under section 302 I.P.C.

26. We accordingly convert the conviction and sentence of the appellant Gurmukh Singh from section 302 IPC to one under section 304 Part II IPC and sentence him to suffer rigorous imprisonment for seven years. The fine as imposed by the trial court and as upheld by the High Court is maintained. The appellant would be entitled to get benefit of section 428 of the Code of Criminal Procedure."

26. In light of the legal position settled on the issue we have examined the argument with regard to appropriateness of sentence to be imposed upon him on the basis of evidence brought on record. We find substance in the argument advanced on behalf of the appellant that life sentence is excessive, inasmuch as the prosecution's admitted case is that the offence on part of accused appellant is not of murder but is culpable homicide not amounting to murder. The evidence on record also shows that it was in a heated state that the accused appellant assaulted the deceased after a fight in the dead of night. It transpires that the accused appellant inflicted fatal blow by spade which turned fatal. It is to be borne in mind that the accused appellant admittedly was not in a fit mental state and even prosecution witnesses have deposed that he was undergoing treatment for the last six months or more. There is nothing on record to show that any prior complaint was ever made against accused appellant of cruelty or causing of physical injury to his wife.

27. Our attention has also been invited by Sri Vishesh Kumar, learned Amicus Curiae to the custody certificate, as per which the accused appellant has remained in jail for 17 years, 11 months and 01 day as on 13.7.2022 and his behaviour inside the jail has been good. It is otherwise a matter of common knowledge that Spade is used for agricultural activity and is ordinarily found in all agricultural households and no premeditation or intent can be inferred on part of the accused appellant for murdering his wife only on account of weapon of assault. When the facts in its entirety are examined in light of the settled legal position we find that the life sentence imposed upon the accused appellant, in the facts of the case, is excessive.

28. We, accordingly, allow this appeal and substitute the life sentence awarded to the accused appellant by the sentence already undergone by him. Unless the accused appellant is wanted in any other case he shall be released on compliance of Section 437-A Cr.P.C. This Jail Appeal is thus allowed in part.

29. Since learned Amicus Curiae has also assisted the Court alongwith private counsel, subsequently engaged by the appellant in the matter, we quantify his fee at Rs.10,000/- to be paid to him by the High Court Legal Services Authority.

(2022) 9 ILRA 1295
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.09.2022

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 2199 of 2019

Lalaram ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Petitioner:
Manish Bajpai, Pradeep Kumar Maurya

Counsel for the Respondents:
Govt. Advocate

Criminal Law - Indian Penal Code, 1860 - Sections 302 & 307-Rituals of marriage going on-someone shot and 4 got injured and 1 died-proved that act was committed without intention of murder-comes under exception I of section 300 IPC-guilty of culpable homicide not amounting to murder u/s 304 IPC-conviction u/s 302 IPC modified u/s 304 IPC-and sentence modified.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Kesar Singh Vs St. of Hary. : (2008) 15 SCC 753

2. Hazara Singh Vs Raj Kumar : (2013) 9 SCC 516

3. Devidas Ramachandra Tuljapurkar Vs St. of Mah. : (2015) 6 SCC 1

4. Ramashraya Chakravarti Vs St. of M.P. : (1976) 1 SCC 281

5. Gurmukh Singh Vs St. of Hary.: (2009) 15 SCC 635

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

(1) Present appeal under Section 374 (2) Cr.P.C. has been preferred by the appellant, **Lalaram**, against the judgment and order dated 15.5.2015 passed by Additional Sessions Judge, Court No.-7, Hardoi in Sessions Trial No. 586 of 2001 : State Vs. Suresh and another arising out of Crime No. 160 of 2001, under Sections 302, 307 I.P.C. and Section 3 (2) (v) of the S.C./S.T. Act, Police Station Sandila, District Hardoi; Sessions Trial No. 587 of 2001 : State Vs. Suresh, arising out of Crime No. 162 of 2001, under Section 3/25 of the Arms Act, Police Station Sandila, District Hardoi; and Sessions Trial No. 588 of 2001: State Vs. Lalaram, arising out of Case Crime No. 163 of 2001 under Section 3/25 of the Arms Act, police station Sandila, district Hardoi, whereby the appellant, Lalaram, was convicted and sentenced under Section 302 I.P.C. for life imprisonment and to pay fine of Rs. 10,000/-, failing which to undergo additional 18 months' rigorous imprisonment; under Section 307 I.P.C. to undergo additional 8 years' Rigorous Imprisonment and to pay fine of Rs. 5,000/-, failing which to undergo 9 months' rigorous imprisonment; and under Section Section 3/25 of the Arms Act to undergo one year's rigorous imprisonment and to pay fine of Rs. 1,000/-, failing which to undergo additional 4 months rigorous imprisonment. All the sentences were directed to run concurrently.

(2) The case of the prosecution, in brief, was that on 13.5.2001, in the house of informant, namely, Udan (PW-2), rituals of marriage relating to his son Rajkapoor was going on. On that night, musical programme was also going on at the door of Bhagwandeen Yadav of his village, wherein Munni Lal Arakh son of Baldev came and informed that relative of Somnath had fallen down from the roof. After getting this information, Sukhdeo (P.W.1), Vinod (P.W.2), Sarvesh (P.W.5), Munna Lal (P.W.12), Sunil (deceased, son-in-law of the deceased) and other villagers had rushed to the spot. In the interregnum period, someone fired at 9:30 p.m., as a consequence of which Sukhdeo (PW-1), Vinod (P.W.2), Sarvesh (P.W.5), Munna (P.W.12) and Sunil (deceased, son-in-law of the informant) got shot and were injured. Immediately thereafter, they were brought through Tractor trolley to the Government

Hospital, from where Sukhdeo (PW-1), Vinod (P.W.2), Sarvesh (P.W.5) and Munna (P.W.12) were referred for further treatment at Lucknow Hospital, however, Sunil (deceased, son-in-law of the informant P.W.2) died before the start of treatment in the hospital.

Thereafter, informant Udan (P.W.2) got the written report scribed by Ramkumar, who after scribing it read it over to him. He, thereafter, put his signature on it and then, proceeded to Police Station Sandila, District Hardoi and lodged it.

(3) The evidence of P.W.8-S.I. Khajan Lal shows that on 13.05.2001, he was posted as Head Moharrir at Police Station Sandila. On that date, on the basis of written report of P.W.2-Udan, a chik F.I.R. No. 73 of 2001 (Ext. Ka. 8) vide Case Crime No. 160 of 2001, under Sections 302, 307 I.P.C. was registered by him against the unknown persons at police station Sandila, District Hardoi.

(4) The investigation of the case was conducted by P.W.15-S.I. Ashok Dixit. His evidence shows that after registration of Case Crime No. 160 of 2001, under Sections 302, 307 I.P.C., at police station Sandila, district Hardoi on 13.05.2001, he went to the place of occurrence and collected blood stained soil and plain soil thereon. He also seized two empty cartridges from the place of occurrence under recovery memo (Ext. Ka. 23). He also inspected the place of occurrence and prepared the site plan (Ext. Ka. 24). He further deposed that S.I. Abad Ali, who was posted along with him at police station Sandila, had conducted the "*panchayatnama*' of the dead body of the deceased Sunil and also sent it for post-mortem.

The evidence of P.W.15-S.I. Ashok Dixit further shows that on 15.05.2001, when he along with police personnel including S.I. Shri Krishna Kashyap (P.W.9), Constable Nawab Singh (P.W.10) went to search the accused of Case Crime No. 16o of 2001, under Sections 302/307 I.P.C. and under Section 3 (2) (v) of the S.C./S.T. Act., witnesses Munna (P.W.12) and Shiv Balak met them and stated that one accused Suresh was waiting for conveyance at the road of Gosaiganj. Immediately thereafter, he (P.W.15) along with police personnel reached there at 09:30 p.m. and caught one person, who, after interrogation, had stated his name as Suresh (co-accused) and from his possession, a countrymade pistol and a cartridge was recovered. After that co-accused Suresh had stated that it was the same countrymade pistol, which was used for firing upon Sukhdev with intention to kill him in the association of his friend Lala Ram who was also armed with countrymade pistol. Thereafter, accused Suresh was arrested and countrymade pistol and catridges were seized under recovery memo. After that on the dictation of Shri Krishna Kashyap (P.W.9), Constable Rama Shanker Singh (P.W.6) had registered Case Crime No. 162 of 2001, under Section 3/25 of the Arms Act, at Police Station Sandila, District Hardoi on 15.05.2001 (Ext. Ka.10).

P.W.15-S.I. Ashok Dixit had also stated that the investigation of Case Crime No. 162 of 2001, under Section 3/25 of the Arms Act was conducted by S.I. Ram Avtar, who was posted along with him at police station Sandila. S.I. Ram Avtar had prepared the site plan and filed charge-sheet in connection with Case Crime No. 162 of 2001 before the Court concerned.

(5) P.W.10-Nawab Singh had supported the aforesaid statement of P.W. 15 S.I. Ashok Dixit and further deposed that on 16.05.2001, he along with the Investigating Officer Ashok Dixit (P.W.15) went to search other accused (Lal Ram) and when they reached at Sandila, on the basis of information of an informer, Lal Ram (appellant) was arrested and from his possession, one countrymade pistol and one cartridge was recovered. Thereafter, on the dictation of S.S.I. Jairam Yadav, recovery memo for countrymade pistol and one cartridge were prepared under a recovery memo (Ext. Ka.11). On the basis of the aforesaid recovery of countrymade pistol and one catridge from the possession of Lala Ram (appellant), Case Crime No. 163 of 2001, under Section 3/25 of the Arms Act, Police Station Sandila, District Hardoi was registered on 16.05.2001.

(6) The evidence of P.W.6-Rama Shaker Singh shows that on the basis of recovery of one countrymade pistol and one catridge from the possession of Suresh (co-accused) and Lala Ram (appellant), he had registered Case Crime No. 162 of 2001, under Section 3/25 of the Arms Act on 15.05.2001 against co-accused Suresh and Case Crime No. 163 of 2001, under Section 3/25 of the Arms Act on 16.05.2001, at police station Sandila, district Hardoi.

(7) P.W.9-S.I. Shri Krishna Kashyap had deposed before the trial Court that on 16.5.2001, he conducted the investigation of Case Crime No. 163 of 2001, under Section 3/25 of the Arms Act. On 25.03.2001, after due investigation, he prepared the charge-sheet against Lala Ram (appellant) under Section 3/25 of the Arms Act and forwarded it for submission before the Court concerned.

(8) P.W.7-Vijay Narayan Singh had deposed before the trial Court that on 15.05.2001, he was posted as Circle Officer in Sandila. On that date, he took over the investigation of the case from S.H.O.-Ashok Dixit (P.W.15). On 17.06.2001, he submitted the charge-sheet before the Court concerned against both the accused, Suresh and Lala Ram.

(9) Going backwards, the injuries of injured Sukhdev (P.W.1), Vinod (P.W.3), Sarvesh (P.W.5) and Munna (P.W.12) were examined on 13.05.2001, at 10:45 p.m., 10:50 p.m., 11:00 p.m. and 11:15 p.m., respectively, at Community Health Centre, Sandila, Hardoi, by Dr. Yogesh Sethi, who found the injuries on their persons as enumerated hereinbelow :-

"Injury of Sukhdev Prasad aged about 32 years, son of Brij Lal (Ext. Ka. 15)

I. Lacerated wound 12 cm x 5 cm x bone deep. Present on (Rt.) side chest. 7 cm laterla to (Rt.) nipple at 9 O'clock position. No blackening & tattooing present.

Injury of Vinod aged about 18 years, son of Shri Laloo (Ext. Ka. 16)

I. Multiple fire arm wound in an area of 17 cm x 5 cm present on (Rt.) side neck and cerebral region. Wound margin 1 cm x 0.5 cm to 0.5 cm x 0.5 cm. No blackening and tattoing present.

II. Multiple fire arm wounds in an area of 31 cm x 20 cm present on both side upper back and neck. Wound size margin from 4 cm x 0.5 cm to 0.5 x 0.5 cm in number of 25. No blackening and tattooing present.

Injuries of Sarvesh aged about 18 years, son of Shri Shiv Mangal (Ext. Ka. 17)

I. Multiple fire arm wound in an area of 20 cm x 12 cm present on (lt.) side chest 2 cm below (Lt.) nipple. Wound size margin from 0.5 cm x 0.5 cm to 1.5 cm x 0.5 cm x stain deep. No blackening and tattooing present.

II. Multiple fire arm wound in an area of 10 cm x 6 cm present on (Lt.) arm 7 cm above Lt. elbow joint. Wound size margin from 0.5 cm x 0.5 cm to 1 cm x 1 cm x skin deep. No blackening and tattooing present.

Injuries of Munna Lal, aged about 35 years son

of Shri Brij Lal (Ext. Ka. 18)

I. A fire arm wound 0.5 cm x 0.5 cm x M.S. deep present on Rt. side shoulder 5 cm below tip of Rt. shoulder. No blackening and tattoing present.

(10) The injuries report of the aforesaid injured shows that Dr. Yogesh Sethi (not examined) had advised for x-ray and further opined that all the injuries were kept under observation. It was also opined that injuries could be caused by some fire arm; duration of the injuries were fresh; and further advised x-ray for confirmation of pellet.

(11) The evidence of P.W.13-Vivek Kumar shows that in the year 2006, he was posted as Chief Pharmacist, at Community Health Centre, Sandila, District Hardoi. At that time, Dr. Yogesh Sethi was posted as Medical Surgeon in Community Health Centre, Sandila, District Hardoi. He proved injury report Ext. Ka. 15 to Ext. Ka. 18 prepared by Dr. Yogesh Sethi.

(12) The injuries of injured Mahadev (P.W.4) were conducted on 14.05.2001 at 12:35 p.m. at Community Health Centre, Sandila, District Hardoi by Dr. Krishna Kumar Singh (P.W.14), who found the following injuries on his person as enumerated hereinbelow :-

"Injuries of injured Mahadev (P.W.4) aged about 35 years son of Vishnu

I. Gun shot wound 0.2 x 0.2 cm in size 3 cm above anterior axillary found on chest. No blackening and scorching.

II. Gun shot wound 0.2 x 0.2 cm in size on lateral aspect of anterior axillary found.

As per the opinion of Dr. Krishna Kumar Singh (P.W.14), the injuries were simple in nature and it would be kept under observation; injuries were caused by fire arm; and duration was about ½ day old.

(13) P.W.14-Dr. Krishna Kumar Singh has reiterated the aforesaid injuries caused to the injured Mahadev (P.W.4) and deposed that he conducted the medical examination of Mahadev (P.W.4) on 14.05.2001. On 14.05.2001 itself, he had issued the certified copy of the injury reports of injured Sukhdev, Munna Lal, Vinod and Sarvesh (Ext. Ka. 15 to Ext. Ka. 18) prepared by Dr. Yogesh Sethi.

In cross-examination, P.W.14 deposed that injuries caused to injured Mahadev (P.W.4) could be attributable by a countrymade pistol and could be attributable from a distance of one meter or 4-5 meters.

(14) The post-mortem of the dead-body of the deceased Sunil Kumar was conducted on 14.05.2001 at 04:00 p.m., at Primary Health Centre, Sandila, Hardoi by P.W.11-Dr. K.P. Singh, who found the ante-mortem injuries on his person as enumerated hereinbelow :-

"Ante-mortem injuries of Sunil Kumar, son of Murli, aged about 30 years

Multiple fire arm wound of entry in an area of 42 cm x 30 cm in front of chest, both upper arm and both shoulder 15 cm above umbilicus.

As per the opinion of Dr. K. P. Singh (P.W.11), the deceased died on account of shock and haemorrhage as a result of ante-mortem injuires.

(15) It is significant to mention that Dr. K. P. Singh (P.W.11), in his deposition before the trial Court, had reiterated the aforesaid cause of death of the deceased Sunil Kumar and had further deposed that on external examination of the deadbody of the deceased, he found that his physique was average; rigor mortis was present on both upper and lower extremities; his eyes and mouth were closed; heir of his scalp was black; and abdomen was distended with gases. On internal examination, he found that both the lungs were congested and punctured; pellets were recovered from lungs; liver was lacerated; pellets were recovered from liver.

In cross-examination, P.W.11 had deposed that injuries on the dead bodies of the deceased could be attributable from a distance of more than three feet and it could be caused by a fire arm.

(16) The case was committed to the Court of Session in the usual manner, where the appellant, Lala Ram and co-accused Lala Ram were charged for offences punishable under Sections 302, 307 I.P.C., Section 3 (2) (v) of the S.C./S.T. Act and Section 3/25 of the Arms Act. They pleaded not guilty to the charges and claimed to be tried. Their defence was that of denial.

(17) During trial, the prosecution, in order to prove its case, had examined fifteen witnesses viz. P.W.1-Sukhdev, P.W.2- Udan, P.W.3-Vinod Kumar Dhobi, P.W.4-Mahadev, P.W.5-Sarvesh Kumar, P.W.6-Constable Rama Shanker Singh, P.W.7-Vijay Narayan Singh, P.W.8-S.I. Khajan Lal, P.W.9-S.I. Sri Krishn Kashyap, P.W.10-Constable Nawab Singh, P.W.11-Dr. K.P. Singh, P.W.12-Munna Lal, P.W.13-Vivek Kumar, P.W.14-Dr. Krishna Kumar Singh and P.W.15-S.I. Ashok Dixit.

(18) From the side of defense/appellant, no witness has been produced.

(19) The statement of appellant, Lala Ram, was recorded under Section 313 Cr.P.C., denying the allegations made in the F.I.R. He stated that he was falsely implicated in the case due to enmity. He was plying rickshaw in Lucknow, wherefrom the police had brought him to home on 15.05.2001; after that false recovery of country-made pistol was made in police station; he was falsely implicated him. He had also stated that on the pressure of Pradhan, the police had lodged the false case against him. He was not named in the F.I.R.

(20) The learned trial Court believed the evidence adduced by the prosecution and convicted and sentenced the appellant, Lala Ram and co-accused Suresh vide judgment and order dated 15.05.2015 in the manner stated in paragraph-1 hereinabove.

(21) Feeling aggrieved by his conviction and sentence under Sections 302, 307 and 3/25 of the Arms Act vide

judgment and order dated 15.05.2015, the appellant-Lalaram has preferred the instant criminal appeal.

(22) Heard Shri Manish Bajpai, learned Counsel for the convict/appellant and Ms. Smriti Sahay, learned Additional Government Advocate for the State and perused the material brought on record.

(23) Learned Counsel for the convict/appellant has argued that :-

I. On the basis of written report submitted by the informant P.W.2-Udan, Case Crime No. 160 of 2001, under Section 302, 307 I.P.C. was lodged against unknown persons. The appellant Lala Ram and co-accused Suresh were not named in the F.I.R.

II. P.W.3-Vinod Kumar and P.W.4-Mahadev, who were the injured witnesses, had not supported the prosecution case and they have been declared hostile by the trial Court.

III. P.W.5-Sarvesh Kumar, who was also the injured witness, had also not supported the prosecution case as he had stated in his deposition that someone had fired, as a consequence of which, he, Sukhdev, Vinod and Sunil got shot. P.W.5 had not named anyone in his deposition as to who had fired upon him, four injured persons and deceased Sunil but the learned trial Court had erred in disbelieving the statement of P.W.5 by recording the reasons that on account of fear, P.W.5 had deposed false evidence before the trial Court.

IV. The deceased and five alleged injured persons had received injuries in a celebratory firing that took place in the musical programme. None had seen the appellant Lalaram to open fire at that time as P.W.2-Udan, who is the informant in this case, had not named the appellant and co-accused Suresh in causing fire arm injuries to the deceased Sunil and five accused persons, in his written report. However, just to conceal the incident of celebratory firing and settled the score of political rivalry, the incident of celebratory firing was given the colour of alleged incident.

V. Lastly, it has been pointed out that against the impugned order dated 15.05.2015, co-accused Suresh had earlier preferred Criminal Appeal No. 767 of 2015 : Suresh Vs. State of U.P. A Co-ordinate bench of this Court, vide judgment and order dated 30.06.2016, while allowing the appeal partly, set-aside the conviction and sentence of co-accused Suresh for the offence under Section 3 (2) (v) of the S.C./S.T. Act; modified his conviction under Section 302 I.P.C. to Section 304 I.P.C.; modified the sentence of life imprisonment to the period of imprisonment for 14 years; confirmed the conviction under Section 307 I.P.C. but his sentence thereunder was modified to 7 years; and confirmed the conviction and sentence for the offence under Section 3/25 of the Arms Act. He argued that the role of the appellant Lalaram is identical to that of co-accused Suresh, hence the benefit of the judgment and order dated 30.06.2016 (supra) passed by a Co-ordinate Bench of this Court may also be granted to the present appellant.

VI. Appellant-Lalram has already undergone imprisonment as under-trial after conviction of about 15 years in jail, hence in view of judgment and order dated 30.06.2016 (supra), the instant appeal also be allowed partly.

(24) Learned Additional Government Advocate, on the other hand, does not dispute the fact that the judgment and order dated 30.06.2016 passed by a Co-ordinate Bench of this Court has been challenged

before the higher Court and the role of the appellant Lalaram is identical to that of co-accused Suresh whose Criminal Appeal No. 767 of 2015 was allowed partly by a Co-ordinate Bench of this Court vide judgment and order dated 30.06.2016.

(25) We have examined the submissions advanced by the learned Counsel for the parties and gone through the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statements of the appellants recorded under Section 313 Cr.P.C.; the judgment and order dated 30.06.2016 passed by a Co-ordinate Bench of this Court in Criminal Appeal No. 767 of 2015 : Suresh Vs. State of U.P.; and the impugned judgment.

(26) It would become manifest that the trial Court has based the conviction of the appellant Lalaram and co-accused Suresh on the ocular account furnished by injured Sukhdev (P.W.1), the informant P.W.2-Udan, injured Munna Lal (P.W.12) and that of recoveries of weapon of assault effected from the possession of the appellant Lalaram and co-accused Suresh.

(27) The injured P.W.3-Vinod and P.W.4 were turned hostile. The another injured P.W.5-Sarvesh Kumar had deposed that someone had fired. It transpires from the evidence of P.W.5 that P.W.5 had not supported the case of the prosecution.

(28) On considering the depositions of the prosecution witnesses as well as material on record, a Co-ordinate Bench of this Court in Criminal Appeal No. 767 of 2015, decided on 30.06.2016 found that from the evidence, it has been established that some rituals were going on the account of marriage of son of informant P.W.2-Udan and several persons including the appellant Lalaram and co-accused Suresh were firing in air to express happiness in marriage, but suddenly information spread about the falling of a person from roof. On this information people started rushing towards the spot of that accident. Therefore, their shots had strayed towards the crowd that included deceased Sunil Kumar and other injured persons including PW-3 Vinod Kumar and PW-4 Mahadeo and PW-5 Sarvesh Kumar. Convict/appellant had no enmity or any motive against any of the injured or the deceased. Before receiving the information of falling of a person from roof, there was no accident or injury to any person, but immediately after spreading of this news accidental fires had caused injuries to these persons. These facts were proved from oral evidences of injured and other witnesses. It was also admitted that those injuries were caused by firing during celebratory Firing. Thus, it is proved that at the time of incident there was no motive to cause injury. It is a case of serious negligence on part of appellant.

(29) After recording the aforesaid findings, a Co-ordinate Bench of this Court in Criminal Appeal No. 767 of 2015 (supra) came to the conclusion that the appellant Suresh is found guilty for the act of culpable homicide not amounting to murder, which is punishable under Section 304 I.P.C. and accordingly, vide order dated 30.06.2016, partly allowed the appeal. The operative part of the order dated 30.06.2016 reads as under :-

"In view of the facts and discussion, the order of conviction for offence u/s 3 (2) (v) of S.C./S.T. Act is set-aside. The conviction u/s 302 I.P.C. imposed on the appellant is hereby modified u/s 304 I.P.C.,

and the sentence of imprisonment for life is modified to period of imprisonment for 14 years. The conviction u/s 307 IPC imposed on the appellant is hereby confirmed but the sentence of imprisonment for life is modified to 7 years. The conviction and sentence u/s 3/25 Arms Act imposed on the appellant is confirmed. With the modification of conviction, punishment and sentence, the appeal is partially allowed. Sentences shall run concurrently."

(30) During course of arguments, learned Additional Government Advocate for the State has not disputed the facts that the role of the appellant Lalaram is identical to that of co-accused Suresh, whose conviction and sentences vide judgment and order dated 30.06.2016 (supra) passed by a Co-ordinate Bench of this Court has been modified.

(31) *Par contra*, learned Counsel for the appellant, during the course of arguments, has not challenged the facts that on the date of the incident, appellant Lalaram had fired shot on the body of the deceased and also on the body of several persons, rather he admitted the fact that those injuries were caused by firing during celebratory firing. It is established that at the time of the incident, there was no motive to cause injury, hence it appears to be a case of a serious negligence on the part of the appellant Lalaram.

(32) At this juncture, it would apt to mention that a culpable homicide is a murder if the act which causes death is done with the intention of causing death or is done with intention of causing a bodily injury and such injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. All murder is culpable homicide but not vice versa. This is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree.

(33) In **Kesar Singh v. State of Haryana** : (2008) 15 SCC 753" Hon'ble Apex had held :

"To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 "Thirdly":

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; these are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and, indisputably, the burden is on the prosecution throughout) the offence is murder under Section 300 "Thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no

knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury is actually found to be proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."

(34) In the instant case, it is proved from the evidence that the charged act was committed by the appellant without intention of murder. From the evidences, it appears probable that the appellant had negligently caused injuries to every person who was found near range of fire without properly knowing as to whether it may cause death or serious injury. This matter comes within Exception 1 of Section 300 IPC. Therefore, the appellant is found guilty of act of culpable homicide not amounting to murder which is punishable under section 304 IPC.

(35) Now, only one question remains and that is the quantum of sentence to be awarded to the appellant-Lalaram for the offence under Section 304 I.P.C.

(36) In **Hazara Singh v. Raj Kumar** : (2013) 9 SCC 516, the Apex Court held that :

"it is clear that the maximum punishment provided therein is imprisonment for life or a term which may extend to 10 years. Although Section 307 does not expressly state the minimum sentence to be imposed, it is the duty of the courts to consider all the relevant factors to impose an appropriate sentence. The legislature has bestowed upon the judiciary this enormous discretion in the sentencing policy, which must be exercised with utmost care and caution. The punishment awarded should be directly proportionate to the nature and the magnitude of the offence. The benchmark of proportionate sentencing can assist the Judges in arriving at a fair and impartial verdict."

"17. We reiterate that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment."

(37) It is pertinent to mention that only because Section 304 IPC provides the life imprisonment as the maximum sentence, does not mean that Court should mechanically proceed to impose the

maximum sentences, more particularly when the incident had occurred suddenly, and accidently due to negligence.

(38) In **Devidas Ramachandra Tuljapurkar v. State of Maharashtra** : (2015) 6 SCC 1, the Apex Court had held :

"While we see no reason to differ with the concurrent findings recorded by the trial court and the High Court, we do see some substance in the argument raised on behalf of the appellants that keeping in view the prosecution evidence, the attendant circumstances, the age of the accused and the fact that they have already been in jail for a considerable period, the Court may take lenient view as far as the quantum of sentence is concerned. The offences having been proved against the accused and keeping in view the attendant circumstances, we are of the considered view that ends of justice would be met, if the punishment awarded to the appellants is reduced."

(39) In **Ramashraya Chakravarti v. State of M.P**. : (1976) 1 SCC 281, the Apex Court had observed :

"To adjust the duration of imprisonment to the gravity of a particular offence is not always an easy task. Sentencing involves an element of guessing but often settles down to practice obtaining in a particular court with inevitable differences arising in the context of the times and events in the light of social imperatives. It is always a matter of judicial discretion subject to any mandatory minimum prescribed by law."

"In judging the adequacy of a sentence the nature of the offence, the circumstances of its commission, the age and character of the offender, injury to individuals or to society, effect of the punishment on the offender, eye to correction and reformation of the offender, are some amongst many other factors which would be ordinarily taken into consideration by courts trial courts in this country already overburdened with work have hardly any time to set apart for sentencing reflection. This aspect is missed or deliberately ignored by the accused lest a possible plea for reduction of sentence may be considered as weakening his defence. In a good system of administration of criminal justice pre-sentence investigation may be of great sociological value."

(40) One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. For sentencing an accused on proof of crime the courts have evolved certain principles; the twin objective of the sentencing policy is deterrence and correction. It lies within the discretion of the court to choose a particular sentence within the available range from minimum to maximum. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

(41) In considering the adequacy of the sentence which neither be too severe nor too lenient the court has, therefore, to keep in mind the motive and magnitude of the offence, the circumstances in which it was committed and the age and character (including his antecedents) and situation in life of the offender.

(42) In **Gurmukh Singh v. State of Haryana** : (2009) 15 SCC 635, the Apex Court had discussed points to be taken into account before passing appropriate sentence as under :

"23. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:

(a) Motive or previous enmity;

(b) Whether the incident had taken place on the spur of the moment;

(c) The intention/knowledge of the accused while inflicting the blow or injury;

(d) Whether the death ensued instantaneously or the victim died after several days;

(e) The gravity, dimension and nature of injury;

(f) The age and general health condition of the accused;

(g) Whether the injury was caused without premeditation in a sudden fight;

(h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;

(i) The criminal background and adverse history of the accused;

(j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;

(k) Number of other criminal cases pending against the accused;

(l) Incident occurred within the family members or close relations;

(m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?

These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused.

The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives appropriate sentence, in other words, sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused."

(43) Now matter is limited to sentence for offence under Section 304 IPC, and we have to consider about the appropriate deserts for the appellant in this case. For it aggravating circumstances relating to the crime while mitigating circumstances relating to the criminal has to be considered. At the time of commission of charged incident age of appellant was about 35 years. He had knowledge of the fact that he had no licence to use the fire arm actually used by him. It is a thing of common knowledge that celebratory firing is not proper, especially in a crowded area. From facts and circumstances of the case it is clear that the appellant initially had no intention for murder/ homicide or causing any injury. Appellant has no criminal history and is in incarceration for about 14 years. Apart from these mitigating circumstances, it is noteworthy that charged incident was due to negligence. Appellant had committed the charged act deliberately.

(44) Sri Manish Bajpai, learned counsel for the appellant has submitted that

the appellant was tried alongwith co-accused, Suresh, who has preferred Criminal Appeal No. 767 of 2015 before this court. The appellant and co-accused, Suresh were convicted under section 302 I.P.C. for life imprisonment and for other offences etc. and the Criminal Appeal No. 767 of 2015 preferred by co-accused, Suresh has been partially allowed by a Co-ordinate Bench of this court vide judgment and order dated 30-06-2016 and the conviction awarded under section 302 I.P.C. was modified to section 304 I.P.C. and sentence for life imprisonment was also modified to the period of 14 years in the case of co-accused Suresh.

(45) Learned counsel for the appellant has also contended that the present appellant-Lalaram has already undergone imprisonment as under trial and after conviction for about 15 years in jail, therefore, the present appeal may also be allowed partly in view of the judgment and order dated 30-06-2016 passed in Criminal Appeal No. 767 of 2015 preferred by Co-accused-Suresh.

(46) In present case after considering the circumstances presented before the trial Court and before this Court during hearing of appeal, it appears appropriate that the conviction under Section 302 IPC and sentence for it should be converted in conviction under Section 304 IPC only and its sentence should not exceed more than 15 years' imprisonment.

(47) Likewise this Court found it appropriate that conviction for charge under Section 307 IPC should be mitigated in present set of circumstances to 7 years' imprisonment which would serve the ends of justice.

(48) In view of above facts and discussion, the conviction under Section 302 IPC imposed on the appellant-Lalaram is hereby modified under Section 304 IPC, and the sentence of imprisonment for life is modified to period of imprisonment for 15 years. The conviction and sentence under Section 3/25 Arms Act imposed on the appellant is confirmed.

(49) With the aforesaid modification of conviction, punishment and sentence, the appeal is ***partly allowed*** in terms of the judgment and order dated 30-06-2016 passed by a Co-ordinate Bench of this Court in Criminal Appeal No. 767 of 2015. Sentences will run concurrently.

(50) Let the copy of this judgment as well as lower Court record be sent to the trial Court for necessary information and ensuring compliance.

(2022) 9 ILRA 1307
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Crl. Appl. No. 2867 of 2013

Mahesh Rathaur ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Sushil Kumar Dubey, Sri Shivanand Mishra, Sri V.K. Srivastava

Counsel for the Respondents:
Govt. Advocate

Criminal Law - Indian Penal Code,1860 - Section 376 -victim -11 year old-allege

attempt to rape -Medical-hymen torn and no mark of injury in her private parts-no definite opinion of rape-Informant for the first time-after 9 months- in his St.ment before Trial court-St.d that rape has been committed-later victim also St.d that rape was committed-accused charged u/s 376 IPC clear improvement in prosecution version-no explanation why disclosure was not made-offence of attempt to rape u/s 376/511 IPC is proved beyond reasonable doubt-conviction altered from section 376 to section 376/511 IPC.

Appeal partly allowed. (E-9)

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. This appeal has been preferred by appellant, Mahesh Rathaur against the judgment and order dated 30th May, 2013 passed by the Special Judge/Additional Sessions Judge, Etawah in Sessions Trial No. 167 of 2012 (State Vs. Mahesh Rathaur), arising out of Crime No. 234 of 2012, under Sections 323,376 and 506 I.P.C., Police Station-Bakevar, District-Etawah, whereby the accused-appellant has been convicted and sentenced to undergo imprisonment for life for the offence punishable under Section 376 I.P.C. with a fine of Rs. 10,000/- and in default thereof, to further undergo six months simple imprisonment.

2. We have heard Mr. Shiva Nand Mishra, learned counsel appearing for the accused-appellant and Mr. Arunendra Singh, learned A.G.A. for the State as also perused the entire materials available on record.

3. The prosecution story, as reflected from the records, is as follows:

On the basis of oral report made by the informant/P.W.-4, namely, Mr. Yasin Ali, a case being Crime No. 234 of 2012 under Sections 323,376/511 and 506 I.P.C. was registered on 5th April, 2012 at 03:20 p.m. at Police Station-Bakevar, District Etawah alleging therein that on 3rd April, 2012 at about 03:00 p.m., the daughter of the informant (hereinafter referred to as the "victim"), aged about 11 years, who was studying in Class-V), along with her younger brother, namely, Ansar aged about 7 years, went to jungle/ravine situated outside the village for collecting woods, where the accused-appellant, who was already present there, with an evil intention, grabbed the victim and dragged her inside the jungle/ravine and he attempted to rape her. It is also alleged that when the victim protested, she was assaulted and threatened not to disclose about the incident to her parents. After coming to her house, the victim informed her mother about the said incident. It is further alleged that since the first informant-P.W.4 had gone to his relative's place and returned only on 5th April, 2012, therefore, as soon as he came to know about the incident, he has come to the Police Station for lodging his report. On the basis of the aforesaid report, the victim was taken to the hospital by Women Constables, namely, Sunita Devi and Pinki Devi for her medical examination, where Dr. Jyotsana Bhatia (P.W.-1) examined the victim internally and for external injuries, she was referred to Emergency Medical Officer. Dr. Jai Prakash Chaudhari (P.W.-3) examined the external injuries of the victim. For knowing the correct age of the victim, she was referred to the District Hospital, Etawah for X-ray, where Dr. Dinesh Singh conducted the same.

4. Dr. Jyotsana Bhatia (P.W.-1), who conducted the medical examination of the victim internally, has opined that her

hymen was torn and no mark of any injury in her private parts was found nor any bleeding was otherwise found in her private parts. On the basis of said medical examination, no definite opinion about rape was given by P.W.-1. As per the X-ray report, the victim was found to be 11 years of age. Report of the Internal examination of the victim is as follows:

"Hymen torn, vagina admits one finger, vaginal smear taken and send to pathologist. No mark of injury on private parts. No bleeding. P/V. She has not attained menarche."

5. Dr. Jai Prakash Chaudhari (P.W.-3), who examined the external injuries of the victim, has found following four injuries on the body of the victim:

"(i) abrasion size 3 cm x 0.5 cm on outer aspect left arm, 18 cm. Above left elbow; dark brownish red scab formed,
(ii) abrasion 2 cm long linear lie on back of left elbow; dark brownish red scab formed,
(iii) contusion size 4 x 2 cm on dorsum of left hand & 2 cm. above left wrist, bluish black, and
(iv) contusion 2 x 1.5 cm. on front of left leg, 7 cm below left knee, bluish black."

In the opinion of P.W.3, all the above injuries found on the body of the victim, are simple in nature.

6. The statement of the first informant/P.W.-4 along with that of the victim/P.W.-5 was recorded under Section 161 Cr.P.C. by the Investigating Officer. Thereafter charge-sheet was submitted against the accused appellant under Sections 323, 376/511 and 506 I.P.C. The Magistrate concerned took cognizance of the charge-sheet and as the offence was triable by the court of Sessions, the same was committed to the Court of Sessions. Consequently, Sessions Trial No. 167 of 2012 (State Vs. Mahesh Rathaur) was registered in the matter. The trial proceeded in the matter and the statements of various witnesses were recorded.

7. It was the first time that when the informant was produced as P.W.-4, he in his statement made before the trial court on 2nd January, 2013, which was completed on 19th March, 2013, has stated that the offence of rape was committed by the accused-appellant upon the victim instead of attempt to rape, as disclosed earlier in the first information report and the statements recorded under Section 161 Cr.P.C. and thereafter, the victim, who was produced before the Court as P.W.-5, in her statement made on 7th March,2013 has stated that she was raped by the accused-appellant. On the basis of aforesaid statements of P.W.-4 and P.W.-5, the charges were altered on 14th March, 2013 so as to delete Section 511 I.P.C. and the accused-appellant was charged under Section 376 I.P.C., whereas initially, in view of the framing of charge order dated 9th December, 2012, the accused-appellant was charged under Sections 323, 376/511 and 506 I.P.C. It is thereafter that the trial proceeded and statements of other witnesses were recorded in the matter.

8. In order to bring home the charge, the prosecution has adduced the evidence of Dr. Jyotsana Bhatia as P.W.-1, who has stated that she has conducted the preliminary medical examination of victim and latter referred her for examination of external injuries to the Emergency Medical Officer. P.W.-1 has stated in her examination-in-chief that in the internal examination conducted by her, she found

that the hymen was torn and no mark of any injuries in private parts of the victim was found.

9. Head Police Constable-13, namely, Nathu Ram, who has proved that Chik first information report, has been adduced as P.W.-2. He has stated that he entered the contents of the oral report of the informant in the General Diary. P.W.-2 has categorically stated in his cross-examination that he had correctly recorded the complaint of first informant (P.W.-4), who has also been read out of the complaint, on which he has affixed his thumb impression. P.W.-2 has clearly stated that he was informed by the informant (P.W.-4) that the daughter of the victim (P.W.-5) was dragged inside the jungle/ravine and raped was attempted upon her by the accused-appellant. No external injuries were otherwise noticed by him on the victim.

10. Dr. Jai Prakash Chaudhary, who has examined the external injuries of the victim, has been adduced as P.W.-3. He has stated that on examination of the victim, he found four injuries on the body of the victim, which has been quoted herein above and in his opinion, the same are simple in nature.

11. Yasin Ali, informant, who is father of the victim, has been adduced as P.W.-4 on 2nd January, 2013 (whose statement has been completed on 19th March, 2013). He has supported the prosecution story by stating that the victim was forcibly taken in the jungle/ravine and she was raped by the accused-appellant. It is further stated that this fact was disclosed by the victim to her mother just after the incident but the informant was informed by the mother of the victim about the same when he returned from the place of his relative. In the said statement, P.W.-4 claims to have informed the Police personnel about the commissioning of the offence of rape upon the victim but in that event it was not recorded in the first information report, he cannot yet give any reason.

12. Victim has also been adduced as P.W.5 on 7th March, 2013, who has fully supported the prosecution story by stating that he was forcibly dragged by the accused-appellant in the jungle/ravine and was raped. In her cross-examination, the victim/P.W.-5 has admitted that her father (informant-P.W.4) was working in the agricultural field of Chandu Bajpai, who had contested the election of the post of Village Pradhan, who had lost to Nawab Singh and that the accused, his brother and other family members were in the party of Nawab Singh. She has also stated that when the cattle herders and other people including Shiv Bharat came to the spot, Mahesh was on her body and seeing them, he ran away. No one has tried to catch him. All the persons had seen the condition of the victim.

13. The Investigating Officer, Sub-Inspector Malkhan Singh has been examined as P.W.-6, who has clearly stated that the victim had not disclosed the factum of rape in her statement recorded by the Police under Section 161 Cr.P.C. He has further stated that the blood stained clothes of the victim (P.W.-5) were also not provided to the Investigating Officer and no recovery memo in that regard was made. He has categorically stated that on the basis of evidence collected during investigation, he did not found the offence of rape committed in the matter and on the basis of statement of victim at best a case of attempt to rape was commissioned and therefore,

charge-sheet was filed in that regard. P.W.-6 has also stated that the first informant in his statement recorded under Section 161 Cr.P.C. has also not disclosed about the commissioning of offence of rape upon the victim.

14. After recording of the prosecution evidence, the statement of the accused-appellant was also recorded under Section 313 Cr.P.C. in which he has denied his involvement in the alleged offence and denied the allegation/charge. Accused appellant has specifically stated before the trial court that due to village party bandi, he has been falsely implicated in this case and he is otherwise, innocent. The defence did not examine any witness from its side.

15. From the material placed on record, it does not appear that the statement of the victim (P.W.-5) was recorded under Section 164 Cr.P.C. upon the Magistrate concerned and in her statement recorded by the Police under Section 161 Cr.P.C., she had only disclosed about the offence of attempt of rape and not actual commissioning of offence of rape.

16. The trial court on the basis of evidence adduced during the course of trial, has found the offence under Section 376 I.P.C. to have been committed against the victim and consequently, has awarded sentence of life imprisonment along with fine of Rs. 10,000/- .

17. Aggrieved by the aforesaid judgment and order of conviction and sentence, the accused-appellant is before this Court by means of the present criminal appeal.

18. Mr. Shivanand Mishra, learned counsel appearing for the accused-appellant submits that as per the prosecution version, the alleged incident took place on 3rd April, 2012 at 03:00 p.m. whereas the first information report has been lodged by the informant/P.W.-4 on 5th April, 2012 at 03:20 P.M. i.e. three days delay for which no plausible explanation has been given by the prosecution.

19. Learned counsel for the accused-appellant also submits that the victim in her statement recorded under Section 161 Cr.P.C. by the Police had only alleged attempt to rape and had not disclosed about any actual act of rape committed upon her. He further submits that the accused-appellant has been falsely implicated and that the medical report does not support the commissioning of rape upon the victim. As per the medical examination report of the victim, neither there was any mark of injury in the private parts of her body nor any bleeding was noticed. He then submits that the hymen of the victim was otherwise found torn. Learned counsel for the accused-appellant submits that the accused-appellant has been falsely implicated in the present case only on account of village enmity, as he had supported Nawab Singh, who won the election on the post of Village Pradhan against Chandu Bajpai, for whom the first informant (P.W.-4) worked. Learned counsel for the accused-appellant next submits that in the first information report as also in the statements of the witnesses including the victim and informant recorded under Sections 161 Cr.P.C., the disclosure is only about attempt to rape and that is why, the charge-sheet was submitted under Sections 323, 506 and 376/511 I.P.C. against the accused-appellant. Submission is that nearly after eleven months from the date of lodging of the first information report to be precise on 5th April, 2012 and after nearly nine

months from the date of recording of statements of the victim and informant under Section 161 Cr.P.C. it was the first time that when the informant was produced as P.W.-4, he in his statement recorded before the trial court on 2nd January, 2013, which was completed on 19th March, 2013, has stated that the offence of rape was committed by the accused-appellant upon the victim and thereafter, the victim, who was adduced before the Court as P.W.-5, in her statement recorded before the trial court on 7th March,2013, has stated that she was raped by the accused-appellant. The aforesaid change in the version of the prosecution (statements of P.W.-4 informant and P.W.-5 victim) clearly indicates that it is a case of improvement. Such improvement has only been made by the prosecution only to falsely implicate the accused-appellant. The subsequent change of stand of the victim does not find any corroboration from the material available on record, and therefore, the trial court has grossly erred in relying upon the statement of the victim as P.W.5, where statement ought to have been subjected to greater scrutiny. It is also argued by the learned counsel for the accused-appellant that in such circumstances, the conviction of the accused-appellant under Section 376 I.P.C. cannot be legally sustained. On the cumulative strength of the aforesaid, learned counsel for the accused-appellant submits that the impugned judgment and order of conviction is liable to be quashed.

20. Learned A.G.A., on the other hand, has supported the prosecution version and submits that the statement of the victim is credible in the facts and circumstances of the case and since she has clearly disclosed about the commissioning of the offence of rape, therefore, the trial court has not committed any error in recoding conviction of the accused-appellants under Section 376 I.P.C.

21. It is in the context of above facts that the present appeal has come up before us for hearing.

22. We have considered the submissions made by the learned counsel for the parties and have gone through the records of the present appeal specially the judgment and order of conviction and the evidence adduced before the trial court.

23. The facts as have been noticed above would clearly go to show that a first information report was lodged on 5th April, 2012 in respect of the incident of 3rd April, 2012 on the oral complaint of the first informant, namely, Yasin Ali. Thumb impression of the informant has been affixed on the report, which contains the allegations about the attempt of rape being committed upon the victim by the accused-appellant. The first information report does not contain any allegation with regard to actual commissioning of rape. Medical examination report of the victim, which has been submitted by Dr. Jyotsana Bhatia (P.W.-1), who has examined the victim internally, shows that neither there was any mark of injury in the private parts of the body of the victim nor any bleeding was observed but hymen of the victim was otherwise found torn. On the basis of such report, the Doctor has clearly opined that no definite opinion about the rape can be given in the matter. We further find from the records that the statements of the victim as also her father i.e. informant were recorded under Section 161 Cr.P.C. in which they have alleged only about the attempt of rape upon the victim and there is no allegation in their statements about the actual commissioning of rape. The

Investigating Officer (P.W.-6) and the Head Police Constable Nathu Ram (P.W.-2), who has proved the chik first information report have also clearly stated that the first informant only alleged attempt to rape upon the victim in his complaint and has never claimed about actual rape being committed upon the victim. It is on the basis of contents of first information report as also the statements of the witnesses including the victim and informant under Section 161 Cr.P.C. that the charge-sheet was submitted under Sections 323, 506 and 376/511 I.P.C. in the matter on 18th April, 2012.

24. It is almost after nine months of the alleged incident which took place on 3rd April, 2012 that for the first time, the informant in his statement recorded before the trial court as P.W.4 on 2nd January, 2012 and therefore, in the statement of victim as P.W.5 on 7th March, 2013, they have come up with a different story of actual commissioning of rape. However, the complaint made orally by the informant-P.W.-4 did not contain any allegation with regard to rape upon the victim.

25. In the facts and circumstances of the case, we do not find the statements of the informant and the victim made for the first time before the trial court as P.W.-4 and P.W.-5 about the commissioning of offence under Section 376 I.P.C., reliable or convincing. We find that the statements of the first informant-P.W.4 and the victim-P.W.5 about commissioning of offence of rape, appears to be clear improvement in the prosecution version, inasmuch as no plausible explanation has been put forth as to why such disclosure was not made, when the first information report itself was lodged or when the statements of such witnesses including the victim and informant were recorded by the Investigating Officer under Section 161 Cr.P.C. Even at the time of framing of charge i.e. 9th October, 2012, such facts were not disclosed by the first informant or the victim. The statement made by the informant for the first time in Court as P.W.-4 on 2nd January, 2013, after nearly nine months from the date of alleged incident of commissioning of offence, therefore, does not inspire confidence of the Court. It may also be noticed that the accused appellant has asserted in his statement recorded under Section 313 Cr.P.C. that he has been falsely implicated on account of enmity relating to election on the post of Village Pradhan and the victim in her cross-examination has also admitted that her father was supporting Chandu Bajpai for whom he worked, who had lost election of the said post to Nawab Singh to whom the accused-appellant and his family members supported.

26. Subsequent statements of the victim-P.W.-5 and informant-P.W.4, therefore, do not appear to be reliable, particularly when it is otherwise not supported by medical evidence.

27. So far as the charge under Section 376/511 I.P.C. against the accused-appellant is concerned, we find that the first information report does contain specific allegations in that regard and the victim along with other witnesses have also supported such allegations. From the medical examination report of the victim submitted by Dr. J.P. Chaudhary (P.W.-3), who examined her externally, there were two marks of abrasion as also two marks of contusion on the body of the victim, which are, in the opinion of P.W.-3, were about 48 hours old.

28. From the statement of the victim, coupled with the marks of injuries sustained by her and the statements of other witnesses, we find that the charge originally framed against the accused-appellant of attempt to rape under Section376/511 I.P.C. is proved beyond reasonable doubt.

29. In view of the above discussions, the present appeal succeeds in part. The conviction of the accused-appellant is altered from Section 376 I.P.C. to Section 376/511 I.P.C. and in view of the provisions contained in Section 57 I.P.C., the accused appellant is sentenced to undergo 10 years imprisonment. The imposition of fine upon the appellant. as was imposed under the impugned judgment and order of conviction, is, however, sustained.

30. Accordingly, the present appeal stands partly allowed.

31. In the event, the accused-appellant has already served the aforesaid sentence i.e. 10 years as on date, he shall be released on compliance of Section 437-A Cr.P.C. and payment of fine, unless he is wanted in any other case.

(2022) 9 ILRA 1314
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 3520 of 2010

Babu Ram Maurya ...Appellant
Versus
State ...Opp. Party

Counsel for the Appellant:
From Jail, Sri Om Prakash Mishra, Sri Kumar Kartikay(A.C.)

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

Criminal Law - Indian Penal Code-,1860 - Section 302 - Benefit of doubt-Informant found a naked body of an unknown women-incised injury marks on abdomen, private parts and face-Trial Court not carefully examined St.ments of prosecution witnesses-for determining whether an alternate hypothesis other than the guilt of accused exist-fallacy in recovery-improper evaluation of motive-Trial Court's judgment unsustainable-Accused entitled to benefit of doubt.

Appeal allowed. (E-9)

List of Cases cited:

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

2. Ram Niwas Vs St. of Hary., 2022 SCC On Line SC 1007

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. This jail appeal has been preferred by the appellant, Babu Ram Maurya challenging the judgment and order dated 17th April, 2010 passed by the Special Judge (Prevention of Corruption Act)/ Additional Sessions Judge, Bareilly passed in Sessions Trial No. 117 of 2008 (State vs. Babu Ram Maurya) under Sections 302 and 201 I.P.C. as also in Sessions Trial No. 118 of 2008 (State Vs. Babu Ram Maurya) under Sections 4/25 Arm Act, arising out of Crime No. 870 of 2007, Police Station-Subhash Nagar, District-Bareilly, whereby the accused-appellant has been convicted and sentenced to undergo (i) life imprisonment under Section 302 I.P.C. with fine of Rs. 20,000/-, in default thereof, he has to further undergo two years additional

imprisonment, (ii) two years rigorous imprisonment under Section 201 I.P.C. with fine of Rs. 5,000/-, in default thereof, he has to further undergo two months additional imprisonment and (iii) one year rigorous imprisonment with fine of Rs. 1,000/- under Sections 4/25 Arms Act, with the direction that all the sentences are to run concurrently.

2. We have heard Mr. Kumar Kartikay, learned Amicus Curiae on behalf of the appellant and Mrs. Archana Singh, learned A.G.A. for the State and have carefully perused the materials available on record.

3. Records of the present jail appeal reveal that a first information report was registered under Sections 302/201 I.P.C. as Crime No. 868 of 2007 on 11th June, 2007 at 07:15 a.m. (morning) on a written report of the Village Chaukidar, namely, Murari Lal son of Hori Lal, who had found an unknown naked body of a lady in the agricultural field of Dori Lal Kanaujiya with incised injury marks on her abdomen and private parts. Her intestine had come out and injuries were also found on her face and she was bleeding. Her bangles were broken. Seeing her condition, it appeared that she was killed elsewhere and thereafter her dead body was thrown in the fields of Dori Lal.

4. The inquest of deceased was conducted by the Police at 10:40 a.m. after starting the process at 09:00 a.m. In the opinion of the Panch (Inquest) witnesses, the death of the deceased was homicidal on account of injuries caused to the deceased. Thereafter the dead body of the deceased was sealed and sent for post-mortem.

5. Dr. Sri Krishna, P.W.-8 conducted the post-mortem of the dead body and his report is on record as Exhibit-Ka-9 as per which the deceased was nearly 50 years of age and had died due to shock as a result of following ante-mortem injuries:

"(i) incised wound 3 cm. X 1/2 cm x above, deep on mid part of nose, underneath bone fractured;

(ii) incised wound 2 cm x 1 c x cavity deep on the left side of abdomen just below left costal margin and 11 cm. anterolateral from navel at 1 o'clock position;

(iii) Incised wound 3 cm x 1 cm x cavity deep on the left side of abdomen, 3 cm. below from injury no. 2, flesh part of muscle coming out from wound;

(iv) Incised wound 2 cm x 1 cm x cavity deep on the left side of abdomen, 4 cm. Interolateral from injury no.3;

(v) incised wound 2 cm. x 1 cm x muscle deep to flesh of chest, mid line;

(vi) Incised wound size 3 cm. x 1 cm. muscle deep over left side of bubic syphilis area."

6. A subsequent first information report was lodged on 13th June, 2007 at 01:30 p.m. as Crime No. 870 of 2007 under Sections 4/25 Arms Act by the Investigating Officer, Sub-Inspector Rohan Lal, who was also the Investigating Officer in the earlier first information report. It was reported that while conducting investigation in the earlier matter, he met Ravi Kumar son of Seema Kashyap i.e. P.W.-2 and Rampal Kashyap, brother-in-law of Seema Kashyap i.e. P.W.-1,who informed him that the dead body found was of Seema Kashyap and that she has been killed by the accused-appellant, namely, Babu Ram Maurya. The Police party lead by Investigating Officer was informed by the informer that the accused-appellant was about to visit his elder brother at Shanti Vihar. On receiving such information the Police party reached Shanti Vihar and

apprehended him. On inquiry, the accused-appellant confessed that he had killed the deceased Seema Kashyap, by stabbing her with a knife at around 08:30 p.m. on 10th June, 2007. He had heavily consumed liquor before that. After killing the deceased Seema Kashyap, the accused-appellant put her clothes, the knife with which he killed her, and a brick, in a bag and threw the same in the drain beneath the culvert situated in front of the Balaji temple.

7. The Police party along with Rampal and Ravi (P.W.-1 & P.W.-2) reached the spot and on the pointing out of the accused-appellant, a plastic bag was recovered containing a brick, clothes of the deceased Seema Kashyap and the knife, purchased by the accused-appellant for committing the crime. The subsequent first information report was registered as Crime No. 870 of 2007.

8. Memo of arrest of the accused-appellant was also prepared, which is marked as Exhibit-Ka-6.

9. Investigation proceeded and the Investigating Officer recorded the statements of Rampal Kashyap, Ravi Kumar and Chhote Lal (P.W.1, P.W.-2 and P.W.5 respectively) and upon conclusion of investigation charge-sheets in both the cases came to be submitted against the accused appellant by the Investigating Officer on 15th June, 2007 and 14th July, 2007, which are marked as Exhibit-Ka-11 and Exhibit-Ka-7 respectively.

10. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. On 15th March, 2008, the concerned Court framed following two charges against the accused-appellant:

"Firstly: That you on 10.06. 2007 at about 8.30 p.m. in the field of Dori Lal Kannojia mohalla Shanti Bihar within the circle of P.S. Subhashnagar Distt. Bareilly, did commit the murder by intentionally or knowingly causing the death of Smt. Seema by inflicting knife injuries and thereby committed an offence punishable U/s 302 IPC and within the cognizance of this court.

Secondly: That you on the aforesaid date time and place you knowing or having reason to believe that certain offence to wit-murder of Smt. Seema, punishable with death sentence has been committed by you, did cause certain evidence of said offence to disappear, to wit the blood stained clothes of Smt. Seema along with her bag with the intention of screening yourself from the legal punishment, and thereby committed an offence punishable U/s 201 of Indian Penal Code and within the cognizance of this court."

The charges were read out to the accused-appellant, who denied the accusation and demanded trial.

11. The prosecution in order to establish the charges levelled against the accused-appellant relied upon documentary evidence, which were duly proved and consequently marked as Exhibits. The same are catalogued herein below:

(i) the written report given by Chaukdar Murari Lal son of Horilal dated 11th June, 2007 has been marked as Exhibit-Ka-1;

(ii) the first information report registered on 11th June, 2007 at 07:/15 on the information of Village Chaukidar, namely, Murari Lal son of Horilal being

Crime No. 868 of 2007, has been marked as Exhibit-Ka-2;

(iii) Inquest report (panchayatnama) of the body of deceased Seema Kashyap has been marked as Exhibit-Ka-13;

(iv) post-mortem report of the deceased Seema Kashyap has been marked as Exhibit-Ka-9;

(v) Memo of arrest of accused-appellant Babu Ram Maurya prepared on 13th June, 2007 by the then Station House Officer, Rohan Lal has been marked as Exhibit-Ka-6

(vi) the first information report registered on 13th June, 2007 at15.30 hours by the Investigating Officer, namely, Sub-Inspector Rohan Lal, the then Station House Officer, Police Station-Subhash Nagar, District-Bareilly being Crime No. 870 of 2007, has been marked as Exhibit-Ka-4; and

(vii) charge-sheet dated 15th June, 2007 submitted in Crime No. 468 of 2007 and charge-sheet dated 14th July, 2007 submitted in Crime No. 470 of 2007 have been marked as Exhibits-Ka-11 and 7 respectively.

12. The prosecution has also adduced oral testimony of following witnesses:-

"i). P.W.-1, namely, Rampal Kashyap, (Behnoi) brother-in-law of the deceased Seema Kashyap;

ii).P.W.-2, namely, Ravi Kumar son of deceased Seema Kashyap; ;

iii) P.W.-3, namely, Shashi wife of P.W.-1 and sister of Seema Kashyap;

iv) P.W.-4, namely, Village Chaukidar, Morarilal son of Horilal, first informant of Crime No. 468 of 2007;

v). P.W.-5, namely, Chhote Lal son of Vishram, who is said to be witness of last seen and neighbour of the deceased Seema Kashyap;

vi). P.W.-6, namely, Vijay Pathak, who proved the chik first information report of Crime No. 468 of 2007;

vii). P.W.-7, namely, Sub Inspector Rohan Lal, the then Station House Officer-Subhash Nagar, District-Bareilly, who lodged the Crime No. 470 of 2007 and investigated the matter;

viii). P.W.-8, namely, Dr. Shri Krishan, who conducted the post-mortem on the body of the deceased;

ix). P.W.-9, namely, Head Constable-270 Tejram Singh, who proved the chik first information report of Crime No. 470 of 2007 under the provisions of Arms Act;

x). P.W.-10, namely, Sub-Inspector Daya Ram Singh the first Investigating Officer; and

xi) P.W.-11, namely, Sub-Inspector Rakesh Singh, who conducted the inquest proceedings of the dead body of the deceased Seema Kashyap"

13. During the course of trial, the prosecution witnesses supported the prosecution case by stating that the deceased was previously married to Patey, who died about 7-8 years back and with whom the deceased had a son, namely, Ravi Kumar (P.W.-2); nearly after one year of the death of her first husband i.e. Patey, the deceased Seema Kashyap solemnized her marriage with the accused-appellant Babu Ram, who is a rickshaw-puller and started living with him in Katara Chand Khan; the accused-appellant is alleged to be drunkard, who had two previous wives, both of whom died. From their earlier wedlock, the accused-appellant has two sons, namely, Ajay and Vijay; the accused-appellant after consuming liquor used to beat the deceased and her son, namely, Ravi Kumar P.W.2, and snatch all money earned by deceased as a domestic aid cleaning utensils etc. of other households.

14. About a month and half before the alleged occurrence, the deceased shifted to Kargaun and started living in a rented room in the house of Roop Chand, along with Ravi Kumar P.W.-2. Rampal Kashyap and his wife Shasi (P.W.-1 and P.W.-3) respectively, were also living at Kargaun and the distance between their houses was about 100/150 meters.

15. The prosecution case is that the accused-appellant came to take the deceased from Kargaun but she denied whereafter threats were extended by him to the deceased.

16. Chhotey Lal son of Visram (P.W.-5) was also living in a room in the house of Roop Chand and thus was immediate neighbour of the deceased saw the deceased lastly in the company of accused-appellant near Balaji Temple on 10th June, 2007 at 06:00 p.m. The deceased was not seen alive thereafter. P.W.2 Ravi Kumar after about 08:30 p.m. made efforts to trace her out but failed.

17. On the next morning at about 9 to 10 a.m. Chhotey Lal (P.W.-5) allegedly informed Ravi Kumar (P.W.-2) that he had seen his mother with the accused-appellant the earlier day at about 05:00 to 06:00 p.m.

18. In his statement Ravi Kumar (P.W.-2) has deposed that on 11th June, 2007 at 10:00 a.m. an unknown lady went to the field of Dori Lal for cutting woods and saw the dead body of a lady wearing Salwar Suit and informed him about it. P.W.2 showed her the photograph of his missing mother, who told him that the dead body was of his mother. However, instead of going to the field of Dori Lal to identify the body, P.W.-2 went to the Police Station Subhash Nagar for lodging the report. The distance between the Police Station and the place of occurrence was about 21 kilometers, whereas the distance between the house of P.W.-2 and the place of occurrence was only one kilometer.

19. The prosecution version is that deceased has been killed by the accused-appellant as she refused to come with him to Katara Chand Khan and her dead body has been thrown in the fields of Dori Lal. The prosecution, therefore, rests its case of circumstantial evidence on the evidence of last seen furnished by Chhotey Lal P.W.5; recovery of the knife and clothes of the deceased at the pointing out of the accused-appellant.

20. At the outset we may note that the knife and clothes belonging to deceased allegedly recovered on the pointing out of the accused-appellant were sent to the Forensic Science Laboratory but the report of the forensic science laboratory was not produced. These articles have also not been produced or exhibited during the course of trial.

21. Statement of the accused-appellant was recorded under section 313 Cr.PC in which he has denied having married the deceased or living with her as husband and wife. He has also denied the alleged recovery. He has stated that only on suspicion, P.W. Nos. 1 to 3 took the deceased to Kargaun. In reply to question no.4, the accused-appellant has stated that due to societal pressure, she went to Kargaun for living. In reply to question no.36, the accused-appellant has stated that he was arrested from his house on 12th June, 2007 at Katara Chand Khan and he was kept at Police Station and has been falsely implicated in the present case.

22. On the basis of above evidence adduced during the course of trial, the court

below has found the accused-appellant guilty of murdering the deceased as she had refused to join his company. The court below concluded that evidence available on record pointed only to the hypothesis of guilt of the accused appellant and no other hypothesis is possible on facts.

23. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the accused-appellant has preferred the present jail appeal.

24. Assailing the impugned judgment and order of conviction, learned Amicus Curiae Mr. Kumar Kartikay, has advanced following submissions:

(i) the prosecution case rests on circumstantial evidence in which the accused-appellant has been implicated only on the basis of suspicion and no evidence exist to hold the accused-appellant guilty;

(ii) evidence clearly shows that the deceased was living with accused-appellant for nearly seven years without any complaint and only on account of societal pressure as also persuasion of her son i.e. P.W.2, she shifted to Kargaun for living;

(iii) the deceased Seema Kashyap shifted to Kargaun against her free will and it is possible that she wanted to return to Katara Chand Khan and to stop her from doing so she was killed by someone else;

(iv) there is no evidence or report of forensic science laboratory to connect the weapon of assault (knife) with the accused-appellant. The recovery was otherwise not proved as the articles were neither produced nor exhibited during trial;

(v) the recovery has been made from an open place during day time from a congested area without any independent witness/person for verifying/testifying the said recovery;

(vi) Rampal Kashyap and Ravi Kumar i.e. P.W.-1 and P.W.-2 respectively, were also present and they had also participated in the recovery proceedings, which makes the prosecution case weak, particularly as P.W.-2 had not singed on the recovery memo on the spot but had signed it later at Police Station;

(vii) the theory of last seen is also not reliable, inasmuch as Chhotey Lal (P.W.-5) is relative of Rampal Kashyap (P.W.-1) and even rental accommodation was arranged by him and soon after the death, he left the house;

(viii) in view of the inconsistency in the statements of the prosecution witnesses; in absence of motive being proved; failure to produce report of Forensic Science Laboratory regarding recovered articles or its production during trial and the theory of last seen being doubtful, the prosecution has failed to establish the guilt of accused-appellant beyond reasonable doubt based on circumstantial evidence.

On the cumulative strength of the aforesaid, learned counsel appearing for the appellant submits that the impugned judgment and order of conviction ought not be sustained and the appeal be allowed.

25. Per contra, Mrs. Archana Singh, learned A.G.A. for the State, supporting the judgment and order of conviction, has made following submissions:

(i) there is definite motive for the accused-appellant to commit the offence as the deceased had declined to join his company; the deceased was otherwise spotted lastly in the company of the deceased, therefore, the statement of

Chhotey Lal (P.W.-5) is absolutely credible in that regard;

(ii) since P.W.-5 Chottey Lal is a rickshaw-puller without having a fixed abode, therefore, the fact that after some time he shifted elsewhere cannot be a ground to discredit his statement;

(iii) the recovery of the knife, which was used in the offence and the clothes worn by the deceased, on the pointing out of the accused appellant, is clearly a strong material to prove that it was the accused-appellant who committed the offence; and

(iv) as per the post-mortem report, the incised wounds found on the body of the deceased, are clearly shown to have been caused by a knife and knife is also recovered at the pointing out of accused-appellant, therefore, the chain of events pointing exclusively to the guilt of the accused-appellant is firmly established during the course of trial.

On the cumulative strength of the aforesaid submissions, learned A.G.A. submits that the impugned judgment and order of conviction does not suffer from any illegally and infirmity so as to warrant any interference by this Court. As such the present jail appeal filed by the accused appellant who committed heinous crime by murdering the deceased is liable to be dismissed.

26. We have considered the submissions made by the learned counsel for the parties and have carefully examined the original records of the case as well as the impugned judgment and order of conviction challenged before us.

27. It is in the context of above submissions and materials placed on record before the Court that this Court is required to consider as to whether the prosecution has established the guilt of accused-appellants on the basis of circumstantial evidence beyond reasonable doubt?

28. Before proceeding with the deliberation any further it would be appropriate to refer to the law governing the case of circumstantial evidence.

29. In **Sharad Birdhichand Sarda vs. State of Maharashtra** reported in (1984) 4 SCC 116, the Apex Court evolved five tests to be established by the prosecution in order to prove the guilt of accused based on circumstantial evidence. Five golden principles have been enumerated in paragraph nos. 152 to 154, which are reproduced hereiafter:

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

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in thefirst instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be

such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground far a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. V. State of Maharashtra, where the following observations were made:

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

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

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

30. Judgment of the Supreme Court in the case of **Sharad Birdhichand Sarda (Supra)** has consistently been followed and reiterated recently by the Court in the case of **Ram Niwas Vs. State of Haryana** reported in 2022 SCC On Line SC 1007

31. This is a case of circumstantial evidence. The dead body of deceased has been found by the Village Chaukidar at 07:15 a.m. in the fields of Dorilal. The dead body was naked with multiple wounds on abdomen and her private parts. The first information report was lodged prior to the identification of deceased. The inquest (Panchayatnama) was started at 09:00 a.m. and completed by 10:45 a.m. The inquest witnesses found the deceased to have died due to injuries caused to her and in the opinion of inquest witnesses, the cause of death of the deceased was homicide. The dead body was accordingly sealed and sent to Mortuary for post-mortem, which was conducted at 04:30 p.m. on 11th June, 2007.

32. From the above evidence, it is shown that till 04:30 p.m. the dead body had not been identified and was shown as unknown.

33. The manner in which the dead body came to be identified as that of the mother of Ravi Kumar (P.W.-2) is an aspect having significance for the proper appreciation of prosecution case. Ravi Kumar (P.W.-2) in his statement claims that he met his mother last on 10th June, 2007

in the morning after which he left for work. Ravi Kumar (P.W.-2) was working in P.K. Namkeen Company, which opened at 10:00 a.m. and close at 08:30 p.m. Ravi Kumar claims that he returned early at 08:00 p.m. on 10th June, 2007 and found the room locked. He tried to search his mother along with Rampal (P.W.-1) and Shashi (P.W.-3) but they could not find her. P.W.-2 claims to be informed by a unknown lady who had gone to cut woods that she saw a dead body of a lady wearing Suit in the field of Dori Lal Kannojiya. Ram Pal (P.W.-1) and Shashi (P.W.-3) were with Ravi Kumar (P.W.-2) then. Ravi Kumar (P.W.-2) claims to have shown the photograph of his mother to this unknown lady who verified that the dead body is that of his mother. The alleged lady who saw the dead body first has neither been produced as witness nor her name has even been disclosed. This unknown lady however saw the deceased wearing a suit.

34. It is difficult to visualize as to how the lady was seen wearing a pink suit at 10:00 a.m. in the morning when as per the first information report lodged at 07:15 p.m., she was naked. We, therefore, find dichotomy in the statement of Ravi Kumar (P.W.-2) when he refers to this unknown lady having seen the dead body of her mother wearing a Suit when admittedly the dead body was found naked. In view of the fact that the unknown lady has otherwise not been identified and her statement is not corroborated by the evidence on record, we suspect the existence of this unknown lady in the statement of P.W.-2. Ravi Kumar (P.W.-2) otherwise does not claim in his statement to have seen the dead body at the place where it was found by the Police.

35. Ravi Kumar (P.W-2) on the other hand states that he met the Investigating Officer at about 11:00 a.m. on 11th June, 2007 with the photograph of the deceased and he was asked to visit the Mortuary. He claim to have identified the dead body of the deceased at 11:30 a.m. He states that the corpse bearer of the Mortuary had opened the seal of the dead body and got it identified by P.W.-2. It is however difficult to comprehend as to how the dead body was shown to P.W.-2 at 11:30 a.m. when the body itself was sealed at 10:40 a.m. upon the acquisition of inquest. The post-mortem was conducted at 04:30 p.m. and between 10:40 a.m. to 04:30 p.m., there was no occasion to open the seal of corpse or to show it to the P.W.-2.

36. P.W.-10 the Investigating Officer Daya Ram Singh has specifically been confronted with the above incongruity and he has clearly stated that the dead body remained sealed from 10:40 a.m. to 04:30 p.m. in the evening, so it is not possible for anybody to see the dead body during this period. He has also stated that the name of person to show the body to Ravi Kumar (P.W.-2) has not been disclosed.

37. The facts noticed above creates doubt in the prosecution story as to how the prosecution witnesses P.W.-1 and P.W.-2 could know before 04:30 p.m. on 11th June, 2007 that the unknown body was that of the deceased. This is so as P.W.-1 and P.W.-2 have specifically stated that they had not visited the place where the dead body was lying and have seen the dead body only in the Mortuary. There is also fallacy in the prosecution case, as P.W.-2 claims that the dead body was wearing Suit while the body recovered by the Police was naked.

38. The second aspect that requires determination is as to how P.W.-1 and P.W.-

2 could know that it was the accused-appellant who had killed the deceased, prior to the alleged recovery made on the pointing out of the accused-appellant in the afternoon on 13th June, 2007. It could only have been a case of doubt on the part of Rampal Kashyap and Ravi Kumar i.e. P.W.-1 and P.W.-2 respectively against the accused-appellant.

39. The story of last seen in this case is routed through Chhotey Lal (P.W.5) who in his examination has deposed of having seen the deceased going with Babu Ram Maurya (accused-appellant) carrying a white bag while talking to each other. P.W.-5 claims that when he heard about the recovery of dead body of a lady, he suspected that accused-appellant may have killed the deceased. He informed P.W.-2 that the deceased and the accused appellant were going together at 06: p.m. on 10th June, 2007. P.W.-5 further claims that he went to Mortuary after the post-mortem was over and found the dead body of deceased Seema Kashyap. The statement of P.W.5 has been recorded by the Investigating Officer under Section 161 Cr.P.C. after four days of incident. In the cross-examination, P.W.-5 has also stated that the deceased was screaming when he saw her with the accused-appellant but this fact has not been mentioned in his statement under Section 161 Cr.P.C. P.W.-5 has specifically been confronted on this aspect.

40. In the recovery memo it has been recorded that the Investigating Officer came to know from the Informer that the murderer of the deceased is the accused-appellant and is hiding and is likely to visit his brother. The question that would arise is as to how the prosecution, even before recovery was made on the pointing out of the accused-appellant could know that it was the accused-appellant who murdered the deceased.

41. The next issue is with regard to recovery of knife and clothes of the deceased on the pointing out of the accused-appellant. First and foremost it is to be noticed that the knife and clothes allegedly recovered on the pointing out of the accused-appellant have not been produced and exhibited before the trial court. According to the prosecution, the knife and other recovered articles on the pointing of the accused-appellant were sent for forensic examination to the Forensic Science Laboratory concerned but no report in that regard was ever produced before the trial court. This is a serious lacuna in the prosecution case and renders the recovery highly suspicious.

42. Even if the recovery is otherwise examined, we find that the accused-appellant, as per the prosecution version, was apprehended at 01:30 p.m. on 13th June, 2007 and he confessed the crime and disclosed that he has thrown the clothes of deceased and knife in a bag, wherein a brick was also kept. He took the Police party to a drain below the culvert in front of Balaji Temple, where he allegedly had thrown this bag. A wet plastic bag was recovered containing a brick; pink colour Chunari having embroidery with blood stained; a pink colour Kurta and Salwar; an old white Bra with plastic on the side; and an iron knife.

43. There is admittedly no independent witness to the above recovery. Rampal Kashyap (P.W.-1) and Ravi Kumar (P.W.-2) were also present at the time of recovery. P.W.-2 has stated that memo of recovery was not signed by him but the

signatures of P.W.-1, P.W.-2 and the accused-appellant were obtained on it only at the Police Station. P.W.-2 has also stated that on the spot pointed out by the accused-appellant, P.W.-2 and P.W.-1 searched for half an hour and thereafter the accused-appellant took out the bag containing knife, clothes of the deceased and a brick.

44. The manner in which the recovery is shown from the accused-appellant, is otherwise rendered doubtful in absence of any independent witness and the statement of the prosecution witness i.e. P.W.-2 himself has contradicted the recovery memo by saying that signatures of P.W.-1, P.W.-2 and the accused-appellant were obtained later at the Police Station. In the absence of any forensic report, the production of recovered articles and serious inconsistency in the statement of witnesses, we find the recovery not to be proved.

45. According to the prosecution the deceased has been murdered by the accused-appellant as she had refused to join his company and there was a fight between the deceased and the accused appellant, thereafter the dead body has been found.

46. The evidence on the aspect of motive therefore, needs to be carefully examined.

47. P.W.-1 Rampal Kashyap who happens to be the husband of younger sister of deceased, has deposed that the deceased was married to Patey, resident of Katara Chand Khan who died about 7-8 years back. Out of this wedlock, the deceased had a son, namely, Ravi Kumar (P.W.-2). Accused-appellant was the friend of Patey and used to visit the deceased house. After about one year of the death of Patey, the accused-appellant married the deceased, who started living with the accused-appellant at Katara Chand Khan along with her son Ravi Kumar (P.W.-2).

48. The relationship of deceased with the accused-appellant was not liked by the relatives of deceased and her son. This apparently was the reason for the deceased to leave the company of accused-appellant and shift to Kargaun. The statement of Ravi Kumar (P.W.-2) is relevant when he says that his mother was living willingly with the accused-appellant. He has stated that he used to hear comments from neighbor on account of living together of deceased with the accused-appellant and he felt sad. P.W.-2 has also deposed that his uncle Chhote Lal had stopped talking to him and the deceased, when they were living at Katara Chand Khan since his uncle was hurt on account of the deceased living with the accused appellant. He has also stated that he was defamed on account of living together of the deceased with the accused appellant. He has further disclosed that P.W.-1 and P.W.-3, Rampal Kashyap and Shashi Kashyap respectively were also disturbed and felt defamed and tried to persuade the deceased jointly and separately to discontinue her relationship with the accused-appellant.

49. P.W.-2 although has deposed that the accused-appellant used to beat him and his mother after consuming liquor for which a report was lodged at Police Post-Jagatpur about two years prior to the death of the deceased but the copy of complaint was not produced before the trial court. He has admitted that this fact has also not been disclosed to the Investigating Officer, earlier.

50. Evidence on record, therefore, shows two distinct versions in respect of the

motive for crime. We find that the deceased was living with the accused-appellant for several years against the wishes of prosecution witnesses, i.e. P.W.-1, P.W.-2 and P.W.-3, who felt defamed on account of their living together. The prosecution witnesses have admitted their objection to the living together of the deceased with the accused appellant and making endeavors to separate them. P.W.-2 particularly felt humiliated on hearing comments against her mother on account of her living with the accused-appellant. It is, therefore, apparent that the deceased, under pressure of P.W.-1, P.W.-2 and P.W.-3, left Katara Chand Khan about a month prior to date of her murder to Kargaun. The rented accommodation was arranged by P.W.-1 close to his house. P.W.-5 was also close to P.W.-1 and his accommodation was also arranged by P.W.-1. He has supported the prosecution version by saying that the accused-appellant came twice to take the deceased but she refused to come with him. He has also claimed that the deceased was screaming when she was last seen with the accused appellant at 06:00 p.m. on 10th June, 2007.

51. From the analysis of evidence led on the aspect of the motive, it is clearly discernible that the deceased was living with the accused-appellant out of her own free will and it was the prosecution witnesses who were annoyed with their relationship. Although it is alleged that the accused-appellant used to beat her after consuming liquor but no such material in the form of any police report etc. has been produced. The deceased apparently had to shift to Kargaun only under the pressure of P.W.-1, P.W.-2 and P.W.-3 and it was not voluntary act on her part to shift to Kargaun.

52. Two eventualities could have happened. It could be the prosecution version that the accused-appellant felt bad when the deceased left his company and as she refused to join her, the accused-appellant killed her. The other eventuality could be that the deceased wanted to return to Katara Chand Khan and the family members, who were annoyed with her for the relationship with the accused-appellant, killed her so that she may not go back to the accused appellant.

53. On facts, we, therefore, find that the plea of motive has not pointed exclusively to the hypothesis of guilt against the accused-appellant but the alternative hypothesis does exist on facts, which may support the innocence of the accused-appellant.

54. On carefully evaluating all evidence existing on record, we find that chain of events pointing exclusively to the hypothesis of guilt on part of the accused-appellant is clearly not established in the facts of the case. Rather, alternative hypothesis does exist on facts to support the appellant's innocence. In such circumstances, the conviction of the accused-appellant based on the circumstantial evidence would clearly be impermissible. Contrary view taken by the trial court, while passing the impugned judgment of conviction, cannot thus be approved of.

55. We have examined the judgment and order of conviction passed by the trial court, which has merely noticed the prosecution version and thereafter has referred to various judgments to hold that the prosecution has established guilt of the accused-appellant based on circumstantial evidence. The trial court has not carefully examined the statements of the prosecution witnesses so as to evaluate the evidence in

its entirety for determining whether an alternative hypothesis, other than the guilt of accused appellant exists on facts. The plea of last seen based on the statement of P.W.-5; without subjecting his statement to closer scrutiny; apparent fallacy in the recovery made on the pointing out of the accused so as to connect him with the offence; improper evaluation of motive based on evidence placed on record, clearly renders the judgment of the trial court unsustainable in the eyes of law. Even legal principles have not been correctly applied by the trial court while convicting and sentencing the accused-appellant to life imprisonment for the offence punishable under Section 302 I.P.C.

56. In view of the above discussions, we hold that the impugned judgment and order of conviction passed by the trial court cannot be legally sustained and is accordingly set aside. The accused-appellant is clearly entitled to benefit of doubt. As he has already suffered incarceration of almost 15 years since the date of his conviction, he is entitled to be released forthwith.

57. Accordingly, the present appeal stands allowed.

58. The accused-appellant shall be released on compliance of Section 437-A Cr.P.C., unless he is wanted in any other case forthwith.

59. We record our appreciation for the able assistance rendered in the case by Mr. Kumar Kartikay, learned Amicus Curiae, who would be entitled to his fee from the High Court Legal Service Authority, quantified as Rs. 15,000/-

60. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Bareilly henceforth, who shall transmit the same to the concerned Jail Superintendent for release of the accused-appellant in terms of this judgment.

(2022) 9 ILRA 1326
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.09.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Government Appeal No. 779 of 2021

State of U.P. ...Appellant
Versus
Mukhtar Ansari ...Respondent

Counsel for the Appellant:
G.A.

Counsel for the Respondent:
Abhishek Misra, Karunesh Singh, Satendra Kumar (Singh)

Criminal Law - Criminal Procedure Code, 1973 – Sections 313 & 378 - Criminal Law Amend Act, 2018 - Section 7 - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Sections 2, 2(b), 2(c), 3 & 3(1) - Indian Penal Code, 1860 – Sections 141, 147, 148, 149, 302, 307, 308, 325, 352, 380, 394, 392, 411, 448, 454, 504 & 506, - Explosive Act, 2008 - Section 5 - Arms Act, 1959 - Sections 3, 7, 7, 12 & 25 - Government Appeal – against order of Acquittal – if the several FIRs were registered or Charge-sheets were filed and the person is member of a gang - it fulfils the ingredients of section 2 of the Gangsters Act, and he can be punished under section 3 - the acquittal of the accused person for turning witness hostile or otherwise is not a material aspect - Gang chart was proved in the court as documentary evidence - Trial Court has grossly erred in acquitting the accused person - accused is found guilty for offence - impugned order set-aside - accused respondent is sentenced for five years of rigorous imprisonment with fine of Rs. 50,000/- - Appeal Allowed. (Para 27, 28)

Appeal allowed. (E-11)

List of Cases cited:

1. St. Vs Abhay Singh & ors., Crime No.0428 of 1999, judgment dated 06.09.2018,

2. Geeta Devi Vs St. of U.P. & ors., Criminal Appeal No.78 of 2022, dated 18.01.2022,

3. Vishnu Dayal & ors. Vs St. of U.P.& anr., 2007 (8) ADJ 716,

4. Udham Singh & anr. Vs St. of U.P. & ors., 2008 (2) JIC 227 (All).

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

1. The present appeal under Section 378 CrPC has been filed against the judgment and order dated 23rd December, 2020 passed by the Special Judge, M.P./M.L.A. Additional Sessions Judge, Court No. 19, Lucknow in Criminal Case No.199 of 2000, arising out of Crime No.0428 of 1999, under Section 2/3 of The Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 (hereinafter referred to as "Gangsters Act") lodged at Police Station Hazratganj, District Lucknow by means of which the accused-respondent has been acquitted of the charge.

2. This Court, vide order dated 27.04.2021, granted leave and admitted the appeal.

3. Charge-sheet was filed against the accused-respondent and 24 other co-accused in Crime No.0428 of 1999, under Section 2/3 Gangsters Act; co-accused, Akbar Husain, Ram Kumar Singh, Guddu Singh, Rajeev Singh alias Raju, Amit Kumar Rawat, Amit Rai, Anil Kumar Tiwari, Sanjeev Dwivedi alias Ramu, Himanshu Negi, Milit Gaud and Surendra Kumar were acquitted by this Court in different applications/petitions filed by them; co-accused Abhay Singh, Rintu Singh alias Vijay Kumar Singh and Manoj Verma were acquitted, whereas co-accused Manish Singh, Arun Kumar Upadhyay alias Babaloo, Chandra Prakash Singh and Chandan Singh Negi had died and, therefore, case against them got abated; Pawan Kumar Upadhyay, Pushpendra Singh and Sandeep Singh Yadav were discharged by the trial Court from offence under Section 2/3 Gangsters Act; trial of co-accused, Shoeb Kidwai, Indra Dev Mishra and K.D. Singh alias Ajay Prakash were separated.

4. On the basis of complaint of Station House Officer, Tejpal Singh Verma, the FIR came to be registered under Section 2/3 Gangsters Act, alleging therein that the accused-respondent and other co-accused, named in the FIR, is a gang, which commits heinous offences, including murder, extortion, kidnapping and abduction etc; one Suresh Kumar, notorious criminal, along with his 3-4 accomplishes, was heard saying that Abhay Singh, who was imprisoned, had got Shri R.K. Tiwari, the then Jail Superintendent, killed in busy Hazratganj area of Lucknow; accused, Abhay Singh and the accused-respondent run their empire of crime from jail; eye-witness, Vinod was asked not to depose in the said case, in support of the prosecution; he was given threats for which FIR at Crime No.0413 of 1999 came to be registered under Sections 504 and 506 IPC on 30.04.1999. It was further said that the gang-members are dreaded criminals, who commit crime in organized manner for accumulation of wealth for themselves and members of the gang;

they strike terror in hearts and minds of the people and no-one dares to lodge FIR even against members of the gang; general public feels in-secured and lives in fear in Lucknow and adjoining areas; on 04.02.1999, Jail Superintendent, Shri R.K. Tiwari was killed in broad-day-light in Hazratganj busy area for which FIR at Crime No.0106 of 1999, under Sections 302 and 307 IPC came to be registered at Hazratganj Police Station; the following other cases are registered against the gang:-

"1.Crime No.0161 of 1990, under Sections 454 and 380 IPC lodged at Police Station Hasanganj;

2. Crime No.064-A of 1999 , under Sections 141, 148 and 352 IPC lodged at Police Station Hasanganj;

3. Crime No.00494 of 1995, under Sections 148, 149 and 307 IPC read with Section 7 Criminal Law Amend Act;

4. Crime No.0473 of 1995 under Section 2/3 Gangsters Act;

5. Crime No.020 of 1998, under Section 2/3 Gangsters Act, Police Station Hasanganj;

6. Crime No.055A of 1995, under Sections 147, 148, 149 and 307 IPC;

7. Crime No.0466 of 1995, under Sections 323 and 504 IPC;

8. Crime No.0514 of 1995, under Sections 147, 148, 149 and 307 IPC;

9. Crime No.09 of 1996, under Sections 147, 148, 149 and 302 IPC read with Section 5 Explosive Act;

10. Crime No.0972 of 1998, under Sections 147, 308 and 325 IPC;

11. Crime No.0115-A of 1995, under Section 307 IPC;

12. 080 of 1999, under Sections 448 and 506 IPC;

13. Crime No.0167 of 1999, under Section 3/25 Arms Act;

14. Crime No.0205 of 1997, under Sections 147, 148, 149 and 307 IPC'

all the said cases were lodged at Police Station Hazratganj, District Lucknow.

15. Crime No.0109 of 1999, under Section 394 IPC;

16. Crime No.01002 of 1998, under Sections 392 and 411 IPC lodged at Police Station Hasanganj;

17. Crime No.049 of 1999, under Section 392 IPC;

18. Crime No.0224 of 1998, under Section 392 IPC lodged at Police Station Mahanagar;

19. Crime No.0390 of 1998, under Section 392 IPC lodged at Police Station Chowk;

20. Crime No.0126 of 1999, under Section 506 IPC lodged at Police Station Krishna Nagar;

21. Crime No.0501A of 1995, under Sections 147, 148, 149, 307, 504 and 506 IPC lodged at Police Station Umari Begamganj, District Gonda; and

22 Crime No.07377 of 1997, under Section 506 IPC lodged at Police Station Baywari, District Varanasi.

5. After completion of investigation, charge-sheet was submitted and charge was framed under Section 2/3 Gangsters Act. However, the accused-respondent denied the charge and claimed trial.

6. The prosecution, to prove its case, produced documentary evidence i.e. FIR, Exhibit Ka-1, charge-sheet, Exhibit Ka-2, gang-chart, Exhibit Ka-3, complaint, Exhibit Ka-4 and Chik FIR, Exhibit Ka-6.

7. Prosecution examined as many as 20 witnesses to prove its case, who deposed as follows:-

1. PW-1, S. P. Singh Pundir, deposed that in the year 1999 he was posted as Additional Inspector General (Prison); on 26.02.1999 he got search conducted of the prison; some persons got highly enraged and became very angry; Mukhtar Ansari, accused-respondent and Abhay Singh were the prominent persons amongst such persons, who got enraged and angry; he was told that a threat had been given for his killing by these criminals; on 27.02.1999, at around 10.30. p.m., two persons in a suspicious position were seen sitting on a motorcycle under eucalyptus tree near his house no. F-182; these persons were noticed by his son, Manish Pundir; these persons were staring at the house of the witness; son of this witness had gone out for a walk along with his dog; out of two persons, one was quite tall and well built of around 6 feet height and second was fat and small; on 28.02.1999, at around 9.15 p.m., when his son went for walk along with dog, he saw that one person jumped from boundary wall of the witness to an open plot and those two very persons, who were found sitting under eucalyptus three on motorcycle on 27.02.1999, were giving indication to him by cigarette; these two persons and the person, who jumped from boundary-wall of the witness to an open plot, were wearing Kamij and Pajama; son of the witness told about it to him and when they came out of the house, these persons were going sitting on a rickshaw; at a little distance from there, 7-8 motorcycles were seen riding by different people; on 01.03.1999, at around 12.15 hours, two persons were seen standing in suspicious condition and as soon as the witness came out of the house, they came on a motorcycle towards his house in a menacing manner; the witness had gone inside the house by that time; these persons, who came on motorcycle, went inside the colony situated near the house of the witness though the road leading to the colony was not a thoroughfare; an FIR about this incident got registered at Police Station Krishna Nagar against the accused-respondent and co-accused, Abhay Singh; statements of this witness and his son were recorded in the Court during trial.

2. PW-2, Tejpal Singh, in his examination in chief, said that in the year 1999 he was posted as In-charge Station House Officer at Police Station Hazratganj; sensational murder of Jail Superintendent, Shri R.K. Tiwari took place in February, 1999 in Hazratganj; 25 persons were named in the said offence, including the present accused-respondent, and charge-sheet was submitted by him on 04.06.1999; on 02.05.1999, he, along with 4 police men, left for Jiyamau; on inquiry people told him that criminal Surendra Kumar, along with his 3-4 persons, was roaming around in the area and saying that Abhay Singh, gang-leader, with his accomplishes, had got killed Shri R.K. Tiwari, Jail Superintendent; some gang-members had been sent to jail; efforts were being made to get them released from jail. He was threatening people to make arrangement of money, and if they would dare to inform to the police, they would get killed; there were several criminals in the gang who were committing serious offences in district Lucknow and other districts for accumulation of wealth for themselves such as robbery, murder, beating, kidnapping and abducting; no-one would dare to lodge FIR because of terror which the gang spreaded in hearts and minds of the people; Abhay Singh and other criminals, lodged in jail, organized criminal activities of the gang from inside the jail using modern information technology; the gang-chart got prepared under his direction by Head

Mohrir which was got approved by the District Magistrate and the same was proved by him as Exhibit Ka-3; the complaint was proved as Exhibit Ka-4; Abhay Singh threatened eye-witness, Vinod for not giving evidence in the murder case of jail superintendent for which FIR No.0413 of 1999, under Sections 504 and 506 IPC was registered on 30.04.1999 at Police Station Hazratganj; several cases got registered against Abhay Singh and his gang-members at Police Station Hazratganj, Mahanagar, Hasanganj, Chowk, Krishna Nagar and district Gonda regarding murder, attempt to murder, robbery, dacoity, riots and extortion etc. Some of such cases are mentioned in the gang-chart. Main profession of members of the gang is to extort money from people and to get them terrorized from their criminal activities.

3. PW-3, Constable Daya Shanker, in his evidence, said that on 01.03.1999, he was appointed as Head Moharir and he wrote the chik FIR of Crime No.0126 of 1999, under Section 506 IPC against Mukhtar Ansari, the present accused-respondent, and Abhay Singh; the said FIR was proved as Exhibit Ka-5.

4. PW-4, Ravindra Singh, in his examination in chief, said that on 02.05.1999 he was posted as constable at Kotwali Hazratganj and on the said date, on the complaint of Station House Officer, Tejpal Singh, In-charge Inspector, FIR at Crime No.0428 of 1999 under Section 2/3 Gangsters Act against the present accused-respondent and other accused was registered. He proved the FIR, which was written in his hand-writing and marked as Exhibit Ka-6.

5. PW-5, Sub-Inspector, Narendra Bahadur Singh, in his evidence said that in the year 1998-99 he was posted as constable Head Moharir. On 04.02.1999, on the written complaint of Jailer, District Jail, Lucknow, Shri Ghanshyam, FIR at Crime No.0106 of 1999, under Sections 307 and 302 IPC was registered at Police Station Hazratganj against two unknown persons. On 06.02.1999, on a complaint of Ram Chandra Gaud, FIR at Crime No.0109 of 1999, under Section 394 IPC was registered at Police Station Hazratganj against unknown person(s) and on 09.10.1998, on a written complaint of Naseem Ahmad Siddiqui, FIR at Crime No.01002 of 1998, under Section 392 IPC was registered against two unknown persons, who came on a black motorcycle. He proved all the three FIRs.

6. PW-6, Ramesh Chandra Pushkar, Inspector, in his examination in chief, said that in 1998 he was posted as Sub-Inspector at Police Station Hazratganj; investigation of Crime No.01002 of 1998, under Section 392 IPC was conducted by him. In the said offence, names of accused, Ravi Dubey and Shoeb alias Boby came into light; they were recognized in the parade conducted inside the district jail. Complainant, Naseem recognized both the accused. On pointing out of accused, Shoeb alias Boby, the bag, which was robbed, could be recovered. After collecting other evidence, the charge-sheet dated 31.05.1999 was filed, which was proved as Exhibit Ka-9.

7. PW-7, constable Sunil Kumar Pandey, in his evidence, said that in the year 1998 he was posted as constable Moharir; on a complaint of Shailesh Kumar Singh on 16.04.1998, FIR at Crime No.0115-A of 1998, under Sections 147, 336, 504, 506 and 323 IPC was registered against accused, Shiv Bhushan Singh, Pawan Upadhyay, Indra Dev Mishra, Hemant Upadhyay and Vinay Singh. He proved certified copy of the chik FIR of the said crime.

8. PW-8, Naseem, in his examination in chief, said that in 1998, at around 12 noon, he was coming out from Bank of Baroda after withdrawing Rs.39,000/-; this amount was kept in a bag and, he was passing by Janpath Market; when he reached at Darulsafa, two persons riding on a motorcycle came there and the person, who was pillion rider, snatched the bag. He was 30-35 years of age, wearing Kurta and Payjama. This witness gave complaint on which FIR at Crime No.01002 of 1998, under Section 392 IPC was registered. This witness was not cross-examined.

9. PW-9, Habib-Ullah, in his statement, said that on 28.02.1999, he was posted as Constable Moharir at police Station Mahanagar; on complaint of Ram Chandra Jaiswal, FIR at Crime No.0119 of 1999, under Section 392 IPC was registered; it was alleged that 3 persons came on a motorcycle and they looted Rs.50,000/- of the complainant; no cross examination was conducted from this witness.

10. PW-10, Ashok Sarswat, In-charge Inspector, in his statement said that on 13.06.1999, he was posted as Senior Sub-Inspector at Kotwali Hussainganj; investigation of Crime No.0428 of 1999, under Section 2/3 Gangsters Act lodged at Police Station Hazratganj was conducted by him after In-charge Inspector, Ram Adhar Yadav was transferred. In the said case, there were 25 accused, including Abhay Singh. On 13.06.1999, statement of complainant, Tejpal Sing Verma, In-charge Inspector Hazratganj was taken. On 15.08.1999, statement of constable Daya Shanker and S.P. Singh Pundir and Virendra Nath and Manish Pundir was taken on 22.07.1999. The statement of Narendra Bahadur Singh and Sub-Inspector, Ramesh Chandra Pushkar were taken in respect of Crime No.01002 of 1998. On 13.08.1999, statement of Naseem Ahmad was taken. Further investigation was conducted by Senior Sub-Inspector, M.M. Khan till 28.01.2000.

11. PW-11, Head Constable, Surendra Singh, in his examination in chief, said that on 05.03.1999, at around 4.30, on written complaint of Harendra Bahadur Singh, student of B.A. 3rd year in Lucknow University, chik FIR at Crime No.060 of 1999, under Section 448 IPC at Police Station Hasanganj was registered against unknown person. He proved the said chik FIR, which was in his hand-writing..

12. PW-12, In-charge Inspector, M.M. Khan, in his statement said that on 16.01.2000, he was posted as Senior Sub-Inspector, Hussainganj, and after transfer of the Senior Sub-Inspector, Ashok Sarswat, he took the investigation of the said case. On the basis of evidence collected in the said case, charge-sheet against accused, Abhay Singh and the present accused-respondent and other accused, named in the charge-sheet, was filed, which was proved and marked as Exhibit Ka-13.

13. PW-13, Ram Chandra Jaiswal, in his evidence, said that on 28.02.1999, he was working in office; Kamal Singh gave him Rs.50,000/- for depositing in the office. He was going on a rickshaw; at that time, 3 persons came on a motorcycle, stopped the rickshaw and on gun-point looted Rs.50,000/- from him for which a written complaint was given at Police Station Mahanagar, which was proved by him.

14. PW-14, Ram Chandra Gaud, in his statement said that on 06.02.1999, he was posted as Clerk in Government High School, Narhi; he went to withdraw salary on the said date at 11.35 a.m. to Allahabad Bank, Hazratganj Branch; he was coming

back from the bank after withdrawing Rs.87,786/- and as soon as he reached in front of Press, near Nawab Ajgar Husain Road, the bag, in which he was carrying the salary of the employees of the school, was looted for which FIR at Crime No.0109 of 1999 got registered at Police Station Hazratganj.

15. PW-15, Virendra Nath Singh, in his statement, said that on 17.06.1999, he was posted as In-charge Inspector at Police Station Krishna Nagar and FIR at Crime No.0126 of 1999 was registered in his presence at the police station Krishna Nagar. The said crime was being investigated by Javed Khan and V.P. Singh. After transfer of Inspector, V.P. Singh, he was appointed as In-charge Inspector at Krishna Nagar and he filed charge-sheet after completing investigation against the present accused-respondent and Abhay Singh under Section 506 IPC and he proved charge-sheet filed in the said offence, which was marked as Exhibit Ka-12.

16. PW-16, Vijay Narain Pandey, in his statement, said that on 05.02.1999 he was posted as Sub-Inspector at Police Station Hasanganj. Crime No.060 of 1999 under Section 448 IPC was registered against unknown persons on a complaint of Harendra Bahadur Singh and investigation of the said offence was carried out by him. In the year 1998-99, he was posted at Police Station Hasanganj and the case was registered against the accused-responent. During the course of investigation of the said offence, his statement was recorded by the investigation officer of the said case, M.M. Khan.

17. PW-17, Shailesh Kumar Singh, in his evidence, said that in the year 1998 he was a student of Lucknow University and he was a candidate for General Secretary for the Student's Union of the University. He got registered the FIR against accused, Piyush Bhushan Singh, Pawan Upadhyay, Indra Dev Mishra, Hemant Upadhyay and Dinesh Singh at Police Station Hasanganj, under Sections 147, 336, 504, 506 and 323 IPC. He proved the FIR.

18. PW-18, Ram Adhara Yadav, in his statement, said that he was entrusted with investigation of Crime No.0428 of 1999 under Section 2/3 Gangsters Act lodged at Police Station Hazratganj as per the order of the Superintendent of Police dated 28.05.1999. He was posted as In-charge Inspector, Hussainganj Police Station.

19. PW-19, Manish Pundir, in his evidence, said that the incident was dated 27.02.1999, at round 10.30 p.m., when he was on walk along with his dog, he saw near House No. F-183, under eucalyptus tree, two persons, one 6 feet height well built and second short and fat, standing there. When he went towards that side, these people went away. On 28.02.1999, when this witness went for a walk along with his dog, he found that one person jumped from his boundary wall to an open plot and those persons thereafter went away on a rickshaw. Two persons, who were seen on previous night, went along with the person who jumped off boundary wall on a rickshaw. He informed his family members about the said incident then the family members came out and they saw several motorcycles with persons present nearby. On 01.03.1999, he saw two persons going in front of his house on a motorcycle towards Hydil colony, which was not a thoroughfare. Investigating officer took his statement in the said case for which the FIR was registered by his father.

20. PW-20, Satya Dev Singh, Circle Officer, in his examination in chief, said that on order of Jail Superintendent,

District Jail, Unnao, he produced accused Mukhtar Ansari in the Court of Special Judge, Gangsters Act, Lucknow on 13.07.2012 .

8. After completing the evidence of the prosecution witnesses, statement of accused, under Section 313 CrPC, was recorded, who denied the incident and said that Shri S.P. Singh Pundir, PW-1 had given false evidence under pressure of the Government and, he lodged the false FIR against him. He further said that PW-2, under pressure of the Government, prepared the charge-sheet by collecting forged and false evidence and the accused had been acquitted in the said case. He further said that PW-4 had given false statement in respect of Case Crime No.0106 of 1999, under pressure of the Government, he lodged the FIR. In respect of PW-5, he said that he was not named in the FIR registered at Crime No.0106 of 1999 at Police Station Hazratganj. Under pressure of the Government, his name was brought in the said offence. He further said that he had no concern regarding Crime No.0109 of 1999, under Section 394 IPC and Crime No.01002 of 1998, under Sections 392 IPC, both lodged at Police Station Hazratganj and, he was not accused in the said cases. In respect of evident of PW-6, he said that he was not accused in the said case. In respect of evidence of PW-7, he said that he was not accused in the said case. In respect of evidence of other witnesses, he said that they were police personnel and they had given false evidence against him and they had collected manufactured and false evidence to implicate him. He further said that he was falsely implicated under Government influence for political reason in several cases. He had been Vidhayak (M.L.A.) for five terms consecutively and, he had defeated the candidates of different parties in different elections. He was very popular in the constituency and he was framed for political reasons.

9. On behalf of defence, copy of judgment dated 06.09.2018 (State Vs. Abhay Singh and others) relating to Crime No.0428 of 1999, certified copy of this Court's order dated 01.05.2017 and other orders of this Court and trial Court were produced and proved.

10. The learned trial Court, after considering the evidence on record and also taking into consideration that in all the cases, mentioned in the gang-chart, either the accused-respondent was acquitted or charge-sheet was not filed or by the orders of the High Court the cases were quashed. It was said that the gang-chart was prepared earlier than the FIR was registered. It was also said that during the course of investigation, no detail of property or wealth, which was allegedly accumulated by committing crime, was given. The learned trial Court acquitted the accused-respondent for the offence under Section 2/3 Gangsters Act as the prosecution could not prove the offence against the accused-respondent beyond reasonable doubt.

11. The Gangsters Act has been enacted as a Special Act for prevention and for coping with gangsters and antisocial activities. The purpose of the Gangsters Act is to prevent organized crimes in the State by enacting the special provisions. The Gangsters Act is deterrent in nature. It provides for deterrent punishment. The gang has been defined under Section 2(b) Gangsters Act, which reads as under:-

*"**2 (b)** "Gang" means a group of persons, who acting either singly or*

collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

(i) offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or

(ii) distilling or manufacturing or .storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956), or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

[(xvi) offences punishable under the Regulation of Money Lending Act, 1976;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities.

(xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966:

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xvv) indulging in crimes that impact security of State, public order and even tempo of life."

12. Thus, if a person belongs to a group of persons, who, either acting singly or collectively, indulges in violence or threat or show of violence and coercion etc., with object to disturb public order or to gain any undue temporal and pecuniary material or other advantage to himself or any other person, indulges in anti-social activities and, commits offence, as defined under the said section, as the group of persons, would be a gang.

13. Gangster has been defined under Section 2(c) Gangsters Act, which reads as under:-

"2(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities."

14. Gang-leader and member of the gang is called gangsters. Even a person, who abets or assists in the activities of gang, as defined under Section 2(b), whether before or after the commission of such activities, or harbours any person, who has indulged in such activities, would be also a gangster. Section 3(1) Gangsters Act provides for punishment of gangster, which would be two years and may extend to ten years with fine and fine should not be less than Rs.5,000/-. If a gangster commits an offence against public servant or any member of public servant, then the minimum punishment would be of three years and fine.

15. The offence under the Gangsters Act is an independent offence than the substantive offence. If it is proved that a person belongs to a group of persons and commits offence individually or with group of persons, which are defined under Section 2(b) of the Gangsters Act, such a person is a gangster and he would be punished for a term, which may be two or three years and extendable to ten years with minimum fine of rupees five thousand.

16. On behalf of the appellant-State, Mr. Umesh Verma, learned Additional Government Advocate, along with Mr. Rao Narendra Singh, learned Additional Government Advocate, has submitted that the basic ingredients to prosecute an individual under the Gangsters Act for commission of an offence as gangster is him being the member of the gang. Even if no FIR is registered against a person, still he can be prosecuted for the offence under the Gangsters Act. The purpose of the Gangsters Act is to curb organized crime and criminal activities of the gang and gangsters.

17. If it is proved that an accused belongs to a gang and commits offences

individually or with other gang members with object of disturbing public order or of gaining any undue temporal and pecuniary material or other advantage for himself or any other member of the gang, he can be prosecuted and punished.

18. When a specific offence has been created in a Special Statute and the offence is covered by the Statute and fulfills the requirement as defined, he may be punished under the Gangsters Act.

19. Mr. Verma has submitted that even if the accused-respondent was acquitted in substantive offences, which are mentioned in the gang-chart, because the witnesses turned hostile out of his fear, manipulation, threats and making the witnesses tired by employing other tactics, that would not absolve the accused-respondent from the offence under Section 2/3 Gangsters Act. If it is proved that the accused-respondent is a member of the gang and he commits offences to disturb the public order and to gain any undue temporal and pecuniary, material or other advantage to himself or any other person.

20. Mr. Verma submits that the accused-respondent is the most dreaded criminal and gangster, whose reign of crime is not spread only in State of Uttar Pradesh, but in other States, including Delhi, Maharashtra and Punjab etc. The trial Court has erred in acquitting the accused-respondent only on the ground that he was not convicted in any of the offences, which were part of the gang-chart. It is not a correct view. It is further submitted that the learned trial Court was required to consider whether the accused-respondent was a member of the gang and had committed the offences, as defined under Section 2/3 Gangsters Act. The trial Court has ignored this vital aspect while acquitting the accused-respondent and, therefore, the impugned judgment and order, passed by the learned trial Court, is unsustainable and liable to be set-aside. The accused-respondent is to be convicted for the offence under Section 2/3 Gangsters Act.

21. On the other hand, Mr. Jyotindra Mishra, learned Senior Counsel, assisted by Mr. Satendra Kumar Singh, Advocate appearing for the accused-respondent, has submitted that all other members, who were named in the gang-chart, have either been acquitted or the prosecution, against them, was quashed by this Court or they were discharged. It has been further submitted that the prosecution had failed to bring any cogent and credible evidence against any of the alleged gang-members. The trial Court has taken a correct view of acquitting the accused-respondent for the offence under Section 2/3 Gangsters Act. It has been further submitted that it is a case of no evidence against the accused-respondent and the accused-respondent cannot be punished for his perceived image. Mr. Jyotindra Mishra, learned Senior Counsel, has placed reliance upon the judgment of the Supreme Court dated 18.01.2022 passed in ***Criminal Appeal No.78 of 2022 (Geeta Devi Vs. State of U.P. & Ors)*** to submit that in appeal, against acquittal under Section 378 CrPC, High Court is not required to re-appreciate entire evidence and if this Court re-appreciates the evidence even then no offence is said to have been made out against the accused-respondent, which would attract provisions of Section 2/3 Gangsters Act.

22. The moot question, which arises for consideration in this case, is that if the accused-respondent has been acquitted for offences, which were mentioned in the

gang-chart, (substantive offences), can he still be convicted for offence under Section 2/3 Gangsters Act. As stated earlier, the offence under Section 2/3 Gangsters Act is a distinct and separate offence than the substantive offence. If the prosecution proves that the person belongs to a gang and indulges himself in committing offence with object of disturbing public order or of gaining any undue temporal and pecuniary material or other advantage for himself or any other person, he may be punished under the Gangsters Act.

23. A Coordinate Bench of this Court in ***2007 (8) ADJ 716 (Vishnu Dayal and others Vs. State of U.P. and another)*** held that the object of the Act is to arrest the activities of organized criminals and members in their gangs. The Court also observed that gangsterism in the recent times has taken menacing dimensions and lives and liberty of citizens have been pushed against the walls of organized crimes. Paragraphs-11 and 12 of Vishnu Dayal and others Vs. State of U.P. and another case (supra), which are relevant for the purpose of this case, would read as under:-

"11. From the definition clause it is per se clear that a gang is a group of one or more persons who commit the crimes mentioned under the definition clause for the motive of earning undue advantage whether pecuniary, material or otherwise. Even a single crime committed by a gang is sufficient to implant Gangsters Act on such members of gang and repetition of crime is not desired for invoking offences under the said Act. The definition clause, as mentioned above does not engulf plurality of offence before the Gangsters Act is invoked. It is an Act to achieve an avowed object of arresting the activities of organised criminate and members of their gang. Gangsterism in the recent times has taken menacing dimensions and lives and liberty of citizens has been pushed against the walls of organised crimes. This type of offences have to be dealt with sternly and with tenacity. Further the offence under the Gangsters Act can be implanted on a group of persons who act individually or collectively.

12. In the present case the incident was motivated and executed because of grabbing of property of the deceased as the accused persons are very close relatives of deceased and are in fact, his real nephews and wife of his real own brother. These accused persons had an evil eye on the property of the deceased because of which they have committed the murder of their own blood relation. The offence was well chalked out and pre-planned. This certainly is gangsterism. This fact clearly brings out the activity of the applicants within the perview of the Gangsters Act. The contention of Sri Sengar, learned counsel for the applicants, is that this was an individual act and from the F.I.R. it cannot be said that the murder had taken place because of the lust of the property and, therefore, the Gangsters Act is not applicable, does not appeal at all as the said contention is against the facts of the case. I have gone through the judgment of this Court in the case of Ashok Kumar Dixit, (1987 All LJ 806) (supra). The said judgment does not countenance the submissions raised by Sri Sengar, learned counsel for the applicants. From the facts of the case it is perceptibly clear that embedded motive in the minds of the culprits was to grab the property and to gain pecuniary advantage for them. This certainly brings in their case within the purview of the Gangsters Act."

24. In ***2008 (2) JIC 227 (All) (Udham Singh & Anr. Vs. State of U.P. & Ors)***, this Court, while dealing with the question whether on the basis of single incident the

provisions of Gangsters Act can be invoked against such a person, this Court held that under Section 2/3 Gangsters Act, if the gang-chart affirms part of the FIR and in the gang-chart it is clearly mentioned that there is a gang, which indulges into commission of offence and on the basis of perusal of the gang-chart the authorities are satisfied for sanctioning registration of the FIR, such person can be prosecuted and punished for the offence. It was again reiterated that the purpose of the Gangsters Act is to control activities of organized gangs and gangsters. When specific offence has been created, it is open to punish a person even for a single act if it is covered by the requirement of law.

25. The Supreme Court also in *Geeta Devi Vs. State of U.P. & Ors. (Criminal Appeal No.78 of 2022)*, while delineating the provisions of Gangsters Act, held that even a person, against whom for single offence, charge-sheet has been filed for any activity, mentioned under Section 2/3 Gangsters Act, he can be prosecuted under the Gangsters Act.

26. Paragraphs 8 and 10 of *Udham Singh & Anr. Vs. State of U.P. & Ors case (supra*), which are relevant for the purpose of decision of the present case, are extracted herein below:-

"8. Coming to the first contention of the learned counsel for the petitioners that on the basis of a single incident, the petitioners cannot be booked under the Act, we need to observe only this much that vide para 14 of the aforesaid judgment of Subhash (supra), the said contention has already been negated by the Division Bench of this Court on which decision, reliance has been placed by the petitioners themselves. It has been held in the aforesaid decision of Subhash (supra) as follows:--

"The words used in Section 2 are no doubt in plural indicating "indulges in anti social activities" but the sentence does not stop with the words "anti social activities". It goes on with the words "viz" followed by 15 clauses of anti social activities enumerated therein. The plural in "anti social activities" referred to the large number of activities to be brought under the umbrella of this single offence and it would never mean that there must be plurality of actions before a person could be prosecuted or convicted for an offence under the Act. When a specific offence has been created, it is open to be punished even for a single act, if it is covered by the requirements of law. We thus, answered point No. 1 framed by us."

10. There is another aspect of the matter which we would like to discuss. Under the definition clause of the Act u/S. 2(b) and (c), it is not required that the FIR must be registered against the gangster before he is booked under the Act. Sine qua non to prosecute an individual under the Act is commission of an offence as a "gangster". Gang means a group of persons, who acting either signally or collectively, by violence, or threat or show violence or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti social activities. It is not the requirement of law that nobody can be prosecuted under the Act if no FIR is registered against him. It is the activity of an individual which is the determinative factor for bringing him under the mischief of the Act and nothing else. If he acts as a member or leader of a gang he can be booked under the Act irrespective of any previous FIR being registered against him or not. The plain reading of different definition clauses clearly

indicates that if the person indulges into the commission of offence enumerated under Section 2(b)(I) to (XV) as a member or leader of a gang for gaining any undue temporal, pecuniary, material or other advantage then he is purviewed within the ambit of the Act and it is not the requirement of law that the FIR for the input offence must be registered before he is booked under the Act. Since the purpose of the Act is to curb the activities of gangster, which are more often than not commit not in any public gaze therefore the provisions of Act have to interpret in a manner which fosters its purpose and the intention of legislature best."

27. It is not in dispute that several FIRs and charge-sheets for offences, which are provided under definition clause of Section 2(b) of the Gangsters Act, were registered against the accused-respondent and the charge-sheets were filed against him, including in the case of murder of Jail Superintendent of District Jail, Lucknow. Acquittal or conviction is immaterial for invoking the provisions of Gangsters Act against a person, who is otherwise a member of the gang and, allegedly commits offences, which are defined under Section 2(b) of the Gangsters Act. If the FIR is registered or the charge-sheet is filed and the person is member of gang, which is defined under Section 2(b) Gangsters Act, it fulfills the ingredients of Section 2 of the Gangsters Act and he can be punished under Section 3 of the Gangsters Act. The trial Court has acquitted the accused-respondent on the ground that the accused-respondent was acquitted in all the offences, which were mentioned in the gang-chart. The gang-chart was approved and the FIR came to be registered against accused-respondent along with others. This Court is of the view, on considering the law laid down by the Supreme Court and this Court, as discussed above, and carefully reading all the provisions of the Gangsters Act, that the accused-respondent was a member of the gang and for his criminal activities several FIRs and charge-sheets came to be registered and submitted against him for offences, which are defined under Section 2/3 Gangsters Act. The acquittal of the accused-respondent for turning the witness hostile or otherwise is not a material aspect. The trial Court has grossly erred in acquitting the accused-respondent vide impugned judgment and order. The gang-chart was proved in the Court as documentary evidence. In view of the foregoing discussion, this Court is of the view that the accused-respondent is a gangster and he allegedly committed several offences and, therefore, he is found guilty for offence under Section 2/3 Gangsters Act. Therefore, the impugned order dated 23.12.2020 passed by the learned trial Court is hereby set-aside. The accused-respondent is sentenced for five years rigorous imprisonment with fine of Rs.50,000/-.

28. In view of aforesaid, the appeal is **allowed**. Since the accused-respondent is already in jail, no order is required to be passed for his surrender.

29. Let the record of the trial Court be remitted back for preparing the conviction warrant against the accused-respondent.

(2022) 9 ILRA 1339
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:LUCKNOW 21.09.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Government Appeal No. 780 of 2021

State of U.P. ...Appellant

Versus

Mukhtar Ansari ...Respondent

Counsel for the Appellant:
G.A.

Counsel for the Respondents:
Abhishek Misra, Karunesh Singh, Satendra Kumar (Singh)

(A) Criminal Law - Criminal Procedure Code, - Sections 161, 311, 313 & 378 - Indian Penal Code, 1860 - Sections 353, 503, 504 & 506 - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Sections 2 & 3 - Government Appeal – against Acquittal – complainant - FIR - offence of threat of life by pointing a revolver by the accused person to complainant who is on official duty as Jailer - during trial witnesses were hostile - Trial court held that offences did not get proved against accused person - Appeal - Law is very clear that, appellant court lightly should not interfere with the judgment of the acquittal unless the impugned judgment is perverse or the view taken by the learned Trial Court is impossible view - the testimony of witness PW 2, who was given threats of life by accused respondent has fully supported the prosecution case in all respects in his examination-in-chief - there was no reason to falsely implicate the accused for commission of the offence - Trial court completely ignored the evidence of PW2 given in Examination-in-chief and had only considered his cross examination - approach of the trial court is palpably erroneous and against the settled law - therefore impugned judgment is unsustainable. **(**Para **-** 53, 54, 55)

(B) Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 311, 313 & 378, - Indian Penal Code,1860 - Sections 353, 503, 504 & 506 - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section - 2, 3 - Government Appeal – against Acquittal – complainant - FIR - Testimony of hostile witnesses does not effaced completely and washed off record but it is for the court to closely scrutinize the testimony of such witnesses in the facts and circumstances and take into consideration while convicting or acquitting the accused - part of the testimony of such witness which supports the prosecution case can be relied on for conviction of the accused - hence, present appeal is allowed - accused respondent is convicted for offence and sentenced for offence as per law. (Para 53, 59)

Appeal allowed. (E-11)

List of Cases cited:

1. Dhanapal Vs St. by Public Prosecutor, Madras, (2009) 10 SCC 401,

2. St. of Raj. Vs Naresh @ Ram Naresh, (2009) 9 SCC 368,

3. St. of U.P. Vs Banne @ Baijnath & ors., (2009) 4 SCC 271,

4. Ghurey Lal Vs St. of U.P., (2008) 10 SCC 450,

5. Samghaji Hariba Patil Vs St. of Karnataka, (2006) 10 SCC 494,

6. Dayaram& anr. Vs St. of M. P., (2020) 13 SCC 382,

7. Ramesh & ors. Vs St. of Har., (2017) 1 SCC 529,

8. Swaran Singh Vs St. of Punj., (2000) 5 SCC 668,

9. Radha Mohan Singh @ Lal Saheb Vs St. of U.P., (2006) 2 SCC 450,

10. Bhagwan Singh v. St. of Har., (1976) 1 SCC 389 : 1976 SCC (Cri) 7 : AIR 1976 SC 202

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

1. Present appeal has been filed under Section 378 Cr.P.C. with an application for leave to appeal against the judgment and order dated 23.12.2020 passed by Special Judge, M.P./M.L.A., Additional Sessions Judge, Court No.19, Lucknow in Criminal Case No. 1818 of 2012: CNR No. U.P.L.K.O.10052862012 arising out of Case Crime No.131 of 2003 under Sections 353, 504, 506 IPC, Police Station Alambagh, Lucknow.

2. Learned Trial Court has acquitted respondent, Mukhtar Ansari of all charges.

3. This Court vide order dated 27.04.2021 had granted leave to appeal and admitted the appeal.

4. Prosecution case in brief is that the complainant, S.K. Awasthi was posted as Jailer in District Jail, Lucknow in the year 2003. On 23.04.2003 at around 10:30 A.M., when he was sitting in his office inside the jail, Gatekeeper, Prem Chandra Maurya told him that some persons had come to meet prisoner, Mukhtar Ansari, the respondent. Mukhtar Ansari, who was also an M.L.A., came to the office of the Jailer. The complainant ordered for his frisking, on which Mukhtar Ansari got highly annoyed. He said, "You Jailer think yourself very high. You create hurdles in coming persons to meet me." Mr. S.K. Awasthi told the respondent that these persons cannot not come inside without being frisked. Mukhtar Ansari said, "You come out of Jail today, I would get you killed." Prisoner, Mukhtar Ansari abused him and took revolver from one of the persons, who had come to meet him and pointed it towards the complainant. It was said that some people caught hold of Mukhtar Ansari and some caught hold of the complainant, otherwise any untoward incident could have taken place. Prisoner, Mukhtar Ansari sent his men, who came to meet him, out of prison and said to the complainant, "Now your days are over and nobody can save you now."

5. At the time of incident, Deputy Jailer, Mr. Sarvesh Vikram Singh, Deputy Jailer, Shailendra Pratap Singh, Gate Keeper, Prem Chandra Maurya, I.W. Rudra Bihari Srivastava, I.W. Radheyshyam Yadav, I.W. Ram Swaroop Pal were present.

6. Mr. S.K. Awasthi, the complainant, gave a complaint to this effect on 28.04.2003 at Police Station Alambagh, Lucknow on which the FIR at Case Crime No.131 of 2003 under Sections 353, 504, 506 IPC came to be registered on the same day against respondent-Mukhtar Ansari. The investigation of the case was entrusted to Sub Inspector, Mr. Ganesh Singh and Smt. Indu Srivastava.

7. After completing the investigation, charge-sheet against the accused-respondent was filed under Sections 353, 506, 504 IPC, 2/3 U.P. Gangsters and Anti Social Activities (Prevention) Act (for short 'the Gangsters Act') on 08.06.2003. Thereafter, on 05.02.2005 a supplementary charge-sheet No.137 of 2003 under Sections 353, 506, 504 IPC was submitted in the Court. Learned Magistrate took cognizance on Charge-sheet No.137 of 2003 arising out of Case Crime No.131 of 2003 under Sections 353, 506, 504 IPC.

8. Charges were framed for offences under Sections 353, 504, 506 IPC on 28.06.2003. The accused-respondent denied the charge and claimed for trial.

9. Prosecution to prove its case, proved documentary evidence i.e. complaint (Exh.Ka-1), Chik FIR (Exh.Ka-2), GD Entry (Exh.Ka-3), Site Map (Exh.Ka-4), Charge-sheets (Exh.Ka-5 and Exh.Ka-6).

10. Prosecution also examined following witnesses to prove its case:-

(a) Gate Keeper, Prem Chanda Maurya as P.W.-1;

(b) Jailer, S.K. Awasthi, the complainant, as P.W.-2;

(c) Jail Warden, Shailendra Pratap Singh as P.W.-3;

(d) I.W. Ram Swaroop Pal as P.W.-4;

(e) I.W. Rudra Bihari Srivastava as P.W.-5;

(f) Inspector, Smt. Indu Srivastava as P.W.6

(g) Inspector Ganesh Singh as P.W.-7.

11. P.W.-1, Prem Chandra Maurya in his evidence has deposed that he had been posted as Jail Warden in Lucknow District Jail since 06.07.2002. On 27.04.2003, he was deputed as Gate Keeper on the main gate of Lucknow District Jail. Between 10:30 A.M. and 11:00 A.M. some persons came to meet prisoner, Mukhtar Ansari. The witness asked Jailer, Mr.S.K. Awasthi present in his office to allow these persons. The jailer denied permission to these persons to come inside to meet Mukhtar Ansari. Persons, who came to meet prisoner, Mukhtar Ansari returned. Thereafter, he started doing his desk work. He did not know that what happened between the Jailer, S.K. Awasthi and Mukhtar Ansari in Jailer's office. He further said that distance between the Jailer's office and main gate of the Jail would be around 40-50 ft and duty of gate keeper is quite onerous and busy. He said that he could not say that how the Jailer in his report had written that some persons came inside the jail from outside, and when the Jailer asked to frisk these persons, prisoner, Mukhtar Ansari got highly annoyed. He said that he did not see what incident took place between Jailer, S.K. Awasthi and Mukhtar Ansari. In his report, Jailer had shown him as an eye witness, but he could not say why he did so. The Investigating Officer did not take his statement. He further said that he did not know how the Investigating Officer had written that this witness out of fear opened the main gate and some persons came inside, and the alleged incident took place. This witness was not cross examined by the defence.

12. P.W.-2, Mr.S.K. Awasthi, the complainant supported the FIR version and said that the incident was of April, 2003. It took place during day time. He was posted as Jailer in District Jail, Lucknow. The accused-respondent was a prisoner in the jail. Some persons had come from outside to meet the accused-respondent, and dispute took place in respect of frisking these persons. The incident took place inside the jail. Prisoner, Mukhtar Ansari took out revolver from one of the persons who had come to meet him. He further said that along with him entire staff and two Deputy Jailers, Sarvendra Vikram Singh and Shailendra Pratap Singh were present. The gate keeper under pressure and fear of the accused-respondent allowed these persons who had come to meet prisoner, Mukhtar Ansari inside the jail. Prisoner, Mukhtar Ansari had extended threats to him. He lodged the FIR at the police station regarding this incident. He proved the complaint given at the police station which was marked as Exh. Ka-1. After examination-in-chief got concluded, no cross examination of the witness was conducted on behalf of the accused-respondent and the trial Court closed the examination of the said witness vide order of date i.e. 12.12.2013 when his examination-in-chief was recorded.

13. Mr.Shailendra Pratap Singh, who was posted as Deputy Jailer, was examined as P.W.-3. He said that on 27.04.2003, he was present in his office. Someone told him that some hot talk was taking place between prisoner, Mukhtar Ansari and

Jailer, Mr. S.K. Awasthi. On this, he went to the office of Jailer and found Mukhtar Ansari coming out of the office of the Jailer. Mr. S.K. Awasthi was sitting in his office. Mr. S.K. Awasthi told him that some hot talk had taken place between him and prisoner, Mukhtar Ansari in respect of some persons coming to meet him. No cross examination of this witness was conducted on behalf of the defence.

14. Mr. Ram Swaroop Pal was examined as P.W.-4. He on oath said that he was posted as Warden in District Jail, Lucknow on 27.04.2003 and Mr. S.K. Awasthi was the Jailer. On the date of incident at 10:30, he was in lock up office. Office of Mr. S.K. Awasthi was not visible from his office. Distance between two offices was more than 500 meters. On 27.04.2003 at around 10:00 A.M., no disturbance/deterrence was created in discharge of the official function of the Jailer, Mr. S.K. Awasthi. Mukhtar Ansari did not abuse Jailer and humiliate him nor he gave threat to the Jailer for his killing. This witness was declared hostile, and was cross examined by the prosecution. During the cross examination, he said that on the alleged date of incident his duty was in the Lock-up complex from 5:30 AM to 8:00 PM. He did not have any information in respect of the incident, subject matter of the case. After finishing his duty, he went to his residence. The investigating officer did not make enquiry from him. The witness was confronted with his statement recorded under Section 161 Cr.P.C. He said that he did not give any such statement. He denied the suggestion that he was giving false statement under pressure and fear of the accused.

15. P.W.5, Mr. Rudra Bihari Srivastava (retired), aged around 66 years, in his statement said that he was posted as Chief Warden on 27.04.2003, and Mr. S.K. Awasthi was the Jailer of the District Jail, Lucknow. His duty on the said date at 10:30 A.M. was on the second gate, and the distance of the Jailer's office from his duty place would be around 250 meters. Office of the Jailer was not visible from his office as the window remained closed. He said that at around 10:30 AM on 27.04.2003, prisoner, Mukhtar Ansari did not create any disturbances/deterrence in the official duty/ function of the Jailer nor he abused the Jailer to humiliate him nor he gave any threat of killing him. No incident took place in front of him. This witness was also declared hostile and was cross examined by the prosecution.

16. In his cross-examination, he said that his duty on the date of incident was from 8 AM to 8 PM, and while he was on duty he did not get the information regarding the alleged incident. After duty got over, he went to his residence. The investigating officer did not make any enquiry from him nor recorded any statement of him. The witness was confronted with his statement recorded Section 161 Cr.P.C. then he said he was not aware that how the investigating officer had written his statement. He denied the suggestion that he was giving evidence under pressure mounted by the accused, Mukhtar Ansari out of fear.

17. P.W.-6, Smt. Indu Srivastava said that in the year 2003, she was posted as S.S.I. at Police Station Alambagh. Investigation of the offence registered at Case Crime No.137 of 2003 under Sections 353, 504, 506 IPC, 2/3 Gangsters Act was entrusted to her after the previous investigating officer, Shri Ganesh Singh was transferred from the police station. Earlier, the Investigating Officer had

completed the investigation up to Parcha No.5. She had requested the district authorities for approval of the gang chart against the accused-respondent, however, the District Magistrate did not approve the gang chart. Earlier, the investigating officer had completed the investigation in respect of the Gangsters Act up to Parcha No.5. Report for deleting the provisions of the Gangsters Act was sent to Superintendent of Police (East), Lucknow on 11.01.2004. Supplementary charge sheet and Parcha No.6 were completed by her. She made efforts to get the earlier charge-sheet cancelled on 15.05.2004. She completed Parcha No.7 and again efforts were made to get earlier charge-sheet cancelled.

18. On 10.06.2004, an additional Parcha No.8 was completed by P.W.-6, and on the said date, she went to District Jail and a request was made from the District Jailer's office to give the list of persons, who had come to visit the jail on 27.04.2003. On this request, information was given that no application or name was mentioned of the person(s) who came to meet Mukhtar Ansari on the said date. On 20.07.2004, she submitted Parcha No.9 and went to District Jail and met Deputy Jailer S.P. Singh and Jailer R.C. Gupta, and their statements were recorded.She tried to collect information regarding the incident, however, no one was ready to give any statement against the accused. On 10.06.2004 she completed supplementary Parcha Nos. 10 and 11 and made efforts to get the previous charge-sheet cancelled. However, she did not receive any order during her investigation from the witnesses. Thereafter, she was transferred. She also said that that Constable Moharir who was posted during her tenure, she had seen him reading and writing. She recognized his writing. She said that the chik FIR and carbon copy were prepared by Head Moharrir.

19. In her cross examination, P.W.-6 said that she was entrusted with the investigation on 11.01.2004 and the investigation was complete on 29.09.2004. She also said that she had made an entry in the G.D. regarding her going to jail. She denied the suggestion that she had completed the charge-sheet sitting in the police station. She also denied the suggestion that she was giving evidence under pressure of the higher authorities.

20. It would be relevant to take note of the fact that examination-in-chief of Jailer, S.K. Awasthi, aged around 61, was recorded on 12.12.2013, and he was not cross examined by the accused and right to defence to cross examine him was closed on the said date. Vide an order dated 30.01.2014 on an application moved on behalf of the accused under Section 311 Cr.P.C., the said witness recalled and cross examined on 25.02.2014. In his cross examination, he said that he was posted in Lucknow District Jail in 2002-03. Complete information including entry of any visitor inside the jail was made in the jail book. He denied the suggestion that it was not necessary to mention name of the visitor who would meet which prisoner, and only number of persons coming to meet the prisoner was mentioned. He clarified that the visitor would give an application in which he would write name of the prisoner whom he would like to meet. However, it was not necessary to get the signature of the visitor made on gate register. He also accepted the suggestion that as per the Jail Manual, only three persons can be allowed to meet a prisoner in a day, and only twice a prisoner can meet the visitors in a week. Any visitor coming to meet a prisoner is

frisked and thereafter he comes inside. Frisking is done outside the gate as well as inside the gate. When incident took place he was in the office, the accused-respondent came in the office and he protested. The witness said, "I had stopped visitors coming to meet him, he became angry and went out of the office." Thereafter, the witness remained sitting in the office. He further said that the fact of showing weapon and threats of killing him were heard by him but he did not see from his own eyes. These facts were told to him by staff and, thereafter, he got the FIR registered. FIR was registered as per his own wisdom. Whatever information regarding the incident was recorded by him, he informed his higher officials and then lodged the FIR.

21. He further deposed that it was prohibited to take mobile and firearm inside the jail. No person could have a firearm inside the jail as only after frisking, prisoners were sent inside the jail. Routine checking would also take place inside the jail. He also said that FIR was registered after consultation with the higher officials. He denied the suggestion that under pressure of the Government, he lodged the false FIR. He accepted the suggestion that he did not see weapon in the hands of Mukhtar Ansari and he did not extend treats to anyone before him, and he also did not abuse the witness on the said date. Mukhtar Ansari did not create deterrence /disturbance in performing the official duties by him.

22. P.W.-7, Inspector Ganesh Singh, deposed that on 28.04.2003 he was posted as S.S.I. in Alambagh Police Station. He conducted the investigation of the Case Crime No.131 of 2003 under Sections 353, 504, 506 IPC. He received the copy of the FIR to conduct the investigation. On the said date, he recorded statement of the complainant, Mr. S.K. Awasthi. He inspected the place of incident, prepared site plan, which was marked as Exh-Ka-4. He recorded the statement of Chief Warden, Rudra Bihari Srivastava and Radhey Shyam, eye witnesses. He also recorded the statement of Deputy Jailer, Shailendra Pratap Singh and after having sufficient evidence against the accused-Mukhtar Ansari, he prepared charge-sheet under Section 353, 504, 506 IPC, 2/3 of the Gangsters Act. He submitted charge-sheet No.134 of 2003 in the Court, which was in his writing and signature. This was marked as Exh Ka-5. He prepared supplementary Parcha No.SCD-5 and from supplementary SCD-6 to 13 were completed by Smt. Indu Srivastava. Supplementary charge-sheet was submitted under Section 353, 504, 506 IPC in the Court, which was marked as Exh-Ka-6.

23. In his cross examination, he said that he carried out the investigation outside the jail and inside the jail. He denied suggestion that he completed the investigation sitting in the police station. He also said that he denied the suggestion that provisions of the Gangsters Act were added under the pressure of higher authorities. District Magistrate did not sanction the Gang chart. He denied the suggestion that the case diary was not sent to the circle officer. He denied the suggestion that he carried out the investigation under the pressure of higher authorities. He also denied the suggestion that he used to receive call from a Minister for filing of charge-sheet, and he also denied the suggestion that he prepared the charge-sheet under the political pressure.

He also denied the suggestion that he was coming to give evidence after 17 years under the pressure of higher officials.

24. In his statement recorded under Section 313 Cr.P.C. the accused-respondent denied the incident and said that no hot talk between him and Jailer took place on the date of incident and for this reason, Gatekeeper, Prem Chandra Maurya did not hear anything. He further said that the complainant, S.K. Awasthi had given false evidence regarding the fact that when the incident took place, his entire staff including two Deputy Jailers, Sarvendra Vikram Singh and Shailendra Pratap Singh were present. He denied that the Warden allowed the visitors inside the Jail under his fear and terror. In respect of statement of P.W.-3, Shailendra Pratap Singh that while he was sitting in the office some hot talk had taken place between S.K. Awasthi and Mukhtar Ansari, and when he went to the office of the Jailer he found accused going out of the office and S.K. Awasthi was sitting in his office, he denied the incident. He also denied the statement regarding the version given by other witnesses and said that the investigation was conducted under political pressure to falsely implicate him. He said that he had been M.L.A. for 5 terms from different political parties. He defeated the candidates of different political parties. He was quite popular in the constituency and he was falsely implicated in the case.

25. Learned Trial Court after considering the evidence and submissions on behalf of the prosecution and the defence vide impugned judgment and order held that from the evidence, offences under Sections 504, 506 did not get proved against the accused-respondent nor the offence under Section 353 IPC was made out and, therefore, learned Trial Court acquitted the accused.

26. Mr. U.C. Verma, learned Additional Government Advocate appearing for the State-appellant assisted by Mr.Rao Narendra Singh, learned A.G.A. has submitted that place of incident, presence of the complainant and witnesses are not in dispute. Alleged incident had taken place inside the jail. The accused-respondent is biggest bahubali of the State, facing several dozens of cases of heinous offences. Accused-respondent's name strikes fear and terror in the hearts and minds of general public, and even in the Government officials. Mr.R.K. Tiwari earlier Jailer was killed in a cold blooded manner in a broad day light near Governor House, Lucknow allegedly on behest of the accused-respondent and other accused as he was enforcing the rules and regulation of jail which was causing hindrance in carrying out illegal and criminal activities of the accused-respondent from Jail in organized manner. These accused, however, could secure acquittal as witnesses turned hostile which is a pattern in all cases where the accused-respondent had secured acquittal.

27. This Court recently while rejecting Criminal Misc. Bail Application No.46494 of 2021 of the accused-respondent in a case registered as Case Crime No.185 of 2021 under Sections 419, 420, 467, 468, 471, 120B IPC, Police Station Sarai Lakhansi, District Mau vide order dated 30.06.2020 while rejecting the bail of the accused-respondent, has held as under:-

"4. *The applicant deserves no introduction in the State of U.P. on account of his alleged "Robin Hood' image in Hindi*

speaking States of India. He is the harden and habitual offender, who is in sphere of crime since 1986 but surprisingly, he has managed not a single conviction against him. It is indeed astounding and more amusing angle of the issue, that a person having more than 50+ criminal cases to his credit of various varieties, has managed his affairs in such a way that he has not received a single conviction order against him. Infact it is slur and challenge to the judicial system that such a dreaded and "White Collored' criminal in the field of crime undefeated and unabetted."

28. This Court has noted the long criminal history of the accused-respondent in the aforesaid judgment which is reproduced as under:-

"Cases registered at Gazipur

Case Crime No. Under Sections Police Station/District

1. 493/05 302, 506, 120B IPC Mohammdabad
2. 589/05 302, 504, 506, 120B IPC Bhanwar Col
3. 169/86 302 IPC Mohammadabad
4. 266/90 467, 468, 420, 120B IPC
5. 172/91 147, 323, 504, 506 IPC Mohammadabad
6. 237/96 136(2), 130, 135, 136(1) Public Property Act & 384, 506 IPC Mohammadabad
7. 1182/09 307, 506, 120B IPC Mohammadabad
8. 1051/07 3(1) U.P.Gangster Act Mohammadabad
9. 482/10 3(1) U.P.Gangster Act Karanda
10. 361/09 302, 120 IPC & 7 C.L.Act Karanda
11. NCR No. 219/78 506 IPC Saidpur
12. NCR No. 19/97 506 IPC Saidpur
13. 106/88 302 IPC Kotwali
14. 682/90 143, 506 IPC Kotwali
15. 399/90 147, 148, 149, 307 IPC Kotwali
16. 44/91 302, 506 IPC Kotwali
17. 165/96 147, 148, 149, 307, 332, 353, 506, 504 IPC & 7C.L Act Kotwali
18. 834/95 353, 504, 506 IPC Kotwali
19. 284/96 3(2) NSA Act Kotwali
20. 33/99 3(2) NSA Act Kotwali
21. 192/96 3(1) U.P.Ganster Act Kotwali
22. 121/21 21/25 Arms Act Mohammadabad

Cases registered at District Varanasi

1. 58/98 3 NSA Act Bhelupur
2. 17/99 506 IPC Bhelupur
3. 285/17 302 IPC Bhelupur
4. 19/97 364A, 365 IPC Bhelupur
5. 229/91 147, 148, 149, 302 IPC Chetganj
6. 410/88 147, 148, 149, 302, 307 IPC Cantt.

Cases registered at District Lucknow

1. 209/02 3/7/25 Arms Act Hazratganj
2. 106/99 307, 302, 120B IPC Hazratganj
3. 91-A/04 147, 148, 149, 307, 427 IPC Cantt.
4. 428/99 2/3 Gangster Act Hazratganj
5. 126/99 506 IPC Krishna Nagar
6. 66/2000 147, 336, 353, 506 IPC Alambagh
7. 236/20 468, 471, 120B IPC & Section 3 of Damages of Public Property Act Hazratganj

Case registered at District Chandauli

1. 294/91 302, 307 IPC Mughalsarai/Chandauli

Case registered at District Shonbhadra

1. 121/97 364A Anpara

Cases registered at District Mau

1. 808/04 147, 148, 149, 393, 307, 504, 506, 342 IPC Kotwali
2. 1580/05 147, 148, 149,302, 435, 436, 427, 153A IPC Kotwali
3. 1866/09 147, 148, 149,302, 307, 120B, 404, 325/34 IPC & 7 CLAct Kotwali
4. 399/10 302, 307, 120B, 34 IPC & 7 CL Act & 25/27 Arms Act Dakshin Tola
5. 891/10 3(1) Gangster Act Dakshin Tola
6. 185/21 419, 420, 467, 468, 471, 120B IPC Sarai Lakhansi
7. 55/21 3(1) of U.P.Gangster Act Dakshin Tola
8. 4/20 30 Arms Act and Sections 419, 420, 467, 468, 471, 120 B IPC Dakshin Tola

Cases registered at New Delhi

1. 456/93 364A, 365, 387 IPC Tilak Marg
2. 508/93 24/54/59 Arms Act & S. Tada K.G. Marg

Case registered in State of Punjab

1. 5/19 386/506 IPC Mathaur, Mohali

Cases registered at District Azamgarh

1. 20/14 147, 148, 149, 302, 307, 506, 120B IPC & Tarwa 7 Crl. Law Amendment Act
2. 160/20 3(1) U.P.Gangster Act Tarwa

Cases registered at District Barabanki

1. 369/21 419, 420, 467, 468, 471, 120B, 506, 177 IPC & 7 Crl. Law Amendment Act Kotwali."

29. This Court also commented about the criminals like the accused-respondent being elected by the public as their representative for six consecutive terms in following words:-

"26. The above mentioned is a rich criminal horoscope of the applicant on which the applicant can boast and claim himself to be a popular public figure, who was elected as MLA for the six consecutive time. As mentioned above, this is a most unfortunate and ugly face of our democracy where a person on one hand facing almost two dozen Sessions Trials and on the other hand the public is electing him as their representative for six consecutive times. It is really uphill task to adjudicate, as to whether he is really a popular public figure? Or his nuisance value, which are giving dividends to him?"

30. Mr. U.C. Verma has submitted that the incident is dated 27.04.2003. The accused-respondent did not allow trial to proceed until he was sure of turning the witnesses hostile. Most of the witnesses got retired when they turned up for examination in the Court. He has submitted that trial court start only in July, 2013.

31. Mr. U.C. Verma has further submitted that the accused-respondent used to enjoy high status and privileges inside the jail and, therefore, would carry out his organized criminal activities from the jail including killing of the people for exhortation, political opponents and officials, who he thought were

coming in his way of his crime world or they could challenge him politically or otherwise. He used to treat jail as his seat of power where his people could come and meet him freely at any time even carrying arms without any hindrance or obstacle by jail officials. Mr. S.K. Awasthi, the complainant, P.W.-2 tried to regulate visitors according to Jail Book and Jail Manual, and this could not be tolerated by the accused-respondent. He has further submitted that there was no enmity between the complainant and accused-respondent Mukhtar Ansari for his false implication. He has further submitted that P.W.-2, who was the complainant, his examination was completed on 12.12.2013, the accused did not cross examine on that day and the right of cross examination was closed. The witnesses got retired soon thereafter and after his retirement when he was won over for fear and terror of the accused-respondent, an application came to be filed under Section 311 Cr.P.C. to recall the said witness, and vide order dated 30.01.2014, the witness was recalled. He has submitted that the said witness in his examination-in-chief has fully supported the prosecution case in all respects and evidence given in cross-examination after he was won over, was because of fear and terror as after retirement there would be concern for his security and security of his family. Even P.W.-3 has supported the prosecution case and deposed that the dispute took place between the accused-respondent and the complainant in respect of visitors coming to meet the accused-respondent-Mukhtar Ansari and hot talk between the accused-respondent and the complainant. He saw the accused-respondent coming out of the office of the complainant.

32. P.W.-6, second Investigating Officer, Smt. Indu Srivastava who completed the investigation had said that her staff was not willing to give evidence against the accused-respondent. P.W.-7, who conducted the final investigation, has also supported the prosecution case. She further said that there was no application and record of visitors who had come to meet the accused-respondent. This would mean that the accused-respondent wanted to the visitors to meet him without any formality. Mr.U.C. Verma, learned A.G.A. for the appellant-State has, therefore, submitted that the offence under Sections 353, 504, 506 IPC are proved on the basis of evidence of prosecution, and the trial Court erred in acquitting the accused-respondent. He has further submitted that even if there is contradiction in the evidence of P.W.-2 given in examination-in-chief and cross examination, it is for the Court to separate wheat from the chaff and find out of the truth. Statement in examination-in-chief has equal value as of cross examination. Even from the evidence of P.W.-3, and P.W.-6 charges against the accused-respondent for offence under Sections 504, 506, 353 IPC are clearly proved and the appeal is liable to be allowed.

33. On the other hand, Mr. Jyotindra Mishra, learned Senior Advocate assisted by Mr. Satendra Kumar (Singh), Advocate appearing for the accused-respondent has submitted that evidence of none of the witnesses is cogent and credible. P.W.-1, P.W.-4, P.W.-5 did not support the prosecution case either in their examination-in-chief or cross examination. P.W.-2 supported the prosecution case in his examination-in-chief he did not support the prosecution case in his cross examination. Evidence of P.W.-6 and P.W.-7 independently are not enough to prove the prosecution case as they are the formal witnesses, who conducted the investigation. He, therefore, has submitted that the Trial

Court after considering the evidence brought by the prosecution did not find the prosecution case proved against the accused-respondent. From the evidence available on record, it cannot be said that the prosecution was able to prove case against the accused-respondent beyond reasonable doubt, and there is no error in the impugned judgment and order passed by learned Trial Court. He has, therefore, submitted that the appeal is without any merit and substance and is liable to be dismissed.

34. Mr. Jyotindra Mishra, learned Senior Advocate has further submitted that in case of appeal against acquittal, the appellate court is required to consider whether the view taken by the Trial Court is possible one or not. If the view of the Trial Court is possible one, then acquittal should not be set aside by merely substituting its reason. He in support of the aforesaid submission has placed reliance on the judgment of in the case of **Dhanapal vs State by Public Prosecutor, Madras: (2009) 10 SCC 401** wherein the Supreme Court has culled out the principal for dealing the judgment of acquittal of trial Court by appellate Court in para 39 which reads as under:-

"39. The following principles emerge from the cases above:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the appellate court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached--one that leads to acquittal, the other to conviction--the High Courts/appellate courts must rule in favour of the accused."

35. Mr.Jyotindra Mishra, learned Senior Advocate has further submitted that in appeal against acquittal under Section 378/386 Cr.P.C. the appellate Court should not likely to interfere with the judgment of acquittal, even if the appellate Court believes that there is some evidence pointing finger towards the accused. In support of the said submission, he has placed reliance on the judgments in the cases of **State of Rajasthan vs Naresh @ Ram Naresh: (2009) 9 SCC 368 and State of Uttar Pradesh vs Banne @ Baijnath & Ors: (2009) 4 SCC 271.**

36. Mr.Jyotindra Mishra, learned Senior Advocate has further submitted that in criminal jurisprudence there is presumption of innocence until the guilt is proved beyond reasonable doubt. If an accused is acquitted in the trial, presumption of innocence gets re-enforced, and the appellate court in exercise of appellate jurisdiction under Section 378/386 Cr.P.C. should reverse an acquittal only when it has "very substantial and

compelling reasons." For the aforesaid submission, learned Senior Advocate has placed reliance on the judgment of the Supreme Court in the case of **Ghurey Lal vs State of Uttar Pradesh : (2008) 10 SCC 450.**

37. It has also been submitted that if the view taken by the Trial Court is not perverse or impossible view, the High Court should not interfere with the order of acquittal. Para 17 of the judgment in the case of **Samghaji Hariba Patil vs State of Karnataka (2006) 10 SCC 494** has been placed on service by the learned Senior Advocate which reads as under:-

"17. We have noticed hereinbefore that the High Court has taken a contrary view. Had the High Court been the first court, probably its view could have been upheld, but it was dealing with a judgment of acquittal. We have taken notice of the depositions of the main prosecution witnesses only to show that the view of the learned trial Judge cannot be said to be perverse or the same was not possible to be taken. While dealing with a case of acquittal, it is well known, the High Court shall not ordinarily overturn a judgment if two views are possible. The appellant had no axe to grind. The prosecution had not proved that he had any motive. He was only said to be the friend of Accused 1. If the accused had gone there with six others to assault the deceased and his family members, it is unlikely that the appellant would take with him for the said purpose, a hammer to an agricultural field. The hammer is not ordinarily used for agricultural operations. Even if we assume that Accused 1 had been nurturing any grudge against the deceased, it is unlikely that the appellant would be involved therein."

38. I have considered the facts, circumstances, evidence and submissions of the learned counsels for the appellant-State and accused-respondent.

39. Section 353 IPC defines assault or criminal force to deter public servant from discharge of his duties as under:-

"353. Assault or criminal force to deter public servant from discharge of his duty.--Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

If an accused uses criminal force against a public servant with an intention to prevent him or deter that public servant from discharging his duty as public servant then, he would commit offence under Section 353 IPC, he may be punished for said offence up to 2 years or with fine or with both."

40. Criminal intimidation is defined under Section 503 IPC which reads as under:-

"503. Criminal intimidation.--Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to

do, as the means of avoiding the execution of such threat, commits criminal intimidation. Explanation.--A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section. Illustration A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation."

41. Punishment for criminal intimidation is provided under Section 506 IPC which reads as under:-

"506. Punishment for criminal intimidation.--Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc.--And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or 1[imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

By State amendment in Uttar Pradesh, it is provided that punishment for offence under Section 506 IPC is imprisonment of 7 years or fine, or both. Offence is cognizable and non bailable.

42. Intentional insult with intent to provoke breach of the peace is defined under Section 504 IPC which reads as under:-

***504. Intentional insult with intent to provoke breach of the peace**.--Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

43. Facts of the case regarding place of incident, presence of the accused at the place of incident, presence of the complainant and the witnesses of fact are not in dispute. Date and time of the incident are not in dispute. The accused-respondent has reputation of most dreaded criminal and mafia don who had more than 60 cases of heinous offences to his credit as mentioned earlier. No one can dispute his credibility of striking terror and fear in minds and heart of the people including the Government officials. Mr. U.C. Verma, learned Additional Government Advocate has submitted that the accused-respondent used to have free run even inside the jail and he had been carrying on his criminal activities in an organized manner from the jail. During his incarceration in the jail, he had committed several heinous offences including elimination of his political rivals, kidnapping/abduction, usurping private and public properties, amassing wealth and properties from proceeds of crime. Even inside the jail, his people would come to meet him without any hindrance created by any jail staff. The warden opened the gate and allowed the people who had come to meet the accused-respondent out of fear and terror of the accused without due permission. He has submitted that in most of the cases the witnesses had turned hostile, and he secured acquittal. This fact cannot be disputed for which this Court has taken judicial notice as mentioned earlier.

44. Jailer, Mr. S.K. Awasthi, the complainant, P.W.-2 did not have any enmity with the accused-respondent, Mukhtar Ansari but it appears that he was trying to enforce rules inside the jail and, therefore, ordered that no visitor should be allowed to meet the prisoners unless permission is granted. P.W.-2, in his examination-in-chief, had said that the accused-respondent got highly enraged by the very fact that the Jailer was not allowing visitors who had come to meet the accused-respondent inside the jail without permission. He took out a revolver from one of the visitors who have been allowed inside the jail by Jail Warden. He also extended verbal threats of killing the Jail Warden. Interestingly, the said witness was not cross examined on 12.12.2013 when his examination-in-chief took place. I find substance in the submission of Mr. U.C. Verma, learned A.G.A. that after he was won over, an application came to be filed to recall the said witness which was allowed by the learned Trial Court vide order dated 30.01.2014, and then witness to some extent did not support the prosecution case in his cross examination.

45. The evidence given in the examination-in-chief does not get completely obliterated, if the witnesses in his cross examination turns hostile or does not support his evidence given in examination-in-chief. Evidence of witness who has supported the prosecution case in examination-in-chief does not get effaced or washed off the record altogether. In such a situation, it is the duty of the Court to examine the evidence carefully and find that part of evidence which can be accepted and be acted upon.

46. The Supreme Court in the case of **Dayaram and another vs State of Madhya Pradesh: (2020) 13 SCC 382** while dealing with hostile witnesses in paras 10.4 to 10.7 has held as under:-

"10.4 .....From their examination-in-chief it is evident that the deceased was conscious and, in a state to lodge the FIR. In their cross-examination, these witnesses denied having any knowledge about the persons who attacked the deceased. They were declared hostile during their cross-examination. The testimony, prior to cross-examination can be relied upon.

10.5. Reliance is placed on the decisions of this Court in Bhagwan Singh v. State of Haryana [Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389 : 1976 SCC (Cri) 7] , Rabindra Kumar Dey v. State of Orissa [Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233 : 1976 SCC (Cri) 566] and Syad Akbar v. State of Karnataka [Syad Akbar v. State of Karnataka, (1980) 1 SCC 30 : 1980 SCC (Cri) 59] , wherein it has been held that the evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution witnesses turned hostile. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on careful scrutiny.

10.6. This Court in Khujji v. State of M.P. [Khujji v. State of M.P., (1991) 3 SCC 627 : 1991 SCC (Cri) 916] , in para 6 of the judgment held that: (SCC p. 635)

"6. ... The evidence of PW 3 Kishan Lal and PW 4 Ramesh came to be rejected by the trial court because they were declared hostile to the prosecution by the learned Public Prosecutor as they refused to identify the appellant and his companions in the dock as the assailants of the deceased. But the counsel for the State

is right when he submits that the evidence of a witness, declared hostile, is not wholly effaced from the record and the part of the evidence which is otherwise acceptable can be acted upon."

(emphasis supplied)

10.7. This position in law was reiterated in Vinod Kumar v. State of Punjab [Vinod Kumar v. State of Punjab, (2015) 3 SCC 220 : (2015) 2 SCC (Cri) 226 : (2015) 1 SCC (L&S) 712] , wherein the Court held that: (SCC p. 237, para 31)

"31. The next aspect which requires to be adverted to is whether testimony of a hostile witness that has come on record should be relied upon or not. Mr Jain, learned Senior Counsel for the appellant would contend that as PW 7 has totally resiled in his cross-examination, his evidence is to be discarded in toto. On a perusal of the testimony of the said witness, it is evincible that in examination-in-chief, he has supported the prosecution story in entirety and in the cross-examination, he has taken the path of prevarication. In Bhagwan Singh v. State of Haryana [Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389 : 1976 SCC (Cri) 7] , it has been laid down that even if a witness is characterised as a hostile witness, his evidence is not completely effaced. The said evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence."

(emphasis supplied)

47. There is no legal bar for conviction upon the testimony of hostile witness, given in examination-in-chief, if it is corroborated by other reliable evidence.

48. The Supreme Court in the case of **Ramesh & Ors vs State of Haryana: (2017) 1 SCC 529** has held that evidence of a hostile witness cannot be totally rejected but requires its closest scrutiny and portion of evidence which is consistent with the case of the prosecution or defence may be accepted. The Supreme Court has noted the disturbing phenomenon almost a regular feature that in criminal cases witnesses turn hostile for various reasons. One of the reasons is status of the accused. Para 39 of the said judgment reads as under:-

"39. We find that it is becoming a common phenomenon, almost a regular feature, that in criminal cases witnesses turn hostile. There could be various reasons for this behaviour or attitude of the witnesses. It is possible that when the statements of such witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 by the police during investigation, the investigating officer forced them to make such statements and, therefore, they resiled therefrom while deposing in the court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations."

49. The Supreme Court has noted earlier judgments wherein such peculiar behavior of witnesses turning hostile, has been commented upon in paras 40 to 44. The Supreme Court culled out the reasons which can be discerned for retracting their statements before the Court and turning hostile. It would be apt to reproduced paras 40-44 of the judgment in Ramesh (supra):-

"40. In some of the judgments in past few years, this Court has commented upon such peculiar behaviour of witnesses turning hostile and we would like to quote from few such judgments. In Krishna Mochi v. State of Bihar [Krishna Mochi v. State of Bihar, (2002) 6 SCC 81 : 2002 SCC (Cri) 1220] , this Court observed as under : (SCC p. 104, para 31)

"31. It is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power."

41. Likewise, in Zahira Habibullah Sheikh (5) v. State of Gujarat [Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] , this Court highlighted the problem with the following observations : (SCC pp. 396-98, paras 40-41)

"40. "Witnesses" as Bentham said:"are the eyes and ears of justice". Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface.... Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer.... There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth presented before the court and justice triumphs and that the trial is not reduced to a mockery. ...

41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this

needs no retaliation (sic repetition). We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before the courts mere mock trials as are usually seen in movies."

42. Likewise, in Sakshi v. Union of India [Sakshi v. Union of India, (2004) 5 SCC 518 : 2004 SCC (Cri) 1645] , the menace of witnesses turning hostile was again described in the following words : (SCC pp. 544-45, para 32) "32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of Section 327 CrPC should also apply in inquiry or trial of offences under Sections 354 and 377 IPC."

43. In State v. Sanjeev Nanda [State v. Sanjeev Nanda, (2012) 8 SCC 450 : (2012) 4 SCC (Civ) 487 : (2012) 3 SCC (Civ) 899] , the Court felt constrained in reiterating the growing disturbing trend : (SCC pp. 486-87, paras 99-101)

"99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law, thereby eroding people's faith in the system.

100. This Court in State of U.P. v. Ramesh Prasad Misra [State of U.P. v. Ramesh Prasad Misra, (1996) 10 SCC 360 : 1996 SCC (Cri) 1278] held that it is equally settled law that the evidence of a hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In K. Anbazhagan v. Supt. of Police [K. Anbazhagan v. Supt. of Police, (2004) 3 SCC 767 : 2004 SCC (Cri) 882] , this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the

witness as a whole, with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court [Sanjeev Nanda v. State, 2009 SCC OnLine Del 2039 : (2009) 160 DLT 775] and they found the accused guilty.

*101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in Manu Sharma v. State (NCT of Delhi) [Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] and in Zahira Habibullah Sheikh (5) v. State of Gujarat [Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC impo*ses punishment for giving false evidence but is seldom invoked."

44. On the analysis of various cases, the following reasons can be discerned which make witnesses retracting their statements before the court and turning hostile:

(i) Threat/Intimidation.

(ii) Inducement by various means.

(iii) Use of muscle and money power by the accused.

(iv) Use of stock witnesses.

(v) Protracted trials.

(vi) Hassles faced by the witnesses during investigation and trial.

(vii) Non-existence of any clear-cut legislation to check hostility of witness."

50. Had P.W.-2 been examined on the same day in all likelihood, he would have supported the prosecution case as he did in his examination-in-chief. The accused-respondent deliberately did not cross examine the said witness on the said date and after the said witness was won over, an application came to be filed under Section 311 Cr.P.C. to recall the said witness and said application was allowed vide order dated 30.01.2014 and in the cross-examination he deviated from the prosecution case to some extent.

51. Criminal case is built on edifice of evidence which is admissible in law. The Supreme Court noted in **Swaran Singh vs State of Punjab: (2000) 5 SCC 668** that criminal cases can be adjourned again and again till the witness get tired or gives up. Adjournments are taken till the witness is no more or is tired. This result in miscarriage of justice. The witness is not treated with respect in the Court. Para 36 of the aforesaid judgment reads as under:-

"36. A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that, witnesses are required whether it is direct evidence or circumstantial evidence. Here are the witnesses who are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the court many times and at what

cost to his own self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only is a witness threatened, he is abducted, he is maimed, he is done away with, or even bribed. There is no protection for him. In adjourning the matter without any valid cause a court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter is adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all. High Courts have to be vigilant in these matters. Proper diet money must be paid immediately to the witness (not only when he is examined but for every adjourned hearing) and even sent to him and he should not be left to be harassed by the subordinate staff. If the criminal justice system is to be put on a proper pedestal, the system cannot be left in the hands of unscrupulous lawyers and the sluggish State machinery. Each trial should be properly monitored. Time has come that all the courts, district courts, subordinate courts are linked to the High Court with a computer and a proper check is made on the adjournments and recording of evidence. The Bar Council of India and the State Bar Councils must play their part and lend their support to put the criminal system back on its trail. Perjury has also become a way of life in the law courts. A trial Judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendment to clause (b) of Section 340(3) of the Code of Criminal Procedure in this respect as the High Court can direct any officer to file a complaint. To get rid of the evil of perjury, the court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code of Criminal Procedure."

52. The Supreme Court in para 7 of the **Radha Mohan Singh @ Lal Saheb vs State of U.P. : (2006) 2 SCC 450** has held as under:-

"7. It is well settled that while hearing an appeal under Article 136 of the Constitution, this Court will normally not enter into reappraisal or review of evidence unless the trial court or the High Court is shown to have committed an error of law or procedure and the conclusions arrived at are perverse. The Court may interfere where on proved facts wrong inference of law is shown to have been drawn. (See Duli Chand v. Delhi Admn. [(1975) 4 SCC 649 : 1975 SCC (Cri) 663] , Dalbir Kaur v. State of Punjab [(1976) 4 SCC 158 : 1976 SCC (Cri) 527] , Ramanbhai Naranbhai Patel v. State of Gujarat [(2000) 1 SCC 358 : 2000 SCC (Cri) 113] and Chandra Bihari Gautam v. State of Bihar [(2002) 9 SCC 208 : 2003 SCC (Cri) 1178 : JT (2002) 4 SC 62] .) Though the legal position is quite clear still we have gone through the

evidence on record in order to examine whether the findings recorded against the appellants suffer from any infirmity. The testimony of PW 1 Ganesh Singh, who is an injured witness, and PW 4 Ramji Singh clearly establish the guilt of the accused. According to the case of the prosecution the incident took place shortly after sunset. The eyewitnesses have deposed that after the incident the deceased Hira Singh was carried on a cot to the "bandh", which is on the outskirts of the village. As no conveyance was available, the first informant had to wait for quite some time and thereafter a tempo was arranged on which the deceased was taken to the district hospital where he was medically examined by PW 2 Dr. Siddiqui at 9.00 p.m. It has come in evidence that the village is at a distance of six miles from Police Station Kotwali, Ballia. The non-availability of any conveyance is quite natural as it was Holi festival. Even PW 3 Mohan Yadav fully supported the prosecution case in his examination-in-chief. In his cross-examination, which was recorded on the same date, he gave details of the weapons being carried by each of the accused and also the specific role played by them in assaulting the deceased and other injured persons. As his cross-examination could not be completed it was resumed on the next day and then he gave a statement that he could not see the incident on account of darkness. His testimony has been carefully examined by the learned Sessions Judge and also by two learned Judges of the High Court (Hon'ble K.K. Mishra, J. and Hon'ble U.S. Tripathi, J.) and they have held that the witness, on account of pressure exerted upon him by the accused, tried to support them in his cross-examination on the next day. It has been further held that the statement of the witness, as recorded on the first day including his cross-examination, was truthful and reliable. It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof. (See Bhagwan Singh v. State of Haryana [(1976) 1 SCC 389 : 1976 SCC (Cri) 7 : AIR 1976 SC 202] , Rabindra Kumar Dey v. State of Orissa [(1976) 4 SCC 233 : 1976 SCC (Cri) 566 : AIR 1977 SC 170] , Syad Akbar v. State of Karnataka [(1980) 1 SCC 30 : 1980 SCC (Cri) 59 : AIR 1979 SC 1848] and Khujji v. State of M.P. [(1991) 3 SCC 627 : 1991 SCC (Cri) 916 : AIR 1991 SC 1853]) The evidence on record clearly shows that the FIR of the incident was promptly lodged and the testimony of PW 1 Ganesh Singh, PW 4 Ramji Singh and also PW 3 Mohan Yadav finds complete corroboration from the medical evidence on record. We find absolutely no reason to take a different view."

53. From the aforesaid discussion, it can be seen that law is very clear that appellant court lightly should not interfere with the judgment and order of acquittal unless the said judgment is perverse or the view taken by the learned Trial Court is impossible view. It is also well settled that testimony of hostile witness does not get effaced completely and washed off record but it is for the Court to closely scrutinize the testimony of such witness in the facts and circumstances of the cases and take into consideration while convicting or acquitting the accused that part of the testimony of such witness which supports

the prosecution case and can be relied on for convicting the accused.

54. Witness P.W.-2, who was given threats of life by pointing a revolver by the accused-respondent, has fully supported the prosecution case in all respects in his examination-in-chief. His testimony in his examination-in-chief is fully in tune with the prosecution case. The said witness did not have any enmity with the accused-respondent, and there was no reason to falsely implicate the accused-respondent for commission of the offence for which the accused-respondent was charged. There is no reason to disbelieve his testimony given in examination-in-chief. His testimony in his cross examination which takes place after he could have been won over does not appear to be credible. The submission of Mr. U.C. Verma, learned Additional Government Advocate, cannot be brushed aside that the application for his re-examination came to be filed after said witness was won over for threat or some other reasons. If the testimony of the such witness is read together with the testimony of P.W.-3, P.W.-6 and P.W.-7, charges against the accused-respondent for committing offences under Sections 504, 506, 353 IPC are proved beyond reasonable doubt.

55. Trial Court had completely ignored the evidence of P.W.-2 given in examination-in-chief and had only considered his cross examination. The approach of the trial Court is palpably erroneous and against the well settled legal position as discussed above. The impugned judgment and order passed by the learned Trial court is unsustainable.

56. Admittedly, the complainant was posted as Jailer in the District Jail, Lucknow on the date of incident. He was present in his office when the alleged incident took place. He was discharging public/official duty on the date, time and place of the incident. From the evidence brought on record, it is proved that the accused-respondent used criminal force by pointing pistol towards him with intent to prevent and deter the complainant from discharging his duty as a Jailer, therefore, offence under Section 353 IPC is clearly proved against the accused-respondent and he is convicted for committing the said offence.

57. From evidence on record, it is also proved that the accused-respondent abused the complainant and insulted him knowing fully well that it would undermine the authority of the Jailer and would cause breach of peace inside the jail and outside inasmuch as if a public servant can be humiliated and abused, then authority of public functionary would get diminished and people would not respect the lawful authority. Therefore, the accused-respondent is found guilty for committing the offence under Section 504 IPC.

58. From evidence on record, it is proved that the accused-respondent on the date, time and place of incident took pistol/revolver from a visitor and pointed towards the complainant and threatened him for his life. He is found guilty for committing offence under Section 506 IPC. He intimidated the complainant who as a Jailer was performing public duty by abusing him and pointing revolver/pistol towards him and threatened to kill him. It would have invoked excitement inside the jail likely to create breach of peace, tumult and disorder inside the jail in discharge of public duties by the jail staff.

59. In view of the foregoing discussion, present appeal is ***allowed***.

Impugned order dated 23.12.2020 passed by Special Judge, M.P./M.L.A., Additional Sessions Judge, Court No.19, Lucknow is set aside. The accused-respondent is convicted for offences under Sections 353, 504, 506 IPC. He is sentenced for offence under Section 353 IPC to undergo rigorous imprisonment for 2 years with fine of Rs.10,000/-. For offence under Section 504 IPC, he is sentenced to undergo rigorous imprisonment for 2 years with fine of Rs.2,000/-. For offence under Section 506 IPC, the accused is sentenced to undergo rigorous imprisonment for 7 years with fine of Rs.25,000/-. All the sentences would run concurrently.

60. Let the learned Trial Court record be remitted back for preparing the custody warrant of the accused-respondent as per the law.

(2022) 9 ILRA 1361
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.08.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Government Appeal No. 1000243 of 2009

Union of India ...Appellant
Versus
P.N. Misra ...Respondents

Counsel for the Appellant:
Bireshwar Nath

Counsel for the Respondent:
Prem Kumar Sahu, Ravi Shanker Tewari, Sheo Pal Singh, Smt. Suniti Sachan, Vinod Kr. Shahi

Criminal Law - Criminal Procedure Code, 1973 - Sections 313 & 378 - Prevention of Corruption Act, 1988 - Sections – 13(1)(d) & 13(2) - Indian Penal Code, 1860 - Sections 20(b), 420, 468 & 471 - Government Appeal – against Acquittal – CBI registered a preliminary inquiry against accused respondents - whom are while posted and functioning as an officer in Telephone department committed offence of Cheating, forgery and criminal mis-conduct - Prosecution has failed to established their case - A Criminal trial proceeds with the presumption of innocence of the accused person - with the acquittal of the accused this presumption of innocence stands fortified - for interference very strong and cogent reasons must be exist - since, view taken by the trial court was probable and logical view which is based on valid reasons - hence, no interference is called for - Leave to appeal is rejected. (Para 13, 14, 17)

Appeal dismissed. (E-11)

List of Cases cited:

1. Sambasiva Vs St. of Kerala, 1998 SCC (Cri) 1320

2. Sadhu Saran Singh Vs St. of U.P. & ors., (2016) 4 SCC 35

(Delivered by Hon'ble Shamim Ahmed, J.)

1. The case is taken up in the revised call.

2. Heard Sri Shiv P. Shukla learned counsel for the appellant and Sri Ravi Shanker Tewari, learned counsel for the respondent Nos. 1 to 3 and perused the material available on record.

3. The present leave to appeal under Section 378 Cr.P.C. has been filed against the judgment and order dated 10.04.2009 passed by the Special Judge, Anti-Corruption (Central), U.P., Lucknow in Case No. 15 of 1999, acquitting the respondents under Section 420, 468, 471 I.P.C. and Section 13 (2) read with Section 13 (1) (d) Prevention of Corruption Act, 1988.

4. The facts and circumstances leading to this case, in nut shell are that the then SP, CBI/SPE Lucknow registered a preliminary inquiry No. 11(A)/96 on 28-06-1996 on source of information. The said preliminary inquiry revealed that respondent no.- namely Sri P N Mishra JTO Rajajipuram, Lucknow and respondent no.-2 namely Sri B B Singh Telephone Inspector, Rajajipuram , Lucknow while posted and functioning as such , entered into a criminal conspiracy with each other and some unknown person in order to commit the offense of cheating , forgery and criminal mis-conduct. in pursuance of common object of said criminal conspiracy Sri PN Mishra and Sri BB SIngh dishonestly and fraudulently installed a new telephone connection No. 259928 on 24-11-1993 in the name of Smt. Nishi Khosla w/o Sri Puneet Khosla against L.P. No. 7532 dated 09-11-1993 OB No. 1137 with STD facility. The said telephone number was installed without observing the bonafide and genuineness of the subscriber for a new telephone connection. The name and address of subscriber was fictitious and bogus, thus they abused their official position as public servants by installing the said new telephone connection in the name of Smt. Nishi Khosla. The aforesaid accused persons in criminal conspiracy with some unknown persons caused wrongful loss to the Telecom Department to the tune of Rs. 91,356 /- approx. and defrauded the Telecom Department. And on the basis of aforesaid preliminary inquiry the then SP, CBI registered a case vide Ext. Ka-18 and ordered investigation to be conducted by Sri B.S. Mishra Dy. SP CBI Lucknow and on the completion of investigation CBI submitted charge sheet Ext Ka-24 u/s 120-B, 420, 468,471 IPC and u/s 13(2) r/w 13(1)(d) of P.C. Act 1988 against the respondents for committing the alleged offenses.

5. The court below after taking into consideration the facts and circumstances of the case and evidence available on record, passed the judgment and order of acquittal dated 10.04.2009.

6. Learned counsel for the appellant submits that the court below did not appreciate the evidence on record. He further submits that prosecution has successfully proved the offence against the accused on the basis of evidence. The judgment was passed without considering the statement of witnesses and the case set up by the prosecution and the judgment of the acquittal was passed on surmises and conjectures.

7. Learned counsel for the respondent Nos. 1 to 3 submits that the present appeal is of the year, 2009. Moreover, there appears no illegality or infirmity in the judgment and order of acquittal passed by the court below, therefore, leave to appeal may be refused.

8. I have heard the learned counsel for the appellant and considered the ground as well as the argument advanced by learned counsel for the respondent Nos. 1 to 3 and gone through the judgment passed by the court below.

9. In the present case from the statements given by the witnesses produced by the prosecution, I found that prosecution has failed to establish that the crime in question has been committed by the accused and there was no direct evidence produced by the prosecution regarding involvement of the respondent Nos. 1 to 3 in the crime.

10. Further, learned counsel for the appellant could not point out any illegality or infirmity in the judgment and order of acquittal passed in favour of respondents which is before this Court.

11. Further, this Court observed that an appeal against acquittal stands on a different footing from the appeal against conviction. Hon'ble the Apex Court in a very recent judgment in the case of **Sadhu Saran Singh Vs. State of Uttar Pradesh and Others reported in (2016) 4 SCC 357** has considered this difference and has observed in paragraph nos.20 and 21 as under:

"20. Generally, an appeal against acquittal has always been altogether on a different pedestal from that of an appeal against conviction. In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can raise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. This Court, while enunciating the principles with regard to the scope of powers of the appellate court in an appeal against acquittal, in ***Sambasiva V. State of Kerala 1998 SCC (Cri) 1320*** *has held:*

"7. The principles with regard to the scope of the powers of the appellate court in an appeal against acquittal, are well settled. The powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate court can interfere with the order of acquittal."

21. The Court, in several cases, has taken the consistent view that the appellate court, while dealing with an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded. If the appellate court, on scrutiny, finds that the decision of the court below is based on erroneous views and against settled position of law, then the interference of the appellate court with such an order is imperative."

12. In the light of the aforesaid guidelines, the impugned judgment has to be considered from the point of view whether the view taken by the court below was a probable view based on the material on record or it is an absolutely erroneous judgment devoid of merits.

13. A criminal trial proceeds with the presumption of innocence of the accused persons. With the acquittal of the accused persons this presumption of innocence stands fortified. So very strong and cogent reasons must exist in interfering the judgment of acquittal.

14. Keeping in view the aforesaid weakness of the prosecution case, as noted by the court below, I am of the view that the view taken by the court below was a probable and logical view, which is based on valid reasons. The judgment of the court

below cannot be said to be illegal, illogical and improbable and not based on material on record or is based on erroneous views and is against the settled position of law. So, this Court is satisfied that there is absolutely no hope of success in this appeal and accordingly, no interference is called for.

15. Leave to appeal is refused.

16. Application for leave to appeal is rejected.

17. Accordingly, the appeal does not survive, and in view of above, the appeal is also dismissed.

18. No order as to costs.

19. Copy of this judgment be sent to the court below for its compliance.

(2022) 9 ILRA 1364
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.09.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 5940 of 2022

Dr. Vaibhavi Dhasmana ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Pawan Kumar Nigam, Ram Babu Singh

Counsel for the Respondents:
C.S.C., Kshitij Mishra

Civil Law- Indian Contract Act, 1872- Section 74- UP NEET Counseling - Forfeiture of Security Deposit- Petition for refund of security deposit- The stipulation of forfeiture of security is clearly by way of a penalty and in view of illustration as contained in Section 74, the stand taken by the respondent cannot be accepted and the State at best can claim reasonable compensation for the los suffered on account of breach of contract. As no loss has been shown to be caused to the respondent by way of resignation coupled with the fact that the seat of the State has not gone vacant, the State cannot even claim reasonable compensation.

The security amount deposited by the petitioner cannot be forfeited by taking recourse to Section 74 of the Contract Act as neither the State has suffered any loss and nor has the seat gone vacant due to the resignation of the petitioner. (Para 16, 19, 20)

Writ Petition allowed. (E-3)

Judgements/Case law relied upon:-

Fateh Chand Vs Balkishan Dass - AIR 1963 SC 1405

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard learned counsel for the petitioner and Shri Sanjay Bhasin, learned Senior Advocate assisted by Shri Kshitij Mishra, learned counsel appearing for respondent no.2.

2. Present petition has been filed seeking refund of the security amount deposited by the petitioner after first round of counseling.

3. The facts in brief are that,the petitioner participated in the UP NEET Counseling 2021 and was allotted seat in M.D. Anesthesia by respondent no.2, the State Counseling Board. Subsequently and prior to the second round of counseling, the petitioner got admission in Hemwati Nandan Bahuguna Uttarakhand Medical

Education University, Dehradun on 28.1.2022, which fact was informed by the petitioner to the respondents on 31.1.2022 alongwith a copy of the allotment letter. In the said application, there was a request for refund of the security deposit also.

4. The respondents did not pass any order on the request of the petitioner for refund of the security deposit, as such, the present petition has been filed.

5. Submission of learned counsel for the petitioner is that the State itself has issued Government Order dated 7.10.2021 wherein it is specifically stated in Clause 8(a)(I) that there is a provision for refund of the entire security deposit in the case of a resignation on the ground that the petitioner has been granted admission in a private medical college.

6. In the light of the said Government Order, it is argued that the security amount deposited by the petitioner amounting to Rs.2,00,000/- is bound to be refunded.

7. Learned counsel for the petitioner further places reliance on the directions given in the judgment dated 16.12.2021 passed in Petition(s) for Special Leave to appeal (C) No(s).10487 of 2021; Nihila P.P. v. The Medical Counseling Committee (MCC) & Ors. wherein the Supreme Court ,referred to the modified scheme of allotment of All India Quota which recorded that in terms of the modified scheme, there will be an option for up-gradation and free exit, only in Round 1 of the AIQ counseling. In the light of the said, he argues that the security deposit is liable to be refunded.

8. Shri Sanjay Bhasin, learned Senior Advocate on the other hand argues that in terms of Clause 8(a)(II) of the Government Order dated 7.10.2021, the entire security deposit was liable to be forfeited. Clause 8 is being quoted below:

*"**8. त्याग-पत्र दिये जाने के संबंध में-***

(क) यदि अभ्यर्थी शैक्षणिक सत्र 2021-22 की प्रथम काउन्सिलिंग से आवंटित होकर प्रदेश के किसी भी मेडिकल / डेण्टल की सीट पर प्रवेश प्राप्त कर लेता है तत्पश्चात् :-

(I) अभ्यर्थी आल इण्डिया या अन्य प्रदेश की काउन्सिलिंग के माध्यम से किसी अन्य पर आवंटन प्राप्त करता है और वह प्रदेश की प्रथम काउन्सिलिंग से प्रवेशित सीट से त्याग पत्र देना चाहता है (त्याग पत्र के समय अन्य काउन्सिलिंग से आवंटन का प्रमाण पत्र प्रस्तुत करना अनिवार्य होगा) तो ऐसे अभ्यर्थी द्वितीय काउन्सिलिंग की च्वाईस फिलिंग से दो दिन पूर्व (उदाहरणार्थ यदि द्वितीय चक्र की काउन्सिलिंग 24.09.2021 से प्रारम्भ होनी है, तो अभ्यर्थी 21.09.2021 को सायं 4.00 बजे तक) अपनी सीट से त्याग पत्र दे सकता है ऐसी स्थिति में अभ्यर्थी द्वारा जमा की गयी सिक्योरिटी धनराशि तथा शिक्षण शुल्क से निम्नानुसार कटौती करते हुए वापस किया जाएगा:-

- राजकीय क्षेत्र के मेडिकल / डेण्टल कालेजों में प्रवेशित अभ्यर्थियों की जमा समस्त शुल्क के 10 प्रतिशत की कटौती करते हुए शेष धनराशि तथा धरोहर धनराशि (Security Money) वापस देय होगी।

- निजी क्षेत्र मेडिकल / डेण्टल कालेजों में प्रवेशित अभ्यर्थियों की जमा शिक्षण शुल्क से 10 प्रतिशत की कटौती करते हुए शेष धनराशि तथा धरोहर धनराशि (Security Money) वापस देय होगी।

(II) प्रथम चक्र की काउन्सिलिंग से आवंटन के पश्चात यदि अभ्यर्थी द्वारा आवंटित कालेज में प्रवेश ले लिया जाता है तथा अभ्यर्थी को आल इण्डिया / अन्य प्रदेश की

काउन्सिलिंग से कोई भी आवंटन प्राप्त नहीं होता है, फिर भी अभ्यर्थी निर्धारित तिथि (द्वितीय चक्र की च्वाईस फिलिंग से दो दिन पहले) से पूर्व त्याग पत्र देता है तो ऐसी दशा में जना की धरोहर धनराशि (Security Money) जब्त कर ली जायेगी तथा शिक्षण शुल्क में से 50 प्रतिशत की कटौती करते हुए शेष धनराशि वापस किया जाएगा।

यदि अभ्यर्थी के द्वारा निर्धारित तिथि के पश्चात त्याग पत्र दिया जाता है तो ऐसी दशा में जमा की गयी धरोहर धनराशि (Security Money) व शिक्षण शुल्क जब्त कर लिया जायेगा।

(ख) राजकीय क्षेत्र के मेडिकल / डेण्टल कालेजों हेतु -

प्रदेश की द्वितीय चक्र की काउंसिलिंग समाप्त होने के पश्चात् प्रवेशित अभ्यर्थी को सीट रिक्क करने की अनुमति नहीं होगी, फिर भी यदि अभ्यर्थी अपनी सीट से त्याग पत्र देता है तो अभ्यर्थी द्वारा जमा की गयी धरोहर धनराशि तथा समस्त शैक्षणिक शुल्क जब्त कर लिया जायेगा व साथ ही साथ रू0 5,00,000/- (रुपये पाँच लाख मात्र) का बाण्ड प्रभावी मानते हुए उक्त धनराशि सरकार के पक्ष में देय होगी, जिसे अभ्यर्थी को आवंटित कालेज में जमा कराना होगा।

(ग) निजी क्षेत्र के मेडिकल / डेण्टल कालेजों हेतु -

शासनादेश संख्या:686/71-4-2021-15/2018 टी0 सी0, दिनांक 16 जुलाई, 2021 के क्रम में प्रदेश की द्वितीय चक्र की काउंसिलिंग समाप्त होने के पश्चात् प्रथम व द्वितीय चक्र से प्रवेशित अभ्यर्थी को सीट रिक्त करने की अनुमति नहीं होगी, फिर भी यदि अभ्यर्थी माप-अप राउण्ड से दो दिन पूर्व अपनी सीट से त्याग पत्र देता है, तो अभ्यर्थी द्वारा जमा की गयी धरोहर धनराशि तथा उत्तके द्वारा तत्समय जमा किये गये शिक्षण शुल्क का 50 प्रतिशत जब्त कर लिया जायेगा।

मॉप अप राउण्ड के पश्चात निजी क्षेत्र के मेडिकल कालेजो/ विश्वविद्यालयों/ डेण्टल कालेजों में प्रवेशित अभ्यर्थी पाठ्यक्रम पूर्ण करने से पूर्व यदि सीट से त्याग पत्र देता है तो उक्त पाठ्यक्रम की समस्त शैक्षणिक शुल्क (Tuition Fee) सम्बन्धित मेडिकल कालेज/विश्वविद्यालय/ डेण्टल कालेज को देय होगी और सिक्योरिटी धनराशि जब्त कर ली जायेगी तथा यदि अभ्यर्थी को सिक्योरिटी धनराशि वापस की जा चुकी है तो वह भी उसे जमा करना होगा।"

9. He further argues that even in terms of the brochure/guidelines issued in pursuance to which the petitioner had applied, there was a clear stipulation that the security deposit shall be forfeited in respect of candidates who do not join after the first round of counseling or resign after joining and the said brochure/guidelines were in nature of an offer which was accepted by the student and thus there was a contract created in between the parties by which the petitioner is bound.

Relevant extracts of the document issued as guidelines are quoted herein below:

"For detailed information see the Government Order Dated 7 October, 2021

....

Step-5:- Seat Allotment:

1.....

2.....

*3. (a) I**f Seat allotted (First Round):- In case***

i. Candidate does not join or after joining resigns from the seat, security money will be forfeited. For participation in second round of counseling security money will have to be deposited again.

ii. Candidate joins the college in first round but wants to upgrade his/her seat,

he/she will remain eligible for second counseling and can fill the choices for second round of counseling.

....."

10. Shri Bhasin further places reliance on Section 74 of Indian Contract Act. He argues that even in the allotment letter issued to the petitioner as contained in Annexure - 4, it was clearly stipulated that in case the candidate does not take admission after allotment, the security deposit will be forfeited. He further argues that the judgment of the Supreme Court relied upon by the petitioner refers to free exit only on up-gradation whereas in the present case, the case of the petitioner is not that of up-gradation but that of resignation on account of the allotment subsequently elsewhere.

11. He further argues that even otherwise the judgment of the Supreme Court pertains to the allotment of All India Quota whereas the issue at hand relates to UP NEET Counseling, thus, the same has no applicability to the facts of the present case as the directions issued in the said judgment pertain to All India Quota seats.

12. In rejoinder, learned counsel for the petitioner argues that the petitioner was allotted seat in the All India Quota seats and thus, the judgment of the Supreme Court is applicable to the facts of the present case.

13. In the light of the arguments as advanced by the parties, this Court is to consider as to whether the confiscation of security deposit, is bad in law? and whether the petitioner is entitled to refund of security amount ?

14. Considering the first submission that the security deposit was liable to be refunded in terms of the Government Order dated 7.10.2021. On plain reading of Clause 8 of the said Government Order, I am of the firm view that the case of the petitioner would fall under Clause 8(a)(I) and not under Clause 8(a)(II) as is being argued by learned counsel for the respondent. Clearly, in terms of Clause 8(a)(I), the petitioner is entitled for refund of entire security deposit.

15. Reverting to the second submission of Shri Bhasin that there was a contract which flows from the offer and acceptance as made through the brochure/guidelines/allottment letter, in between the parties and in terms of the Section 74 of the Indian Contract Act, the respondents are well within their right to forfeit the security deposit, Section 74 of the Indian Contract Act with illustrations is quoted herein below:

***"74. Compensation for breach of contract where penalty stipulated for.**--When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*

Explanation.--A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.--When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the

performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.--A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

(a) A contracts with B to pay B Rs. 1,000, if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation; not exceeding Rs. 5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty."

16. In the present case, the guidelines issued and annexed, specifically provides that the detailed information contained in the Government Order dated 7.10.2021 would guide the issues pertaining to the counseling, forfeiture and the payments, as such, the information given to the student contained a clear stipulation that the provisions of Government Order dated 7.10.2021 would govern, however, even assuming that the guidelines given to the student and its acceptance form a separate contract (as argued by respondents), the stipulation of forfeiture of security is clearly by way of a penalty and in view of illustration as contained in Section 74, the stand taken by the respondent cannot be accepted and the State at best can claim reasonable compensation for the los suffered on account of breach of contract. As no loss has been shown to be caused to the respondent by way of resignation coupled with the fact that the seat of the State has not gone vacant, the State cannot even claim reasonable compensation.

17. **Scope of** Section 74 of the Indian Contract Act was considered and explained

by the Hon'ble Supreme Court in the case of **Fateh Chand v. Balkishan Dass - AIR 1963 SC 1405** wherein the Hon'ble Supreme Court has held as under:

"10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether Section 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. ***There is however, no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the, aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered.*** *Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74.* ***In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers r****easonable, but not exceeding the amount specified in the contract as liable to forfeiture. We may briefly refer to certain illustrative cases decided by the High Courts in India which have expressed a different view."*

18. Testing the third argument as raised in between the parties with regard to the judgment of the Supreme Court, learned counsel for the petitioner argues that, the contract, even if for the sake of arguments is considered to be correct, would stand superseded by the subsequent judgment of the Supreme Court whereas Shri Bhasin argues that the contract would not get affected by the said judgment inasmuch as the directions contained were based upon an affidavit filed by Directorate General of Health Services (DGHS) for counseling for 50% All India Quota seats.

19. Be that as it may, once I have held that even by virtue of Section 74 of the Indian Contract Act, the respondents - authorities are not entitled to impose a penalty over and above what they can establish as a loss caused to them, thus, the said argument becomes redundant and cannot be considered.

20. Thus, holding that the petitioner is entitled in terms of the Government Order dated 7.10.2021 for refund of the entire security deposit and the respondents are not entitled to resort to penal clause as contained in the guidelines for recovering damages over and above what they can establish, ***the present petition deserves to be allowed and is ordered accordingly.***

21. Respondent No.2 i.e. Director General (Medical Education & Training), Chairman, Counseling Board, U.P. NEET PG - 21, Lucknow, U.P. is directed to refund the amount of Rs.2,00,000/- deposited by the petitioner as security deposit to her within a period of four weeks from today. 22. In the event the amount is not refunded within a period of four weeks from today, the same shall carry interest at the rate of 6% per annum from the date of application for refund till payment /realisation.

(2022) 9 ILRA 1370
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.092022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SHREE PRAKASH SINGH, J.

Special Appeal No. 408 of 2021

Gaya Prasad Yadav ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Mohd. Shujauddin Waris

Counsel for the Respondent:
C.S.C.

A. Civil Law - Service Law - Disciplinary Action Post Employee's Retirement - U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 - R. 14 - Civil Service Regulations, Article 351-A - if departmental proceedings are instituted against the government servant prior to the government servant attains the age of superannuation and retires, then in that eventuality the departmental proceedings can continue & no sanction of the Governor is required for continuance of the departmental proceedings - however, departmental enquiry initiated against the employee, before his retirement, could be continued only for a limited purpose for determining whether or not he is entitled for pensionary benefits and gratuity - if the employee is found to be guilty of grave misconduct or is found to have caused pecuniary loss to the Government, in such a situation, it is *only the Governor* (i.e. the State Government in accordance with the Rules of Business) who can take certain action permissible under Article 351-A of the CSR

- the only action permissible against a retired government servant on conclusion of the departmental enquiry is withholding or withdrawing the pension or any part of it for permanently or for a specified period and ordering for recovery from the pension of the whole or part of it - however none of the substantive penalties, which include dismissal of service, can be imposed on an employee after his retirement unless there exists a specific rule in that behalf - Neither in U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 nor in Civil Service Regulations contain any rule or provision which permit passing of order of dismissal or any other penalty in case the employee has retired (Para 21, 27, 34, 35)

B. Civil Law - Service Law - Civil Service Regulations, Article 351-A - Phrase - *'The Governor reserves to himself the right'* - use of this phrase would mean that no one else has a right including Disciplinary Authority or Appointing Authority to withdraw or withhold pension and ordering recovery from pension in respect of government servant who has retired on attaining the age of superannuation (Para 21)

Proceedings were instituted prior to retirement of the appellant-petitioner - prior to passing of the dismissal order on 01.11.2018, he retired on 31.05.2015 - after 31.05.2015 the employee-employer relationship got severed - in terms of the provisions contained in Article 351-A of the Civil Service Regulations it is the Governor who had the authority to take action which could be confined only to curtailment or withholding the pension or recovery therefrom - appellant-petitioner could not have been inflicted with the punishment of dismissal from service with retrospective date - Dismissal order set aside.

Allowed. (E-5)

List of Cases cited:

1. State of U.P. & ors. Vs Harihar Bholenath, (2006) 13 Supreme Court Cases 460

2. Chairman-Cum-Managing Director, Mahanadi Coalfields Ltd. Vs Rabindranath Choubey, AIR 2020 Supreme Court 2978

3. UCO Bank & ors. Vs Prabhakar Sadashiv Karvade (2018) 14 Supreme Court Cases 98

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

1. Heard Sri Amit Bose, learned Senior Advocate, assisted by Sri Mohd. Shujauddin Waris for the appellant-petitioner and the learned State Counsel representing the State-respondents.

2. We have also perused the record available before us on this Special Appeal.

3. By means of this Special Appeal instituted under Chapter VIII Rule 5 of the Rules of the Court, challenge has been made by the appellant-petitioner to a judgment and order dated 11.08.2021, passed by the learned Single Judge in Writ Petition No.7483(SS) of 2019 whereby the writ petition has been dismissed and the order dated 01.11.2018 reiterating the order of dismissal of the appellant-petitioner has been affirmed.

4. The appellant-petitioner was recruited as Constable of Armed Police in the establishment of the Uttar Pradesh Police. On certain charges relating to obtaining employment on the basis of certain allegedly forged education certificates, he was dismissed from service by means of an order dated 20.06.2009, passed by the Superintendent of Police, Sultanpur. The said order of dismissal was challenged by the appellant-petitioner by filing Writ Petition No.5847(SS) of 2009, which was allowed by this Court by means of order dated 11.09.2013 whereby the order of dismissal passed by the

Superintendent of Police, Sultanpur dated 20.06.2009 was set aside with the direction that the appellant-petitioner will be reinstated in service. While allowing the Writ Petition No.5847(SS) of 2009, this Court further observed that it will be open to the Superintendent of Police, Ambedkar Nagar to take action in accordance with law.

5. In compliance of the aforesaid order dated 11.09.2013, passed by this Court, the appellant-petitioner was reinstated by means of order dated 31.01.2014, passed by the Superintendent of Police, Ambedkar Nagar, however, the departmental proceedings were further carried against the appellant-petitioner and he was again dismissed from service by means of order dated 04.07.2014, passed by the Superintendent of Police, Ambedkar Nagar. By means of another order passed on the same day i.e. 04.07.2014, the representation of the appellant-petitioner regarding payment of back wages was also rejected.

6. Both the aforesaid two orders dated 04.07.2014 whereby the appellant-petitioner was dismissed from service and his claim for payment of back wages was rejected became the subject matter of the Writ Petition No.5703(SS) of 2014 which was decided by the learned Single Judge of this Court by means of an order dated 13.03.2018. By the said order, the order of dismissal dated 04.07.2014 was set aside with the further stipulation therein that the Superintendent of Police, Ambedkar Nagar shall pass a fresh order in accordance with law. The reason indicated in the order dated 13.03.2018, passed by this Court while quashing the order of punishment of dismissal was that the order of punishment of dismissal which was challenged did not refer to the show cause notice and the reply submitted by the appellant-petitioner to the said show cause notice and accordingly it was held that the appellant-petitioner was denied opportunity of hearing.

7. The appellant-petitioner, in the meantime, attained the age of superannuation on 31.05.2015. In compliance of the order dated 13.03.2018, passed by this Court in Writ Petition No. 5703(SS) of 2014, a show cause notice was given to the appellant-petitioner on 22.05.2018 to which he submitted his reply by means of his letter dated 23.07.2018. The Superintendent of Police, Ambedkar Nagar thereafter passed the order dated 01.11.2018 who reiterated the earlier order of dismissal and further stated that it will not be lawful to reinstate the appellant-petitioner in service. It is this order dated 01.11.2018 which was challenged by the appellant-petitioner by instituting the proceedings of Writ Petition No.7483(SS) of 2019, which has been dismissed by means of judgment and order dated 11.08.2021, which is under challenge herein.

8. Learned Senior Advocate, Sri Bose impeaching the judgment and order passed by the learned Single Judge has vehemently argued that since the appellant-petitioner had attained the age of superannuation on 31.05.2015, as such in terms of the provisions contained in Article 351-A of the Civil Service Regulations (herein after referred to as "CSR"), it is the Governor who had the authority to take action which could be confined only to the nature of action permissible and given in the said provision, that is to say, curtailment or withholding the pension or recovery therefrom.

9. It has further been argued on behalf of the appellant-petitioner that once the appellant-petitioner attained the age of

superannuation and retired on 31.05.2015, for all purposes, relationship between the appellant-petitioner and the State authorities so far as the employment is concerned, got severed and hence, having regard to the provision contained in Article 351-A of the CSR, the appellant-petitioner could not have been inflicted with the punishment of dismissal from service with retrospective date.

10. Sri Bose, learned Senior Advocate has, thus, argued that the issue raised in the writ petition has not been addressed by the learned Single Judge while passing the judgment and order dated 11.08.2021, inasmuch as that the learned Single Judge went to examine the issue as to whether after the appellant-petitioner attained the age of superannuation, any sanction to continue with the departmental proceedings, from the Governor as per the requirement of Article 351-A of the CSR was required or not. It has thus been argued that this issue neither arose nor was argued before the learned Single Judge. Submission further is that, as a matter of fact, in view of law laid down by Hon'ble Supreme Court in the case of **State of U.P. and others Vs. Harihar Bholenath, reported in (2006) 13 Supreme Court Cases 460**, the said issue is well settled according to which in case the departmental proceedings are instituted against the government servant prior to the government servant attains the age of superannuation and retires then in that eventuality, no sanction of the Governor is required for continuance of the departmental proceedings in terms of Article 351-A of the CSR.

11. Sri Bose has further argued that the issue raised before the learned Single Judge was that once the government servant retires and departmental proceedings were already instituted against him prior to his retirement, it is not that any sanction for continuance of the disciplinary proceedings is required; rather in such a situation, it is only the Governor who can take certain action permissible under Article 351-A of the CSR. According to him, the only action permissible against a retired government servant on conclusion of the departmental enquiry is withholding or withdrawing the pension or any part of it for permanently or for a specified period and ordering for recovery from the pension of the whole or part of it.

12. It has, thus, been argued on behalf of the appellant-petitioner that in the instant case, the punishment of order of dismissal has been passed by the Superintendent of Police and not by the Governor (i.e. the State Government in accordance with the Rules of Business), that too, retrospectively, as such the order of dismissal is not sustainable, however, learned Single Judge has, thus, erred in law in upholding the dismissal of the appellant-petitioner.

13. On the other hand, learned State Counsel defending the judgment and order under appeal passed by the learned Single Judge, has submitted that in view of the law laid down by the Hon'ble Supreme Court in the case of **Chairman-Cum-Managing Director, Mahanadi Coalfields Limited Vs. Rabindranath Choubey, reported in AIR 2020 Supreme Court 2978**, it is permissible for the Disciplinary Authority to impose punishment of dismissal after conclusion of disciplinary proceedings, in a situation where such disciplinary proceedings were initiated against the employee concerned before he had attained the age of superannuation and retired. In

this view, submission of learned State Counsel is that the judgment and order under appeal herein passed by the learned Single Judge does not require any interference in this Special Appeal, which is liable to be dismissed.

14. We have taken into consideration the rival submissions made by the learned counsel representing the respective parties and have also gone through the records available before us.

15. The issue which emerges for our consideration and reflection in this case is as to whether in view of the provisions contained in Article 351-A of the CSR, it was open to the State-respondents to have inflicted punishment of dismissal from service upon the appellant-petitioner once he had retired which is other than the action permissible under Article 351-A of the CSR. In other words, the issue is as to whether the order of dismissal could have been passed by the Superintendent of Police, Ambedkar Nagar after the appellant-petitioner had retired on attaining the age of superannuation. The other issue which needs our consideration is as to whether the order of dismissal of appellant-petitioner could have been passed with retrospective date considering the provisions of Article 351-A of the CSR and the provisions contained in U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991.

16. Article 351-A of the CSR is extracted herein under :

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or Negligence, during his service, including service rendered on re-employment after retirement;

Provided that--

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment--

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceeding, and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

Explanation--For the purposes of this article--

(a) Departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him or, if the officer has been placed under suspension from and earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted :

(i) in the case of criminal proceedings, on the date on which a complaint is made, or a charge-sheet is submitted, to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court".

17. A bare perusal of the afore-quoted provision of Article 351-A of the CSR shows that once the government servant retires, it is the Governor who has the right of withholding or withdrawing the pension or any part of it, permanently or for a specified period. The Governor under the said provision has also the right of recovery from the pension of the whole or part of any pecuniary loss caused to the Government, if the employee is found in departmental or judicial proceedings to have caused pecuniary loss to Government by misconduct or negligence during his service or he has been found guilty of gross misconduct.

18. It is, thus, clear that after retirement, withholding or withdrawing a pension and ordering the recovery from pension is permissible to be caused only by the Governor i.e. the State Government in terms of the Rules of Business, not only in case such employee is found causing pecuniary loss to the Government by his misconduct or negligence but also in a cases when the employee concerned is found guilty of grave misconduct.

19. The provision of first proviso appended to Article 351-A of the CSR clearly prohibits institution of departmental proceedings except with the sanction of Governor if such proceedings were not instituted while the employee was on duty either before retirement or during re-employment. Thus, Article 351-A of CSR puts a prohibition of initiating the departmental proceedings in a case of retired government servant, however, such proceedings are permissible to be instituted with the sanction of Governor, that too, in respect of an event which took place not more than four years before institution of such proceedings. The provision further provides that departmental enquiry in such an event shall be conducted by such authority and at such place as the Governor may direct and in accordance with the procedure applicable.

20. Accordingly, we are of the considered opinion that in the instant case, since the departmental proceedings were already instituted against the appellant-petitioner prior to his retirement on attaining the age of superannuation, no sanction under Article 351-A of the CSR was required to be taken from the Governor. This view is fully supported by the judgment of Hon'ble Supreme Court in the case of **Harihar Bholenath (supra)**. To this extent we do not find any error in the judgment of learned Single Judge which is under appeal herein.

21. In terms of the provisions contained in Article 351-A of the CSR, it is the Governor who reserves to himself the right of withholding or withdrawing a pension or any part of it and right of ordering the recovery from a pension. Opening words of Article 351-A, namely, "**The Governor reserves to himself the right**' are very important to be noticed. The use of this phrase would mean that no one else has a right including Disciplinary Authority or Appointing Authority to withdraw or withhold pension and ordering

recovery from pension in respect of government servant who has retired on attaining the age of superannuation. In this view, the action, if any, against a government servant, who has retired, is permissible to be taken only by the Governor and no one else.

22. Having observed as above, what we further need to reflect upon is the issue as to whether the order of punishment of dismissal from service can be passed in case of the appellant-petitioner who had already retired much prior to the date on which the order under challenge before the learned Single Judge i.e. order dated 01.11.2018 was passed.

23. Learned State Counsel has laid great emphasis on the law laid down by Hon'ble Supreme Court in the case of **Rabindranath Choubey (supra)**. The judgment in the case of **Rabindranath Choubey (supra)** has been rendered by a Bench of three Hon'ble Judges of Hon'ble Supreme Court. The majority view in the said judgment was expressed by Hon'ble Mr. Justice M.R. Shah with Hon'ble Mr. Justice Arun Mishra. The majority view expressed in the said case based on consideration of the relevant rules applicable for conducting the disciplinary proceedings in respect of employee concerned. The employee in the said case was employed with Mahanadi Coalfields Limited which had framed Conduct, Discipline and Appeal Rules,1978. Rule 27 of the said Rules mentions the authority where employer has the power to impose punishment including punishment of dismissal. Rule 34.2 of the said Rules provides that disciplinary proceedings, if instituted while the employee was in service before his retirement, shall be deemed to be proceeding even after the final retirement of the employee and shall be continued and concluded as if the employee had continued in service.

24. Rule 34.2 of the Conduct, Discipline and Appeal Rules in the case of **Rabindranath Choubey (supra)** as extracted by the Hon'ble Supreme Court in the said judgment, is as follows :

"34.2. Disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his reemployment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service."

25. From a perusal of Rule 34.2 of Conduct, Discipline and Appeal Rules as discussed in the case of **Rabindranath Choubey (supra)**, it is clear that the said rule creates a legal fiction to the effect that if disciplinary proceedings are instituted prior to retirement of the employee concerned, such disciplinary proceedings shall not only be deemed to be proceedings even after retirement, but also that such proceedings shall be continued in the same manner, if the employee had continued in service. Thus, considering the wording of Rule 34.2 of Conduct, Discipline and Appeal Rules in the case of **Rabindranath Choubey (supra)** it is seen that in the organization concerned where the employee was working, even after retirement the employee is deemed to be in continued in service even if he retires.

26. The majority view in the case of **Rabindranath Choubey (supra)**, thus, having regard to the provision contained in

Rule 34.2 of the Conduct, Discipline and Appeal Rules applicable to the employee in the said case, has given a finding that on conclusion of such disciplinary proceedings any of the penalties provided under the Rule can be imposed by the authority concerned including the order of dismissal.

27. Hon'ble Supreme Court in the case of **Rabindranath Choubey (supra)** has taken into consideration the law laid down by the Division Bench of Hon'ble Supreme Court in the case of **UCO Bank and others, Vs. Prabhakar Sadashiv Karvade, reported in (2018) 14 Supreme Court Cases 98**, wherein it has clearly been held that even though a departmental enquiry instituted against an officer/employee before his retirement can continue even after his retirement, none of the substantive penalties, which include dismissal from service, can be imposed on the officer/employee after his retirement on attaining the age of superannuation. Hon'ble Supreme Court in the said case has observed that master and servant relationship between the employee and the Bank comes to an end for all practical purposes on the date the employee concerned is superannuated and further that departmental enquiry initiated against the employee before his retirement could be continued only for a limited purpose for determining whether or not he is entitled for pensionary benefits and gratuity. Hon'ble Supreme Court in the said case has clearly observed that an order of dismissal or removal from service can be passed only when an employee is in service and further that if the person is not in employment, the question of terminating his services ordinarily would not arise unless there exists a specific rule in that behalf.

28. However, so far as the case of **Rabindranath Choubey (supra)** is concerned, it is relevant to note that the Conduct, Discipline and Appeal Rules applicable to the employee in the said case created a legal fiction by specifically providing that in case the departmental proceedings were instituted prior to retirement of an employee concerned, such proceedings shall be deemed to be continued and shall be concluded by the authority by which such proceedings were commenced in the same manner as if the employee had continued in service.

29. While deducing the ratio in the case of **Rabindranath Choubey (supra)**, we cannot loose sight of the provisions of the Rules, specifically Rule 34.2 of the Conduct, Discipline and Appeal Rules applicable in the said case. Thus, if we read the case of **Rabindranath Choubey (supra)** and the case of **Prabhakar Sadashiv Karvade(supra)** together, the principle of law, in our considered opinion, which emerges, is that once the employee retires on attaining the age of superannuation, punishment of dismissal or removal from service cannot be inflicted for the reason that if the person is not in employment, the question of terminating his services would not arise, unless there exists a specific rule in that behalf.

30. What we notice in the judgment in the case of **Rabindranath Choubey (supra)**, which has heavily been relied upon by the learned State Counsel, opposing the instant special appeal, is that a specific rule under the Conduct, Discipline and Appeal Rules provided in the said case that the employee will be deemed to continue in service even after retirement. In fact, the language of Rule 34.2 of the Conduct, Discipline and Appeal Rules in the case of **Rabindranath Choubey (supra)** is very relevant to cull the ratio

laid down therein. According to Rule 34.2 of the Conduct, Discipline and Appeal Rules as discussed in the case of **Rabindranath Choubey (supra)**, in a situation where the disciplinary proceedings were instituted while the employee was in service, such disciplinary proceedings shall be deemed to be proceeding and shall be continued and concluded by the authority which had commenced such proceedings in the same manner as if the employee had continued in service. It is in the light of the said Rule that Hon'ble Supreme Court in the case of **Rabindranth Choubey (subra)** has observed that on conclusion of the disciplinary proceedings, the penalty of dismissal could be imposed under the Conduct, Discipline and Appeal Rules applicable to the said case.

31. The question, therefore, in this case to be considered as to whether any such rule, as discussed in the case of **Rabindranath Choubey(supra)** by the Hon'ble Supreme Court exists in the Conduct, Discipline and Appeal Rules governing the appellant-petitioner.

32. The State Government in exercise of its powers vested in it under the Police Act, 1861 has framed "*The U.P. Police Officers of the Subordinate Ranks(Punishment and Appeal) Rules, 1991*". The Rules are statutory in nature. Two types of punishment are provided in Rule 4, according to which major penalties include (i) dismissal from service, (ii) removal from service and, (iii) reduction in rank including reduction to a lower-scale or to a lower stage in a time scale whereas minor penalties include (i) withholding of promotion, (ii) fine not exceeding one month's pay, (iii) withholding of increment, including stoppage at an efficiency bar and, (iv) Censure. The procedure for award of punishment is provided in Rule 14.

33. Rule 14(1) provides for the procedure for major penalty, according to which the proceedings are to be conducted in accordance with the procedure laid down in appendix-I appended to the Rules. Rule 14(2) states that minor penalty may be imposed after informing the Police Officer in writing of the action to be proposed to be taken against him and what imputation of the act or omission on which action is proposed to be taken after giving him reasonable opportunity of making representation.

34. In U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 there is no provision akin to the provision of 34.2 of the Discipline and Appeal Rules, as discussed in the case of **Rabindranath Choubey (supra)**. Even the Civil Service Regulations does not contain any such rule or provision which may permit passing of order of dismissal or for that matter any other penalty in case the employee has retired. Learned State Counsel has also not been able to place any such rule before us.

35. In absence of any rule, which permits imposition of punishment of dismissal after retirement or which deems the employee-employer relationship to be continued even after retirement for the purposes of disciplinary proceedings, in our opinion, the judgment of Hon'ble Supreme Court in the case of **Rabindranath Choubey (supra)** does not have any application in this case. Accordingly the reliance placed by the learned State Counsel on the said judgment is misplaced. As already observed above, Hon'ble Supreme Court in the case of **Prabhakar Sadashiv Karvade (supra)** has

clearly held that penalty of dismissal cannot be imposed on an officer/employee after his retirement after attaining the age of superannuation unless there exists a specific rule in that behalf. If the disciplinary enquiry is instituted prior to retirement of the employee concerned, the same will continue by operation of Article 351A of Civil Service Regulations as held by Hon'ble Supreme Court in the case of **Harihar Bholenath (supra)**. However, in such a case if the employee is found to be guilty of grave misconduct of or is found to have caused pecuniary loss to the Government, it is the Governor who can take action as provided in Article 351-A of the Civil Service Regulations.

36. Admittedly, in the instant case the proceedings were instituted prior to retirement of the appellant-petitioner, however, prior to passing of the order dated 01.11.2018 reiterating the order of dismissal, he had already retired on 31.05.2015 on his attaining the age of superannuation and accordingly after 31.05.2015 the employee-employer relationship had already got severed and thus only action permissible against him is in terms of the provisions contained in Article 351A of Civil Service Regulations.

37. Learned Single Judge while passing the judgment and order under appeal has not addressed the aforesaid issues, though these issues were contended not only in the writ petition but even in the reply submitted by the appellant-petitioner to the show cause notice dated 22.05.2018. Learned Single Judge while passing the judgment and order under appeal appears to have lost sight of the aforesaid aspects of the matter and accordingly, in our opinion, the judgment rendered by the learned Single Judge is not tenable.

38. Resultantly, the special appeal is **allowed.** The judgment and order dated 11.08.2021 passed by the learned Single Judge in Writ Petition No.7483 (S/S) of 2019 is hereby set aside. The order dated 01.11.2018 passed by the Superintendent of Police, Ambedkar Nagar is also set aside.

39. However, it will be open to the respondents to take action in terms of the provisions contained in Article 351-A of Civil Service Regulations and in case decision to take such action is taken, the process thereof shall be completed within three months from today.

(2022) 9 ILRA 1379
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2022

BEFORE

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

Writ-A No. 481 of 2021
connected with
Writ-A Nos. 482 of 2021, 484 of 2021, 486 of 2021, 487 of 2021 and 491 of 2021

Arsiya Bano ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anand Prakash Pandey, Sri Prabhakar Awasthi

Counsel for the Respondents:
C.S.C., Ms. Archana Singh

A. Civil Law - Constitution of India,1950 - Art. 226 - Writ petition - maintainability - re-evaluation of the answer-key - Judicial Review of the expert opinion - Under Article 226, High Court can judicially review the expert opinion, given by the persons specialized in the field, only if it is

demonstrated very clearly, that the key answer is patently wrong & a material error has been committed and / or if there are allegations of mala fide against any of the Members of the Expert Committee - burden of proof lies upon the candidates to demonstrate that the key answer is incorrect & that there is a glaring mistake which is totally apparent and no inferential process or reasoning or research is required to show that the key answer is wrong - In the event of any doubt, the benefit should go to the examination authority rather than to the candidate. (Para 14,18, 21)

B. Civil Law - Constitution of India, Art. 226 - Writ petition - successive writ petition - maintainability - Any relief not claimed in the earlier writ petition should be deemed to have been abandoned by the petitioner - Even if a party does not pray for the relief in the earlier writ petition, which he ought to have claimed in the earlier petition, he cannot file a successive writ petition claiming that relief (Para 32, 27)

Petitioners earlier filed writ petition before High Court which was disposed off directing the authorities to conduct the re-evaluation of the answer-sheets of petitioners - Petitioners filed second writ petition seeking the same relief i.e. re-evaluation of their answer sheets Held - Court held that the second writ petition was not maintainable for again issuing a direction to re-evaluate the respective booklet Series (Para 38)

Dismissed. (E-5)

List of Cases cited:

1. Maharashtra State Board of Secondary and Higher Secondary Education & anr. Vs Paritosh Bhupesh Kurmarsheth & ors., AIR 1984 SC 1543

2. Pramod Kumar Srivastava Vs Chairman, Bihar Public Service Commission, Patna & ors., J.T. 2004 SC 380

3. Ran Vijay Singh & ors. Vs St. of U.P. & ors., (2018) 2 SCC 357

4. U.P.P.S.C. & ors. Vs Rahul Singh & ors. AIR 2018 SC 2861

5. University of Mysore Vs C.D. Govinda Rao & anr., AIR 1965 SC 491

6. Bihar Staff Selection Commission Vs Arun Kumar, (2020) 6 SCC 362

7. Jitendra Singh VsU.O.I.& anr., Writ C No. 53877 of 2017

8. M/s. Sarguja Transport Service Vs State Transport Appellate Tribunal & ors., AIR 1987 SC 88

9. Ashok Kumar & ors. Vs Delhi Development Authority, 1994 (6) SCC 97

10. Khacher Singh Vs St. of U.P. & ors., AIR 1995 All. 33

11. Commissioner of Income Tax, Bombay Vs T.P. Kumaran 1996 (10) SCC 561

12.U.O.I. & ors. Vs Punnilal & ors. 1996 (11) SCC 112

13. M/s. D. Cawasji & Co. & ors. Vs State of Mysore & anr. AIR 1975 SC 813

14. Avinash Nagra Vs Navodaya Vidyalaya Samiti & ors. (1997) 2 SCC 534

15. Uda Ram Vs Central State Farm & ors. AIR 1998 Raj. 186;

16. M/s. Rajasthan Art Emporium Vs Rajasthan State Industrial and Investment Corporation & anr. AIR 1998 Raj. 277

17. St. of U.P. & anr. Vs Labh Chand AIR 1994 SC 754

18. Burn & Co. Vs Their Employees AIR 1957 SC 38

19. Dr. Buddhi Kota Subbarao Vs K. Parasaran & ors., AIR 1996 SC 2687

20. K.K. Modi Vs K.N. Modi & ors., (1998) 3 SCC 573

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

1. Heard Mr. Prabhakar Awasthi and Mr. Anand Prakash Pandey, learned counsel for the petitioner, Ms. Archana Singh, learned counsel for the respondent-Basic Education Board, U.P. Prayagraj through its Secretary and Mr. Shailendra Singh, learned Standing Counsel for the State-respondents in the above writ petitions.

2. Writ- A No. 481 of 2021 has been filed by the petitioner with a prayer to issue a direction upon the respondents to forthwith allocate 1 mark each for Question nos. 116 and 146 after re-evaluating Booklet Series-'C' qua the petitioner and thereafter may appoint the petitioner on the post of Assistant Teacher.

By means of Writ-A No. 482 of 2021, the petitioner has prayed for a direction upon the respondents to forthwith allocate 1 mark each for Question Nos. 3, 35, 70 and 126 after re-evaluating Booklet Series-'A' qua the petitioner and thereafter may appoint the petitioner on the post of Assistant Teacher.

Writ-A No. 484 has been filed for a direction upon the respondents to forthwith allocate one mark, which has been wrongly deducted pursuant to an order of a Writ Court dated 22nd October, 2019 passed in Writ-A No. 4235 of 2019 (Jyoti Yadav Vs. State of u.P. & Others) along with Writ-A no. 6420 of 2019 (Narendra Kumar Chaturvedi Vs. State of U.P. & Others) and may also allocate one mark in respect of Question No. 21 and thereafter may appoint the petitioner on the post of Assistant Teacher.

In Writ-A No. 486 of 2021, it has been prayed by the petitioner that the respondents be directed to forthwith allocate 1 mark each for Question Nos. 34 and 50 after re-evaluating Booklet Series-'C' qua the petitioner and thereafter may appoint the petitioner on the post of Assistant Teacher.

By Writ-A No. 487 of 2021, a writ of mandamus has been prayed by the petitioner directing the respondents to forthwith select the petitioner after allocating marks to Question Nos. 76 and 79 in relation to Assistant Teacher Recruitment Examination-2018 within stipulated period of time as this Court may desire and deem fit in the interest of justice.

Writ-A No. 491 has been filed by the petitioner for a direction upon the respondents to forthwith allocate 1 mark each for Question Nos. 18 and 133 after re-evaluating Booklet Series-'A' qua the petitioner and thereafter may appoint the petitioner on the post of Assistant Teacher.

3. As the rudimentary realities and the permissible facets intricate are indistinguishable in this bunch of the writ petitions, they have been amalgamated and heard together and are being decided by this conjoint verdict. The particulars chronicled in Writ- A No.- 481 of 2021 (Arsiya Bano Vs. State Of U.P. And 3 Ors.) are being canned to be the leading case.

4. According to the petitioners, the realistic milieu of the case is as follows:-

The State of Uttar Pradesh, by making 20th amendment in the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981, fixed a criteria for making appointments of Assistant Teachers in Primary Schools run and controlled by the U.P. Basic Basic Education Baord, Prayagraj/Allahabad. Pursuant to the said amendment, a letter has been issued by the State inviting online

applications from the prospective candidates for appointment on the post of Assistant Teachers in Primary Schools against total 68,500 posts for which the State also proposed to conduct Assistant Teachers Recruitment Examination-2018.

As per the provisions contained in the guidelines so issued, initially the cut off marks i.e. minimum qualifying marks was fixed at 45% for General and Other Backward Class category and 40% marks fixed for Scheduled Caste Category. The total marks of the Entrance Examination is 150 for which 150 questions provided in written examination so conducted by the State of Uttar Pradesh and on calculating 45% marks of which will be 67 marks and 40% marks will be 60 marks. As the petitioners possessed the degrees of Graduation and B.T.C. and also cleared T.E.T. examination, therefore, they were fully eligible to be appointed as Assistant Teacher in primary schools and also entitled to appear in Recruitment Examination-2018. The petitioner in leading case applied for appearing in Assistant Teachers Recruitment Examination-2018 by depositing the requisite fee and was also registered as a candidate having Registration No. 3500028774 and allotted Roll No. 35351808887. Pursuant thereof, the petitioner appeared in Assistant Teacher Recruitment Examination-2018 on 27th May, 2018, wherein he was provided Booklet Series "C". In the said recruitment examination, there were four series of booklets consisting of 150 questions, which were marked as "A", "B", "C", & "D". After the said recruitment examination, a model booklet answer key of Booklet Series "C" was duly published by the Secretary, Examination Regulatory Authority, U.P. Prayagraj, i.e. respondent no.4 on the concerned website on 5th June, 2018 and further a revised model booklet answer key of Booklet Series "C" was published on 18th June, 2018 by respondent no.4. The results of Assistant Teachers Recruitment Examination-2018 was declared by respondent no.4 on the concerned website on 13th August, 2018 and against total 68,500 posts, only 41,556 candidates were declared successful, as they secured minimum eligibility cut off marks, which was fixed as 45% for General and Other Backward Class Category candidates and 40% for Scheduled Caste Category candidates i.e. 67 marks for General/OBC candidates and 60 marks for SC candidates. When the result was declared, the petitioner has obtained 63 marks.

For ensuring transparency in the result so declared against the Assistant Teacher Recruitment Examination-2018, a Government Order dated 5th October, 2018 was issued, whereby the candidates, who were not satisfied with the result so declared, were directed to apply online between 11th October, 2018 to 20th October, 2018 for re-evaluation of the answer-key. Pursuant to the said Government Order, an advertisement dated 10th October, 2018 was issued for re-evaluation of the answer-key. Accordingly, the petitioner filled online form for re-evaluation. After filling the form for re-evaluation, the result was declared on 17th February, 2019 and the total marks of the petitioner have been increased by two more marks i.e. 63+2=65 marks, whereas qualifying marks, as fixed by respondent no.4 for the General/Other Backward Class Category candidates, is 67 marks. For question no. 10 of Booklet Series "C" which was provided to her, a litigation was pending before the Apex Court and upon intervention of the Apex Court, one mark each was given to all the candidates,

therefore, total marks of the petitioner was swelled to 66 marks. Against the re-evaluated result, so declared on 17th February, 2019, various writ petitions were filed before this Court for subsequent re-evaluation. The petitioner also filed Writ-A No. 10620 of 2019. This writ petition was clubbed with Writ-A No. 6420 of 2019 (Narendra Kumar Chaturvedi VS. State of U.P. & Others), which was the leading petition. This bunch of writ petitions were disposed by a Writ Court vide common judgment and order dated 22nd October, 2019 with a direction upon the respondents to conduct the re-evaluation in light of the judgment dated 30th October, 2018 passed in Writ-A No. 18235 of 2018 (Aniruddh Narayan Shukla & 118 others VS. State of U.P. & Others). Pursuant to the above order of the Writ Court dated 22nd October, 2019, the answer-keys of the prospective candidates were re-evaluated, after which the result was declared on 18th September, 2020, wherein the petitioner was awarded 66 marks, which was less than the qualifying cut off marks i.e. 67 marks in General/Other Backward Class Category. Not being satisfied with the said re-evaluation, the petitioner again approached this Court by means of present leading writ petition for re-evaluating Question Nos.116 and 146 of "C" booklet series which was provided to the petitioner.

5. Submissions made on behalf of petitioner in each writ petition of the aforesaid bunch are as follows:-

(I) So far as the case of petitioner of leading writ petition i.e. Writ-A No. 481 of 2022 is concerned, learned counsel for the petitioner submits that pursuant to the order of the Writ Court dated 22nd October, 2019, re-evaluation was done but the marks to the answers given by the petitioner against question nos. 116 and 146, have not been given to her. In the said factual background, the petitioner would refer Question No.116 which reads as under:-

"शारदा अधिनियम का सम्बन्ध किससे है?"

The answer given by the petitioner is "विवाह', whereas the answer as per the answer sheet is "बाल विवाह Child Marriage Restraint Act 1929/युवकों की 18 एवं महिलाओं की 14 वर्ष में विवाह/विवाह की उम्र/विवाह की न्यूनतम आयु से सम्बन्धित/लड़के एवं लड़कियों के विवाह की निश्चित आयु से सम्बन्धित/ महिला विवाह/ विवाह आयु से'.

Now petitioner would like to refer Question No.146, which is quoted herein below:-

""व्यास सम्मान,2017' के लिए किसे चुना गया है?".

The answer given by the petitioner is "ममता', whereas the answer in the answer sheet is "ममता कालिया'.

Learned counsel for the petitioners, therefore, submits that the answer given by the petitioner is nearly the same which has been given in the answer-sheet, hence, the marks for those questions should be given to the petitioner.

(II) In respect of the case of petitioner in Writ-A No. 482 of 2021, learned counsel for the petitioners submits that on the basis of aforesaid order of the Writ Court, the re-evaluation was done but no marks were awarded to the petitioner. In support of his case, the petitioner would like to reproduce Question No.3 which reads as under:-

"चौराहा में कौन सा समास है?'.

The answer given by the petitioner is "द्विगु समास/तत्पुरुष समास', whereas the answer as per the answer sheet is "द्विगुसमास'.

Similarly, the petitioner would like to refer Question No.35 which is set-out hereinbelow:-

""पठनीयः पद में कौन-सा प्रत्यय है?".

To the said question, the answer given by the petitioner is "अनीयर प्रत्यय/अनीय', whereas the answer in the answer sheet is "द्विगुसमास अनीयर'.

The petitioner would also like to refer Question No.70 which is set- out hereinbelow:-

"10. से०मी० त्रिज्या वाले एक वृत की एक जीवा की लम्बाई 16 से०मी० है। वृत के केंन्द्र से जीवा की दूरी ज्ञात कीजिए।".

To the said question, the answer given by the petitioner is "6 सेंमी या 6 cm', whereas the answer given in the answer sheet is "6'.

Lastly, the petitioner refers Question No. 126, which is being quoted herein-below:-

"वर्ष 1893 में किस शहर में स्वामी विवेकानन्द ने भारत के प्रतिनिधि के रूप में विश्व धर्म संसद में प्रेरणादायक भाषण दिया?".

To the said question, the petitioner has given his answer as "शिकागो', whereas the answer as per the answer sheet is "शिकागो मे'.

Learned counsel for the petitioner, therefore, submits that on the basis of aforesaid factual background, the petitioner ought to have been accorded one mark each for Question Nos. 3, 35, 70 and 126.

(III) Qua the case of the petitioner in Writ-A No. 484 of 2022, learned counsel for the petitioner submits that in compliance of the order of the Writ Court as mentioned herein above, the re-evaluation of the booklet series provided to him, was done but no marks were accorded to the petitioner. In support of his submission, learned counsel for the petitioner reproduces Question No.21, which reads as follows:-

"व्यूह का विलोम शब्द क्या है?".

Against the said question, the answer given by the petitioner is "निर्व्यूह/अव्यूह', whereas the answer as per the answer sheet is "आव्यूह'.

Learned counsel for the petitioners, therefore, submits that as the answer given by the petitioner is nearly the same to the answer mentioned in the answer-sheet, hence, the marks should have been given to the petitioners in the interest of substantial justice.

(IV) As regards, the case of the petitioner in Writ-A No. 486 of 2022, learned counsel for the petitioner submits that pursuant to the order of the Writ Court as referred to above, the re-evaluation of the booklet series provided to the petitioner, was done but no marks were accorded to the petitioner for Question Nos. 34 and 50. In support of his submission, learned counsel for the petitioner refers to Question No.34, which reads as follows:-

"प्रत्येकम् पद में कौन-सा उपसर्ग प्रयुक्त है?".

For the said question, the answer given by the petitioner is "प्रति'.

He also refers to Question No. 50, which is being quoted herein-below:-

"एक जीव की संरचना, कार्य या व्यवहार वातावरण के अनुरुप परिवर्तन कहलाता हैः-".

The answer given by the petitioner to the same is "अनुकूलन/Adaptation', whereas, the answer is the answer sheet is "अडप्टेशन'.

Learned counsel for the petitioner, therefore, submits that as the answers given by the petitioner for the aforesaid questions are the same as mentioned in the answer-sheet, therefore, the marks to the aforesaid questions should be given to the petitioner in the interest of substantial justice.

(V) Insofar as it relates to the case of the petitioner in Writ-A No. 487 of 2022,

learned counsel for the petitioner submits that though the re-evaluation pursuant to the aforesaid order of the Writ Court was done, but no marks have been given to the petitioner for Question Nos. 76 and 79. For ready reference, Question No. 76 reads as follows:-

"कौन सा अभिलेख छात्रों की योग्यता, रूचि, क्षमताओं एवं प्रतिक्रियाओं की जाँच करने हेतु रखा जाता है?".

Learned counsel for the petitioner further submits that the answer for the aforesaid question given by the petitioner is "छात्र अभिलेख', whereas, the answer as per the answer sheet is "संचयी अभिलेख/ उपाख्यानात्मक (एनेक्डोटल) अभिलेख/ छात्र प्रोफाइल/ छात्र प्रगति अभिलेख/ संचित अभिलेख/पोर्टफोलियो'.

Similarly, learned counsel for the petitioner would like to refer Question No.79 which is quoted as under:-

"यदि आप कक्षा में ज्यादा छात्रों की प्रतिभागिता चाहते हैं तो आप शिक्षण की कौन सी विधि का चुनाव करेंगे?".

The answer given by the petitioner is छात्र सहभागिता विधि', whereas the answer given in the answer-sheet is "विचार-विमर्श/सहकारी/वाद-विवाद/सहभागी शिक्षण/ समूह चर्चा/ रूचि पूर्ण समूह चर्चा'.

Learned counsel for the petitioner, therefore, submits that the answer given by the petitioner is nearly the same which has been given in the answer-sheet, hence, the marks for those questions should be given to the petitioner.

(VI) With respect to the case of the petitioner in Writ-A No. 491 of 2022, learned counsel for the petitioner submits that the petitioner has given right answers to question nos. 18 and 133 but after re-evaluation, no marks have been given to him. For justifying his answer, the petitioner wants to refer Question No.18 which reads as under:-

"लिखावट' शब्द में किस प्रकार का प्रत्यय है?".

Learned counsel for the petitioner further submits that the answer given by the petitioner is "कृत् प्रत्यय/ आवट/ वट', whereas, the answer disclosed in the answer sheet is "आवट् प्रत्यय'. Similarly, learned counsel for the petitioner refers to Question No. 133 which is quoted herein-below:

"क्षेणी 4M,9K,16I,25G,.....? का अगला पद ज्ञात कीजिए।".

The answer given by the petitioner is "36E', whereas, answer mentioned in the answer-sheet is "36E'. Learned counsel for the petitioner, therefore, submits that as the answers given by the petitioner for the aforesaid questions are the same as mentioned in the answer-sheet, therefore, the marks to the aforesaid questions should be given to the petitioner in the interest of substantial justice.

6. On the cumulative strength of the aforesaid eventualities, learned counsel for the petitioner submits that the petitioner of all the writ petitions should have been awarded marks towards the respective questions strictly in terms of the judgment rendered in the case of Aniruddh Narayan Shukla and in that event, petitioner would secure the cut off marks as required, in all eventuality, petitioner of all the writ petitions would have been selected. Hence, a direction be issued to the respondent authorities to award marks as aforesaid so that the petitioners of their respective petitions may be declared successful and be selected on the post in question.

7. Controverting the submissions made by the learned counsel for the

petitioner, Mr. Shailendra Singh, learned Standing Counsel for the State-respondents submits as follows:-

a) The relief prayed by the petitioner in Writ-A No. 481 of 2022 cannot be granted by this Court, as the re-evaluation of answers given by the petitioner in Booklet Series "C" which was provided to him, have been done twice and for question nos. 116 and 146, he has not been awarded marks, as he had given incomplete/incorrect answer to the same. To question no. 116, the petitioner gave answer as " विवाह", whereas the correct answer of the same is " बाल विवाह". Similarly, to question no. 146, the petitioner had given answer as " ममता", whereas the correct answer to the same is " ममता कालिया". Learned Standing Counsel, therefore, submits that there is no illegality or infirmity in the re-evaluation done in the case of the petitioner.

b) With regard to the petitioner in Writ-A No. 491 of 2022 for re-evaluation of question nos. 18 and 133 of Booklet Series "A" which was provided to the petitioner, learned Standing Counsel for the State-respondents submits that for question no.133, marks have already been awarded, whereas for question no.18, the petitioner has not been awarded mark as he has given incorrect/incomplete answer. Qua question no.18, as per the re-evaluated answer-key published on 18th September, 2020, the correct answer to the same is "कृत प्रत्यय/आवत/वत", whereas the petitioner has given the answer as "आवत प्रत्यय". Learned Standing Counsel therefore, submits that the relief as prayed in the writ petition cannot be granted. In support of the said plea, the learned Standing Counsel has placed reliance upon a judgment of this Court dated 25th January, 2021 passed in Writ-A No. 10393 of 2020 (Gargi Singh Vs. State of U.P. & Others), wherein similar dispute qua incorrect/incomplete answer, was involved. The said writ petition was dismissed by a Writ Court while recording a finding that as there were major spelling error in answer to question no.21, which was related to language and the spelling errors were relevant, the examining body has correctly marked the said answer as "wrong".

c) To the prayer made in Writ-A No. 482 of 2022 for re-evaluation of question nos. 3, 35, 70 and 126 of Booklet Series which was provided to the petitioner, learned Standing Counsel for the State-respondents submits that the marks have already been awarded to the petitioner after re-evaluation, therefore, this prayer has no leg to stand. Even otherwise, pursuant to the Government Order dated 5th October, 2018 and advertisement dated 10th October, 2018, the petitioner had not made online application for re-evaluation of which the result was declared on 17th February, 2019.

d) Qua the submissions made by the learned counsel for the petitioner in respect of Writ-A No. 487 of 2022 for re-evaluation of question nos. 76 and 79 of Booklet Series "C" which was provided to the petitioner, learned Standing Counsel for the State-respondents submits that against the said questions, the petitioner has given incorrect/incomplete answer. As per the re-evaluated answer-key published on 18th September, 2020, the correct answer to Question No. 76 is "संचयी अभीलेख/उपख्यानतमक (अनेकद्योतल) अभीलेख/ छात्र प्रोफाइल/छात्र प्रगति अभिलेख/संचित अभिलेख/पोर्टफोलियो, whereas the petitioner has given the answer as " छात्र अभीलेख". Similarly, the correct answer to question no.79 is "विचार-

विमर्ष/सहकारी/वाद-विवाद/सहभागी शिक्षण/ समुह चर्चा/रुचिपूर्ण सामूहिक शिक्षा, whereas the petitioner has given the answer as " छात्र सहभागिता विधि". Therefore, he has not been awarded marks to the said questions and controversy has been settled in favour of respondents by a Writ Court in the case of Gargi Singh (Supra).

e) So far as prayer made in Writ-A No. 484 of 2022 for re-evaluation of question no. 21 of Booklet Series "B", which was provided to the petitioner, is concerned, learned Standing Counsel for the State-respondents submits that as per the re-evaluated answer-key published on 18th September, 2020, the correct answer to Question No. 21 is "निव्यूह/आव्यूह" of which the petitioner has given answer as " आव्यूह" which is also incomplete/incorrect answer, therefore, petitioner has not been awarded marks for the same.

f) To the prayer made in Writ-A No. 486 of 2022 for re-evaluation of question nos. 34 and 50 of Booklet Series "A" which was provided to the petitioner, learned Standing Counsel for the State-respondents submits that the marks have already been awarded to the petitioner after re-evaluation, therefore, this prayer has no leg to stand. Learned Standing Counsel for the State-respondents, therefore, submits that this petition is wholly misconceived and is liable to be dismissed.

Even otherwise, to the submissions made by the learned counsel for the petitioner for re-evaluation of answer-sheets of the petitioner in all the writ petitions, which were in form of Booklet Series "A", "B", "C" respectively, Mr. Shailendra Singh, learned Standing Counsel for the State-respondents submits that there is no provision of re-evaluation of answer-sheets thrice and it would not be out of place to mention that the answer-sheets of the petitioners have already been re-evaluated twice.

Apart from the above, Mr. Shailendra Singh, learned Standing Counsel has also raised preliminary objection to the maintainability of all the writ petitions by contending that the petitioners of their respective petitions have earlier approached this Court by means of Writ-A No.10620 of 2019, Writ A-No. 13024 of 2019, Writ-A No. 4235 of 2019, Writ-A No. 13333 of 2019, Writ-A No. 4166 of 2019 and Writ-A No. 6959 of 2019 respectively. All these writ petitions have been clubbed with Writ Petition No. 6420 of 2019 and the same have been disposed off by means of a common judgment and order dated 22nd October, 2019, whereby the Secretary, examination Regulatory Authority, U.P. Allahabad was directed to conduct the re-evaluation of the answer-sheets of petitioners of all the writ petitions. Learned counsel for the State-respondents, therefore, submits that this second writ petition nearly for the same relief i.e. for re-evaluation cannot be entertained by this Court and the same is liable to be dismissed on this ground alone. The proper remedy available to the petitioner is to file a recall/modification application in the said writ petition or file a special appeal against the order passed therein.

On the cumulative strength of the aforesaid, learned Standing Counsel for the State-respondents submits that all these writ petitions are not maintainable and the same are liable to be dismissed.

8. I have considered the submissions made by Mr. Awasthi, learned counsel for the petitioner and Mr. Singh, learned Standing Counsel for the State-respondents in all the writ petitions.

9. Learned Counsel for the petitioner has not brought to this Court's attention any

rules, regulation or any guidelines framed by the respondent, notification or circular, bulletin issued by the respondent or any authority of law that may permit re-evaluation time and again.

Contrarily, it is an admitted position that re-evaluation of respective Booklet Series provided to the petitioners in all the writ petitions has been done twice.

10. The issue of re-evaluation of answer book or sheet is no more res integra. This issue has been considered by the Apex Court in the case of **Maharashtra State Board of Secondary and Higher Secondary Education & Anr. Vs. Paritosh Bhupesh Kurmarsheth & Ors**., reported in AIR 1984 SC 1543, wherein the Apex Court rejected the contention that in absence of provision for re-evaluation, a direction to this effect can be issued by the Court. The Apex Court further held that even the policy decision incorporated in the Rules/Regulations providing for rechecking/ verification/re-evaluation cannot be challenged unless there are grounds to show that the policy itself is in violation of some statutory provision. The Apex Court held as under:-

"In our opinion, this approach made by the High Court was not correct or proper because the question whether a particular piece of delegated legislation - whether a rule or regulation or other type of statutory instrument - is in excess of the power of subordinate legislation conferred on the delegate as to be determined with reference only to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation, etc. and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the court to substitute its own opinion for that of the legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the Statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the Statute.

In our opinion, the aforesaid approach made by the High Court is wholly incorrect and fallacious. The Court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But

any draw-backs in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution."

11. This view referred to above has been approved, relied upon and reiterated by the Apex Court in the case of **Pramod Kumar Srivastava Vs. Chairman, Bihar Public Service Commission, Patna & Ors**, reported in J.T. 2004 SC 380 observing as under:

"Under the relevant rules of the Commission, there is no provision wherein a candidate may be entitled to ask for re-evaluation of his answer-book. There is a provision for scrutiny only wherein the answer-books are seen for the purpose of checking whether all the answers given by a candidate have been examined and whether there has been any mistake in the totalling of marks of each question and nothing them correctly on the first cover page of the answer-book. There is no dispute that after scrutiny no mistake was found in the marks awarded to the appellant in the General Science paper. In the absence of any provision for re-evaluation of answer-books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for re-evaluation of his marks."

12. This Court feels that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheets. The law is well settled that the burden is on the candidates, not only to demonstrate that the key answer is incorrect but also to show that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the key answer is wrong. The Constitutional Courts must exercise great restrain in such matters and should be reluctant to entertain a plea challenging the correctness of the key answers. The Court should not over step its jurisdiction by giving the directions for re-evaluation which would amount to judicially reviewing the decision of the expert in the field.

13. The legal position in this respect has been summarised in case of **Ran Vijay Singh and Ors. Vs. State of U.P. and Ors**., reported in (2018) 2 SCC 357 which is follows:-

"30. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are:

30.1. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then

the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

30.3. The court should not at all re-evaluate or scrutinise the answer sheets of a candidate--it has no expertise in the matter and academic matters are best left to academics;

30.4. The court should presume the correctness of the key answers and proceed on that assumption; and

30.5. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate."

14. Undoubtedly, the Courts cannot judicially review the expert opinion unless and until the key answer is patently wrong. There is no doubt that the candidates put in dreadful efforts while preparing for an examination, it must not be unremembered that even the examination authorities as well as experts put in equally great efforts to successfully conduct the examination, therefore the Court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities.

15. Therefore, the Court should restrain in interfering with the efforts put in by the candidates as well as the examination authorities unless and until the mistake is apparent on the face of record and no research has to be done in proving the same, as the same will be an unending process resulting in uncertainty and confusion.

16. Keeping in mind the aforesaid, the Court in case of **U.P.P.S.C. and Ors. Vs. Rahul Singh and Ors**. reported in AIR 2018 SC 2861 has observed as follows:-

"Unless the candidate demonstrate that the key answers are patently wrong on the fact of it, the Courts cannot enter into the academic field, weigh the pros cons of the arguments given by both sides and then come to the conclusion as to which of the answer is better or more correct."

17. Indubitably, conducting and holding of examinations in a most fitting and fair manner is peremptory and is solemn duty of examining body to provide for fair procedure, rules, regulations or bye-laws, keeping in mind that the career and fate of the students depends upon the result of the examinations.

18. A Constitution Bench of the Apex Court in the case of U**niversity of Mysore Vs. C.D. Govinda Rao & Anr**., reported in AIR 1965 SC 491, has held that where the decision under challenge has been taken by the Committee of Expert, "normally the Courts should be slow to interfere with the opinion expressed by the experts" unless there are allegations of mala fide against any of the Members of the Expert Committee. The Court further observed as under:-

".....It would normally be wise and safe for the Courts to leave the decisions of academic matters to experts who are more familiar with the problems they face than Courts....."

19. It is settled law that when a decision is taken by the Committee of Expert having high academic qualifications and long experience in the specialised field, the

Courts should not normally interfere in the matters unless there are compelling circumstances for doing so.

20. The aforesaid issue is also well settled in view of the judgement of Apex Court in case of **Bihar Staff Selection Commission Vs. Arun Kumar**, reported in (2020) 6 SCC 362. There are otherwise catena of judgements of Supreme Court holding that in the competitive selection test, prayer for re-evaluation of marks cannot be accepted unless a rule for it exists.

21. Taking into consideration the settled position of law in the matters where the answer key is disputed, this Court in case of **Jitendra Singh Vs. Union of India and Another**, passed in Writ C No. 53877 of 2017, has held that the Court has to proceed on the assumption and presumption that the answer key is correct as the same is based on experts opinion given by the persons specialised. In the event of any doubt, benefit should go to the examination authority rather than to the candidate. It is with a rider that the Court should not re-evaluate or scrutinize the answer sheets of the candidates as it has no expertise in the matter, the academic matters are best left to the academicians there being no scope of judicial review in the matter.

22. Appropriately, considering the capitulations made by Mr. Shailendra Singh, learned Standing Counsel for the State-respondents and law laid down by the Apex Court, established position of law, this Court finds no good ground to interfere in this bunch of writ petitions and the same are liable to be dismissed.

23. Apart from the above, learned Standing Counsel has also raised preliminary objection to the maintainability of all the writ petitions by contending that the petitioners of their respective petitions have earlier approached this Court by means of Writ-A No.10620 of 2019, Writ A-No. 13024 of 2019, Writ-A No. 4235 of 2019, Writ-A No. 13333 of 2019, Writ-A No. 4166 of 2019 and Writ-A No. 6959 of 2019 respectively. All these writ petitions have been clubbed with Writ Petition No. 6420 of 2019 and the same have been disposed off by means of a common judgment and order dated 22nd October, 2019, whereby the Secretary, examination Regulatory Authority, U.P. Allahabad was directed to conduct the re-evaluation of the petitioners of all the writ petitions. Learned counsel for the State-respondents, therefore, submits that these writ petitions being second nearly for the same relief i.e. for re-evaluation cannot be entertained by this Court and the same are liable to be dismissed on this ground alone.

24. It is an admitted position between the parties that for the same relief as made in all the writ petitions, i.e. mandamus for re-evaluation, the petitioner of each writ petition has already filed writ petition for the same relief i.e. mandamus for re-evaluation and all the writ petitions had been clubbed with Writ No. Writ-A No. 6420 of 2019 and have been disposed of by a common judgment and order dated 22nd October, 2019.

25. The issue of filing successive writ petition has been considered by the Apex Court time and again, accordingly it has been held that even if the earlier writ petition has been dismissed as withdrawn, Public Policy which is reflected in the principle enshrined in **Order 23 rule 1 C.P.C.**, mandates that successive writ petition cannot be entertained for the same relief. (**Vide M/s. Sarguja Transport Service Vs. State Transport Appellate**

Tribunal & Ors., AIR 1987 SC 88; **Ashok Kumar & Ors. Vs. Delhi Development Authority**, 1994 (6) SCC 97; and **Khacher Singh Vs. State of U.P. & Ors.**, AIR 1995 All. 338).

26. In **Sarguja Trasnport Service (Supra)**, the Apex Court has specifically opined that in the instant case, the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition.

27. Even if a party does not pray for the relief in the earlier writ petition, which he ought to have claimed in the earlier petition, he cannot file a successive writ petition claiming that relief, as it would be barred by the principle of constructive res judicata enshrined in Explanation IV to Section 11 and Order 2 rule 2 C.P.C. as has been explained, in unambiguous and crystal clear language by the Apex Court in **Commissioner of Income Tax, Bombay Vs. T.P. Kumaran** reported in 1996 (10) SCC 561; **Union of India & Ors. Vs. Punnilal & Ors. reported in 1996 (11) SCC 112; and M/s. D. Cawasji & Co. & Ors. Vs. State of Mysore & Anr**. reported in AIR 1975 SC 813.

28. Similar view has been reiterated by the Apex Court in **Avinash Nagra Vs. Navodaya Vidyalaya Samiti & Ors.** reported in (1997) 2 SCC 534 and by the other Court in **Uda Ram Vs. Central State Farm & ors.** reported in AIR 1998 Raj. 186; and M/s. **Rajasthan Art Emporium Vs. Rajasthan State Industrial and Investment Corporation & Anr.** reported in AIR 1998 Raj. 277.

29. In the case of **M/s. D. Cawasji & Co. etc. (Supra)**, the Apex Court observed as under:-

"Be that as it may, in the earlier writ petitions, the appellants did not pray for refund of the amounts paid by way of cess for the years 1951-52 to 1965-66 and they gave no reasons before the High Court in these writ petitions why they did not make the prayer for refund of the amounts paid during the years in question. Avoiding multiplicity of unnecessary legal proceedings should be an aim of the Courts. Therefore, the appellants could not be allowed to split up their claims for refund and file writ petitions in this piecemeal fashion. If the appellants could have, but did not, without any legal justification, claim refund of the amounts paid during the years in question, in the earlier writ petitions, we see no reason why the appellants should be allowed to claim the amounts by filing writ petitions again. In the circumstances of this case, having regard to the conduct of the appellants in not claiming these amounts in the earlier writ petitions without any justification, we do not think, we would be justified in interfering with the discretion exercised by the High Court in dismissing the writ petitions which were filed only for the purpose of obtaining the refund....in view of the above, the petition is liable to be dismissed as not maintainable and it is dismissed accordingly...."

30. Similarly, in the case of **State of U.P. & Anr. Vs. Labh Chand** reported in AIR 1994 SC 754, the Apex Court has held as under:-

"This reason is not concerned with the discretionary power of the Judge or Judges of the High Court under Article 226 of the Constitution to entertain a second writ petition whose earlier writ petition was dismissed on the ground of non-exhaustion of alternative remedy but

of such a Judge or Judges having not followed the well established salutary rule of judicial practice and procedure that an order of a Single Judge Bench or a Larger Bench of the same High Court dismissing the writ petition either on the ground of latches or non-exhaustion of alternative remedy as well shall not be bye-passed by a Single Judge Bench or Judges of a Larger Bench except in exercise of review or appellate powers possessed by it.*.... But as the learned Single Judge constituting a Single Judge Bench of the same Court, who has in the purported exercise of jurisdiction under Article 226 of the Constitution bye-passed the order of dismissal of the writ petition made by a Division Bench by entertaining a second writ petition filed by the respondent in respect of the subject matter which was the subject matter of the earlier writ petition, the question is, whether the well established salutary rule of judicial practice and procedure governing such matters permit the learned Single Judge to bye-pass the order of the Division Bench on the excuse that High Court has jurisdiction under Article 226 of the Constitution to entertain a second writ petition since the earlier writ petition of the same person had been dismissed on the ground of non-availing of alternative remedy and not on merits.... Second writ petition cannot be so entertained, not because the learned Single Judge had no jurisdiction to entertain the same, but because entertaining of such a second writ petition would render the order of the same Court dismissing the earlier writ petition, redundant and nugatory although not reviewed by it in exercise of its recognized power. Besides, if a learned Single Judge could entertain a second writ petition of a person respecting a matter on which his first writ petition was dismissed in limine by another Single Judge or a Division Bench of the same Court, it would encourage an unsuccessful writ petitioner to go on filing writ petitions after writ petition in the same matter, in the same High Court and for it brought up for consideration before one Judge after another. Such a thing, if is allowed to happen, it would result in giving full scope and encouragement to an unscrupulous litigant to abuse the process of the High Court exercising its writ jurisdiction under Article 226 of the Constitution in that any order of any Bench of such Court refusing to entertain a writ petition could be ignored by him with impunity and the relief sought in the same matter by filing a fresh writ petition. This would only lead to introduction of disorder, confusion and chaos relating to exercise of writ jurisdiction by Judges of the High Court, for there could be no finality for an order of the Court refusing to entertain a writ petition. It is why the rule of judicial practice and procedure that a second writ petition shall not be entertained by the High Court on the subject matter respecting that the writ petition of the same person was dismissed by the same Court even if the order of such dismissal was in limine, be it on the ground of latches or on the ground of non-exhaustion of alternative remedy, has come to be accepted and followed as salutary rule in exercise of writ jurisdiction of the Court."*

(Emphasis added).

31. In the case of **Burn & Co. Vs. Their Employees**, reported in AIR 1957 SC 38, the Apex Court has held as under:-

"That would be contrary to the well-recognised principle that a decision once rendered by a competent authority on a matter in issue between the parties after a full enquiry should not be permitted to be

re-agitated. It is on this principle that the rule of res judicata enacted in Section 11, Civil P.C. is based. That section is, no doubt in terms in application to the present matter, but the principle underlying it, expressed in the maxim "interest rei publicae ut sit finis litium", is founded on sound public policy and is of universal application. (Vide Broom's Legal Maxims, Tenth Edition, page 218). 'The rule of res judicata is dictated' observed Sir Lawrence Jenkins C.J. in Sheoparasan Singh Vs. Ramnandan Prasad Narayan Singh, 43 Ind. App. 91: ILR 43 Cal. 694: (AIR 1916 PC 78) (C), by a wisdom which is for all time."

32. Therefore, in view of the above referred judgments, it is abundantly clear that even if the provisions of the Code of Civil Procedure are not applicable in writ jurisdiction, the principle enshrined therein can be resorted to for the reason that the principles, on which the Code of Civil Procedure is based, are founded on public policy and, therefore, require to be extended and made applicable in writ jurisdiction also in the interest of administration of justice. Any relief not claimed in the earlier writ petition should be deemed to have been abandoned by the petitioner to the extent of the cause of action claimed in the subsequent writ petition and in order to restrain the person from abusing the process of the Court, such an order/course requires not only to be resorted to but to be enforced.

33. In the case of **Dr. Buddhi Kota Subbarao Vs. K. Parasaran & Ors**., reported in AIR 1996 SC 2687, the Apex Court has observed as under:-

"No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes. However, access to justice should not be misused as a licence to file misconceived and frivolous petitions."

34. Similar view has been reiterated by the Apex Court in the case of **K.K. Modi Vs. K.N. Modi & Ors**., reported in (1998) 3 SCC 573.

35. In **Tamil Nadu Electricity Board & Anr. Vs. N. Raju Reddiar & Anr**. reported in AIR 1997 SC 1005 the Apex Court held that filing successive misconceived and frivolous applications for clarification, modification or for seeking a review of the order interferes with the purity of the administration of law and salutary and healthy practice. Such a litigant must be dealt with a very heavy hand.

36. In **Sabia Khan & ors. Vs. State of U.P. & ors.,** reported in (1999) 1 SCC 271, the Apex Court held that filing totally misconceived petition amounts to abuse of the process of the Court and such litigant is not required to be dealt with lightly.

37. In the case of **Abdul Rahman Vs. Prasoni Bai & Anr**., reported in (2003) 1 SCC 488, the Apex Court held that wherever the Court comes to the conclusion that the process of the Court is being abused, the Court would be justified in refusing to proceed further and refuse the party from pursuing the remedy in law.

38. Thus, in view of the above, the second writ petition is not maintainable for issuing a direction upon the respondent authorities to re-evaluate the respective Booklet Series provided to the petitioner of all the writ petition thrice.

39. In view of the aforesaid, this Court is of the opinion that these second

writ petitions of the respective petitioner are not maintainable and are liable to be dismissed on this ground alone.

40. For the findings recorded by this Court to the maintainability of these writ petitions as well as on merits of the case as set up by the parties, this Court finds no good ground to interfere in the matter. All the writ petitions are, accordingly, dismissed.

(2022) 9 ILRA 1395
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.09.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 13263 of 2021

Ajai Kumar ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Shobhit Mohan Shukla

Counsel for the Respondents:
C.S.C., Ashok Shukla, R.K. Upadhyay, Waseeq Uddin Ahmed

A. Civil Law - Service Law - U.P. Government Servants (Discipline and Appeal) Rules, 1999, Rule 9 - Action on Inquiry Report - After submission of the Inquiry report, in case the disciplinary authority does not find any infirmity with the Inquiry report he shall proceed as per Rule 9(4), give a show cause notice to the Government servant requiring him to submit his response to the said report, and on receiving the same, and after consultation with the U.P Public Service Commission, where necessary, may impose any penalty as provided in Rule 3 - In case the disciplinary authority finds that the *inquiry has been held in violation of Rule 7* & there is *procedural defect* in conduct of the Inquiry as provided for in Rule 7 of the Rules of 1999 or some grave misconduct has been conducted by the Inquiry Officer, then the Disciplinary Authority, after recording reasons for not accepting the Inquiry report & disclosing the infirmity/defect in the Inquiry proceedings, can exercise power under Rule 9(1) of the Rules, 1999 & remit the case for re-inquiry from the stage of infirmity in the Inquiry proceedings, as pointed out by him, in his order passed under rule 9(1) of the rules of 1999 - Inquiry officer shall thereupon proceed to hold inquiry from such stage as directed by disciplinary authority, according to the provisions of Rule 7 - Where in case the Disciplinary Authority *disagrees* with the Inquiry Officer *on the merits of the case or findings* recorded by the Inquiry Officer, he must record his disagreement and proceed according to under Rule 9 (2) of the Rules, 1999, following the procedure prescribed under Rule 9(4) of the Rules, 1999 - When Inquiry Officer has exonerated the Government employee and Disciplinary Authority agrees with the inquiry report he shall proceed in accordance with Rule 9(3) of the Rules, 1999 (Para 25, 26, 27, 39)

B. Civil Law - Service Law - U.P. Government Servants (Discipline and Appeal) Rules, 1999, Rule 9 (1) - Re-Inquiry - infirmity in the inquiry report, which is the basis for ordering Re-Inquiry, must be one in relating to violation of the specific procedure provided under Rule 7 of the rules of 1999, in conduct of the Inquiry - resorting to re-inquiry under provision of Rule 9(1) of the rules of 1999 cannot be passed without disclosing the infirmity in the Inquiry report - On passing of an order for re-Inquiry, under rule 9(1), the previous inquiry report becomes non est and cannot be used against the Government servant

in the subsequent stage of inquiry (Para 28)

C. Civil Law - Service Law - U.P. Government Servants (Discipline and Appeal) Rules, 1999, Rule 9 (1) - Re-Inquiry - some of the instances in which the disciplinary authority can invoke the powers for Re-Inquiry - if the inquiry is conducted by an authority not authorised by the disciplinary authority to conduct the inquiry, or If the charges in the charge sheet do not fall in the category of "definite charge" or that the charge sheet is not approved by the Disciplinary authority, or In case the charge sheet does not give adequate time for reply or is less than 15 days from the charge sheet, or there is no recital that the Government servant may cross examine any witness mentioned in the charge sheet or to produce evidence in his defence, or In case the charge sheet is not duly served upon the Government servant, or the Government servant is not permitted to produce witnesses in his defence, or his oral evidence is not recorded despite his request, or he may be of the opinion that proper opportunity has not been given to the Government servant to defend himself are (Par 28)

Disciplinary Authority ordered re-inquiry for the second time merely on the reason that there were two conflicting inquiry reports dated 04.07.2016 and 31.12.2018 - Held- once State Government itself found infirmity in the first Inquiry report dated 04.07.2016, and directed for re-Inquiry, thereafter the first/previous inquiry report ceased to exist & was non est and therefore could not be taken into consideration by the Disciplinary Authority - It is only the subsequent inquiry report dated 31.1.2018 which only could have be considered by the disciplinary authority - order dated 22.07.2019 is illegal as the disciplinary authority has not disclosed any infirmity with the subsequent second inquiry report dated 31.12.2018 - order dated 22.7.2019 passed by Additional Chief Secretary ordering re-Inquiry was set aside - subsequent Inquiry proceedings, Inquiry report as well as punishment order quashed - matter remitted to the disciplinary authority to proceed with the Inquiry from the stage of submission of Inquiry report dated 31.12.2018 (Para 36, 37, 38)

Allowed. (E-5)

List of Cases cited:

1. State Bank of Patiala & ors. Vs S.K.Sharma (1996)3 SCC 364

2. St. of U.P. Vs Saroj Kumar Sinha, (2010) 2 SCC

3. Chancery Division Taylor Vs Taylor

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

1. Heard Sri Jaideep Narain Mathur, Senior Advocate assisted by Sri Shobhit Mohan Shukla for the petitioner, Sri Vivek Shukla, learned Additional Chief Standing counsel along with Sri Prafulla Yadav, Standing counsel for State-opposite parties, Sri R. K. Upadhyay for opposite party No.3 and Sri Ashok Shukla for opposite party No.6.

2. By means of the present writ petition the petitioner has assailed the order dated 16.5.2021 passed by the State Government thereby awarding punishment to the petitioner of reversion along with censure entry. Further the advice of U.P Public Service Commission dated 19.2.2021 has also been challenged. The petitioner has further challenged the order dated 22.7.2019 passed by Additional Chief Secretary (Appointment Department), Government of U.P, whereby order of re-enquiry has been passed in exercise of powers under Rule 7 and 9(1) of U.P. Government Servants (Discipline and Appeal) Rules, 1999. The petitioner has also sought for a direction to the opposite parties not to give effect to the impugned order dated 16.5.2021 and also to allow the petitioner to work on the post of Sub

Divisional Officer, regularly with all consequential benefits.

3. It has been submitted by learned counsel for the petitioner that having been selected on the post of Naib Tehsildar the petitioner started working on 19.12.1993 under the control of Board of Revenue, U.P. He was subsequently transferred/appointed on the post of Officer on Special Duty (Land Management) under New Okhla Industrial Development Agency (NOIDA), U.P., Gautam Buddha Nagar on 3.2.2009 till 16.4.2012 and thereafter he was posted at Board of Revenue U.P., Lucknow.

4. The controversy in the present case arose during his posting as an Officer of Special Duty (Land Management), NOIDA. The petitioner was placed under suspension by the Commissioner, Meerut Division, for causing loss to the Government property and subsequently decision was taken for initiating disciplinary proceedings against the petitioner and he was placed under suspension. The order of suspension was revoked by the Board of Revenue on 13.8.2012. It has been submitted that during the aforesaid period the petitioner was considered for promotion in the cadre of U.P. Civil Service (Executive Branch) and the Departmental Promotion Committee recommended his promotion on 3.9.2012 but he was not promoted looking to the disciplinary proceedings pending against him. It is on the intervention of this Court in a writ petition preferred by the petitioner that by means of the judgment and order dated 19.12.2012 passed in Service Bench Petition No.1316 of 2012 considering that the suspension of the petitioner had been revoked and no charge sheet has been issued to him and accordingly while disposing the writ petition directed the opposite parties to consider issuance of promotion order in favour of the petitioner if he has been found to be eligible by the D.P.C. The petitioner was served with charge sheet on 19.9.2012 containing 11 charges. All the charges pertain to issuance of a letter by the petitioner on 1.9.2010 written by the petitioner to the Director General (Tourism). It has been submitted that the said letter dated 1.9.2010 was sent in response to the letter of Director General (Tourism), dated 12.8.2010 who had required certain information with regard to the Hotel Golf View Ambedkar Vihar, Village Chhalaira Bangar, Tehsil Dadari, District Gautam Buddha Nagar, NOIDA. The said letter was written after seeking information from the Chief Planner and Architect as well as the Officer on Special Duty (Y) with Chief Executive Officer of NOIDA , and the petitioner was directed to communicate on behalf of NOIDA that actually Hotel Golf View Ambedkar Vihar, Village Chhalaira Bangar, Tehsiil Dadari, District Gautam Buddha Nagar, Noida is situated on abadi land and the NOIDA authority does not have any power to sanction map on a land which is in rural area. It is on the basis of the letter dated 01.09.2010 the opposite parties have come to a conclusion that the petitioner while exercising his power holding the post of Officer on Special Duty (Land Management), NOIDA did not take any action against the said hotel which has been illegally constructed and did not inform the higher authorities about the same and consequently he is guilty of committing causing loss to the Government. It is stated that all the charges pertained to the same issue and most of them are more or less similar in nature. The inquiry officer i.e. Additional Commissioner, Meerut

Division, Meerut conducted the inquiry and submitted inquiry report vide letter dated 2.7.2016 where all the 11 charges were found proved against the petitioner. Thereafter the State Government provided copy of the inquiry report to the petitioner vide letter dated 23.5.2017 for submitting his representation/explanation to the inquiry report.

5. The petitioner submitted a detailed reply to the show cause notice on 08.01.2018 which was forwarded by the District Magistrate, Hapur to the State Government and the State Government on 14.08.2018 after considering the reply submitted by the petitioner directed the inquiry officer / Additional Commissioner (Administration) to re inquire into all the facts and submit his report. Along with the said order Government order dated 22.12.2005 was enclosed and specific query was put to the inquiry officer to indicate as to how the petitioner could have been found guilty in light of order dated 22.12.2005.

6. In pursuance of the order dated 14.8.2018 the inquiry officer reexamined the entire factual matrix and again submitted his report to the State Government recording a finding that the charges against the petitioner were not found proved and he further raised the issue as to how can the Panchayat pass the map of the said Hotel when on the said date the land was vested with Noida authority and also as to under what circumstances the office of District Magistrate registered it as a hotel when the ownership of the land was not clear and as to who are the Engineers responsible for not taking proper steps despite the fact that the said hotel had been constructed without proper sanction of the authorities.

7. The State Government faced with two contradictory inquiry reports dated 4.7.2016 and 31.12.2018 cancelled both the inquiry reports and again in exercise of the powers under Rule 9 (1) of the Rules of 1999 appointed Commissioner, Meerut Division, Meerut as an inquiry officer to re-enquire the matter.

8. Pursuant to the order of re-enquiry against the petitioner the petitioner received a letter from Additional Commissioner, Meerut Division instead of Commissioner who was directed to re-inquire, on 18.10.2019 stating that he has been entrusted with the inquiry and the petitioner was required to submit his reply. The petitioner appeared before Additional Commissioner, Meerut on 02.11.2019 and submitted his reply. Subsequently, realizing the mistake, the Commissioner Meerut Division herself required the petitioner to appear before her on 25.11.2019 . The petitioner appeared before the said authority and submitted his reply which he had submitted earlier before the Additional Commissioner, Meerut. It is stated that the inquiry officer did not afford any opportunity of personal hearing or of cross examining any of the witnesses and concluded the said inquiry on 16.7.2020 holding the petitioner guilty of all the charges. The petitioner was given a show cause notice along with copy of the inquiry report by means of order dated 24.7.2020 to which the petitioner replied on 14.9.2020 pursuant to which the impugned order dated 16.5.2021 has been passed reverting the petitioner to the post of Tehsildar and also awarding him censure entry. The impugned order further records that the State Government after considering the reply of the petitioner, was of the view that the petitioner should have been awarded the punishment of withholding two

increments along with censure entry and the said recommendation was forwarded to U.P. Public Services Commission for its approval in accordance with the rules and the U.P. Public Services Commission by means of order dated 19.2.2021 was of the opinion that considering the gravity of the charges against the petitioner harsher sentences deserves to be awarded to the petitioner and was, therefore, of the opinion that in the present facts and circumstances of the case he should be awarded the punishment of reversion along with censure entry. The State Government concurred with the view of the Uttar Pradesh Public Service Commission and by means of the impugned order dated 16.5.2021 has awarded the punishment of reversion along with censure entry.

9. Learned counsel for the petitioner has challenged the disciplinary proceedings on the ground that the order dated 27.7.2019 cancelling the inquiry reports dated 04.07.2016 and 31.12.2018 is illegal and arbitrary and passed on incorrect appreciation facts and law. It is submitted that in case the disciplinary authority disagrees with the inquiry report he has two options open to him, he can either remit the matter to the enquiry officer for re enquiry if conditions contained in Rule 9(1) are fulfilled, or he has an option of recording his disagreement with the enquiry report and proceed with the matter as provided in Rule 9(2) of the rules of 1999, adhering to the conditions prescribed in Rule 9(4) after giving a copy of the enquiry report to the Government servant. It has further been submitted, that once decision has been taken by the disciplinary authority, the matter is fit for re-enquiry then the previous inquiry report is rendered non est, and it cannot be acted upon in the subsequent stage of the enquiry, where only the fresh inquiry report can be relied upon by the disciplinary authority to proceed against the delinquent employee.

10. The learned counsel for the petitioner has submitted that the order dated 22.07.2019 passed by the State Government cancelling both enquiry reports and again resorting to re-inquiry under provision of Rule 9(1) of the rules of 1999 is illegal and arbitrary as such an order cannot be passed without disclosing the infirmity in the enquiry report and as such in the circumstances of the present case, there was no cogent reason for invoking provisions of rule 9(1) of the rules of 1999.

11. It has been submitted that when decision is taken in exercise of powers under rule 9(1) then the matter is remitted to the enquiry officer for conducting the enquiry from the stage of infirmity as determined by the disciplinary authority, and the previous inquiry report which is found to be infirm is rejected.

12. The challenge to the impugned punishment order has also been made on the ground that when the enquiry was conducted by the Commissioner Meerut division, the petitioner was not informed of any date, time and place for the said enquiry and no opportunity was afforded to the petitioner to examine or cross examine any of the witnesses. It is further stated that the documents relied upon in the charge sheet were not proved, and hence the entire proceedings were conducted in violation of principles of natural justice without giving due opportunity of hearing to the petitioner.

13. Learn counsel for the petitioner has also contended that when the enquiry was ordered for the 2nd time he preferred a

representation to the Chief Secretary stating that the order read 22.07.2019 was illegal in arbitrary as re-enquiry for the 2rd time cannot be ordered. It was further stated that once an enquiry report has been submitted exonerating the petitioner it was incumbent upon the Disciplinary Authority to proceed in terms of rule 9(3) or to record his disagreement in accordance with rule 9(2) and pass appropriate orders. It is stated that the Chief Secretary did not consider or decide the representation made by the petitioner.

14. It has been submitted on behalf of the petitioner that the enquiry officer while submitting the enquiry report has not considered the reply submitted by the petitioner, nor has he considered the previous inquiry report dated 31.12.2018 wherein the petitioner was exonerated of all the charges, despite the fact that the inquiry officer was mandated to look into both enquiry reports, and hence it has been submitted that the inquiry report dated 16.07.2020 is illegal in arbitrary and deserves to be set aside.

15. It was lastly contended the disciplinary authority after perusing the inquiry report dated 16.07.2020 as well as the reply of the petitioner had proposed the punishment of stoppage of two annual increments with cumulative effect. The proposal was forwarded to the U.P Public Service Commission under rule 16 of the U.P Government Servant (Discipline and Appeal) Rules 1999. U.P Public Service Commission recommended enhancement of the punishment of reduction in rank, and the State Government has accepted the said recommendation, in the most illegal and arbitrary manner without applying its mind. It has been stated that recommendations of the Public Service Commission are also arbitrary being bereft of any cogent reason from which can reflects that it has applied its mind while proposing to enhance the punishment and consequently prayer has been made to set aside the impugned order.

16. The learned standing counsel has opposed the writ petition and submitted that there were serious allegations against petitioner which required to be inquired into, and therefore disciplinary proceedings were instituted against the petitioner where he was afforded full opportunity of hearing, and it cannot be said that there was any infirmity in the disciplinary proceedings leading to award of punishment of reversion to the petitioner.

17. The learned standing counsel also supported the exercise of power under rule 9(1) of the rules of 1999 and submitted that once a disciplinary authority comes to a decision that the inquiry report has certain infirmities then he can direct the inquiry officer to re-inquire into the allegations levelled in the charge sheet. He further submitted that there is no limitation that such exercise of power that it can be resorted to only once during an enquiry, nor is such a restriction discernible from the reading of rule 9(1) of the rules of 1999. Whenever such infirmities in the inquiry report are discovered by the disciplinary authority he would be at liberty to invoke provisions of rule 9(1) of the rules of 1999.

18. Supporting the impugned order, it was submitted that unless it is shown that some prejudice has been caused to the petitioner the inquiry proceedings cannot

be set aside merely because of violation of any statutory provision or rule. In support of the contentions learned Standing counsel relied upon the judgement in the case of ***State Bank of Patiala and others vs S.K.Sharma (1996)3 SCC 364.***

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

20. The disciplinary proceedings were initiated against the petitioner when he was holding the post of Officer on special duty (Land Management) under New Okhla Industrial Development Agency. He was placed under suspension and subsequently the said order was revoked on 13.08.2012. A chargesheet was issued to him on 19.09.2012 containing 11 charges which pertain to issuance of a letter dated 01.09. 2010 sent in response to the letter of the Director General (Tourism) who had required certain information with regard to Hotel Golf View Ambedkar Vihar, NOIDA. The allegations levelled against the petitioner pertained to the fact that the petitioner did not take any action against the said Hotel which was illegally constructed, without approval of map, and also that did not inform the higher authorities about the same. The inquiry officer conducted the inquiry and submitted the inquiry report on 04.07.2016 where all the charges were proved against the petitioner. The Disciplinary Authority provided the copy of the inquiry report to the petitioner vide show cause notice dated 23.05.2017, to which the petitioner replied on 8.01.2018.

21. Considering the reply submitted by the petitioner to the inquiry report, the Disciplinary Authority vide order dated 14.08.2018 directed the inquiry officer/ Additional Commissioner (Administration) Meerut to re-inquire into all the facts and to submit his enquiry report. The enquiry officer inquired into the charges against the petitioner again and submitted his inquiry report on 31.08.2018 exonerating the petitioner of all the charges.

22. On receiving the second inquiry report dated 31.12.2018, the State Government by means of impugned order dated 22.07.2019, after recording that there are two conflicting inquiry reports in existence, decided to cancel both the inquiry reports dated 04.07.2016 and 31.12.2018 in exercise of rule 9(1) and further directed the matter be re-inquired by the Commissioner Meerut division.

23. The petitioner has assailed the order dated 22.07.2018 and questioned the exercise of power by the disciplinary authority under rule 9(1) of the Rules of 1999 for sending the matter for re-inquiry only because there were two conflicting inquiry reports. He submits that the said order is illegal and arbitrary and beyond the scope of power vested in disciplinary authority as per rule 9(1) as that the enquiry officer can proceed only in accordance with Rules of 1999, and cannot travel beyond the prescription provided therein, and in the present case he has exercised power under rule 9(1) which could not have been validly exercised by him in the facts of the case.

24. For adjudication of the other matter it will be relevant to refer to Rule 9 of the Rules of 1999 which reads as under:-

"Rule 9(1): The Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-enquiry to the same or any other inquiry officer under intimation to the charged Government Servant. The inquiry officer shall thereupon proceed to

hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7.

Rule 9(2): The Disciplinary Authority shall, if it disagrees with the findings of the inquiry officer on any charge, record its own findings thereon for reasons to be recorded.

Rule 9(3): In case the charges are not proved, the charged Government Servant shall be exonerated by the Disciplinary Authority of the charges and inform him accordingly.

Rule 9(4): If the Disciplinary Authority, having regard to its findings on all or any or charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charge Government Servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government Servant and require him to submit his representation if he so desires, within a reasonable specified time. The Disciplinary Authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government Servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government Servant."

25. It appears from rules of 1999 that same is a self-contained code and the procedure has been prescribed for holding disciplinary inquiry and awarding punishment. After the submission of the Inquiry report where charges are proved, the disciplinary authority proceeds to examine the inquiry report and in case he does not find any infirmity with the enquiry report he shall proceed in terms of rule 9(4) and give a show cause notice to the Government servant requiring him to submit his response to the said report, and on receiving the same, and after consultation with the U.P Public Service Commission, where necessary, may impose any penalty as provided in Rule 3.

26. In case he finds that the inquiry has been held in violation of rule 7, where either the Government servant has not been given adequate opportunity of hearing or for any other cogent reason, the disciplinary authority after recording reasons for not accepting the enquiry report, may order a re-inquiry under Rule 9(1).

27. As is discernible from rule 9(1) the infirmity in the inquiry report, which is the basis for ordering re-enquiry, must be one in relating to violation of the specific procedure provided under Rule 7 of the rules of 1999, in conduct of the enquiry. This aspect is clear from the perusal of rule 9(1) where it is provided that the "inquiry officer shall thereupon proceed to hold inquiry from such stage as directed by disciplinary authority, according to the provisions of rule 7". Therefore, the disciplinary authority can direct for re-enquiry from the stage of infirmity in the enquiry proceedings as pointed out by him in his order passed under rule 9(1) of the rules of 1999. In exceptional circumstances where there exists serious allegation against the enquiry officer, of bias or misconduct in conducting the enquiry, the disciplinary authority after recording his satisfaction can also invoke rule 9(1).

28. In where the inquiry is conducted:-

i. By an authority not authorised by the disciplinary authority to conduct the inquiry, or

ii. If the charges in the charge sheet do not fall in the category of "definite charge" or that the charge sheet is not approved by the Disciplinary authority, or

iii. In case the charge sheet does not give adequate time for reply or is less than 15 days from the charge sheet, or there is no recital that the Government servant may cross examine any witness mentioned in the charge sheet or to produce evidence in his defence,or

iv. In case the charge sheet is not duly served upon the Government servant, or

v. The Government servant is not permitted to produce witnesses in his defence, or his
oral evidence is not recorded despite his request, or

vi. He may be of the opinion that proper opportunity has not been given to the Government servant to defend himself are some of the instances in which the disciplinary authority can invoke the powers under rule 9(1) of rules of 1999.

29. The natural corollary to invocation of power and the rule 9(1) of the Rules of 1999 is that the previous inquiry report is set aside, when the re-inquiry is ordered. On passing of an order under rule 9(1), the previous inquiry report becomes non est and cannot be used against the Government servant in the subsequent stage of inquiry. The reasons which must be recorded by the disciplinary authority are about the defect in the enquiry proceedings. Such a defective inquiry which has been so declared by the disciplinary authority, while passing the order under rule 9(1), ceases to exist and hence becomes unactionable, and cannot be relied upon.

30. The Supreme Court has considered this aspect of the matter in the case of **State of U.P. v. Saroj Kumar Sinha, (2010) 2 SCC** where it was held:-

"25. A bare perusal of the aforesaid charges shows that the three charges were based on official documents/official communications. We have earlier noticed the relentless efforts made by the respondent to secure copies of the documents, which was sought to be relied upon, to prove the charges. These were denied by the Department in flagrant disregard of the mandate of Rule 7 sub-rule (v). Therefore the inquiry proceedings are clearly vitiated having been held in breach of the mandatory sub-rule (v) of Rule 7 of the 1999 Rules.

26. The first inquiry report is vitiated also on the ground that the inquiry officers failed to fix any date for the appearance of the respondent to answer the charges. Rule 7(x) clearly provides as under:

"7. (x) Where the charged government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the inquiry officer shall proceed with the inquiry ex parte. In such a case the inquiry officer shall record the Statement of witnesses mentioned in the charge-sheet in absence of the charged government servant."

27.A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the Statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But

nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

31. In the present case the Disciplinary Authority has ordered re-inquiry by means of dated 22.07.2019. The only reason stated in the said order is that there are two conflicting inquiry reports dated 04.07.2016 and 31.12.2018 and for this reason alone the matter has been referred for re-enquiry for the second time.

32. The question which arises for consideration is regarding the validity of the order dated 22.07.2019 ordering re-inquiry on the grounds that there were two conflicting enquiry reports in existence, and clearly, no infirmity or defect was pointed out or considered in the second enquiry report dated 31.12.2018.

33. In the instant case the first inquiry report was submitted by the inquiry officer on 04.07.2016 holding the petitioner guilty of all the 11 charges. On 14.08.2018 the decision was taken by the State Government for re-enquiry after considering the reply submitted by the petitioner. In his reply he had submitted that according to the order dated 22.12.2005 passed by NOIDA giving the responsibility of removing the illegal encroachments was of the Project Engineer and not the petitioner, and consequently the petitioner was not responsible for removal of illegal encroachments. The said reply seemed logical and reasonable to the disciplinary authority, and he was of the considered opinion that the inquiry officer had not considered the reply of the petitioner in the correct perspective, and it was thought fit to have the matter re-enquired.

34. It is noticed that the State Government was of the considered view that the earlier inquiry dated 04.07.2016 stood vitiated, as the reply of the petitioner was not considered and more specifically when there was a specific order holding the Project Engineer responsible for removal of any encroachment coming up in the area under by NOIDA, then how could the petitioner be found to be guilty of the said charges, was a question which was posed in the said order itself.

35. The State Government itself had found infirmity in the enquiry report dated 04.07.2016, and according to the judgement of the Supreme Court in the case of ***State of U.P. v. Saroj Kumar Sinha*** the first/previous inquiry report was vitiated and ceased to exist.

36. On 22.07.2019 when the State Government was considering the second enquiry report then previous enquiry report dated 04.07.2016 had ceased to exist. The only enquiry report which should have been considered by the disciplinary authority was the subsequent enquiry report dated 31.12.2018. The reason stated in the impugned order dated 22.07.2019 that there are "two contradictory inquiry reports" is based on a fallacious belief that the previous inquiry report dated 04.07.2016 was in existence and could be acted upon, which is clearly erroneous, arbitrary and illegal.

37. As discussed earlier, the moment decision is taken by the disciplinary authority invoking the provisions of rule 9(1) of the rules of 1999, the previous inquiry report ceases to exist because of the

infirmities as pointed out by the disciplinary authority and consequently the previous enquiry report dated 04.07.2016 was non est and of no consequence, and therefore, could not be taken into consideration by the Disciplinary authority. It is only the subsequent inquiry report dated 31.1.2018 which only could have be considered by the disciplinary authority for further proceedings.

38. The order dated 22.07.2019 is also illegal and arbitrary for the reason that the disciplinary authority did not find any infirmity with the inquiry report dated 31.12.2018, nor any such infirmity has been disclosed in his order. It is the defects/infirmities found in the enquiry report by the disciplinary authority which clothes him which with the authority to exercise the power vested in rule 9(1) of the rules of 1999, in other words pointing out of such infirmity in the enquiry report is a precondition for exercise of power on the disciplinary authority under rule 9(1) of the rules of 1999. It is only when there is an infirmity in conduct of the inquiry in violation of any of the provisions of rule 7 of the Rules of 1999, or there is any other allegation of grave misconduct against the inquiry officer in conducting the said enquiry can the disciplinary authority exercises jurisdiction under rule 9(1) of the rules of 1999, after recording such reasons. No such infirmity has been pointed out considered or stated in the order dated 22.07.2019 for rejecting the inquiry report dated 31.12.2018 which renders the exercise of power by the Disciplinary Authority without jurisdiction, illegal and arbitrary.

39. This Court is of the considered view that disciplinary authority while exercising power under Rule 9 would exercise the power in the following manner:-

(I) In case there is any procedural defect in conduct of the enquiry as provided for in Rule 7 of the Rules of 1999 or some grave misconduct has been conducted by the Inquiry Officer then the Disciplinary Authority can exercise power under Rule 9(1) of the Rules, 1999.

(II) Where in case the Disciplinary Authority disagrees with the Inquiry Officer on the merits of the case or findings recorded by the Inquiry Officer, he must record his disagreement and proceed according to under Rule 9 (2) of the Rules, 1999, following the procedure prescribed under Rule 9(4) of the Rules, 1999.

(III) When Inquiry Officer has exonerated the Government employee and Disciplinary Authority agrees with the inquiry report he shall proceed in accordance with Rule 9(3) of the Rules, 1999.

40. It is also noticed that by not following the mandatory provisions for conduct of the inquiry can itself cause prejudice to the Government servant. Procedural fairness is the hallmark of the conduct of disciplinary proceedings. The Rules of 1999 are mere incorporation of the principles of natural justice which deserve to be rigorously followed by the enquiry officer. It is trite law that so far as the statutory provisions are concerned, the law is clear to the effect that if the same requires a thing to be done in a particular manner, then it cannot be done in a different manner and has to be done in that manner alone. The law, therefore, right from 1876 **Chancery Division Taylor Vs. Taylor** till date is the same. The disciplinary authority having failed to exercise his power under rule 9(1) of rules

of 1999 in the prescribed manner, vitiates the order dated 22.07.2019 and all the subsequent proceedings. Prejudice has also been caused to the delinquent employee, the disciplinary authority could have accepted the enquiry report exonerating him, and he could have proceeded under rule 9(3) of the Rules of 1999 and dropped the proceedings in his favour.

41. Considering the above, this Court is of the considered view that the order dated 22.07.2019 it is clearly arbitrary and illegal and such an order could not have been passed in exercise of jurisdiction under rule 9(1) of the rules of 1999 and consequently the order dated 22.07.2019 is hereby quashed, and consequently the subsequent enquiry proceedings resulting in enquiry report dated 16.07.2020 as well as punishment order dated 16.05.2021 are quashed. The matter is remitted to the disciplinary authority to proceed with the enquiry from the stage of submission of enquiry report dated 31.12.2018 and pass appropriate orders and proceed in accordance with law.

42. The counsel for the petitioner has also raised other grounds for challenging the impugned order of punishment dated 16.05.2021, where the petitioner was not giving proper opportunity of hearing and no date, time and place was fixed, nor his reply considered by the inquiry officer, rendering the entire enquiry arbitrary and illegal, and also that the U.P Public Service Commission had not given reasons for enhancing the punishment. Considering that this Court has already set aside the order dated 22.07.2019 ordering re-inquiry, it would be futile at this stage to consider the said ground raised by the petitioner, as in any case the enquiry would be proceeded with from the stage of submission of the second enquiry report dated 31.12.2018 to the disciplinary authority, and the petitioner would have adequate opportunity as provided in the Rules.

43. Considering that the enquiry proceedings are pending since last 10 years, it is provided that the enquiry proceedings be concluded within a maximum period of two months from the date a certified copy of this order is produced before the Disciplinary authority, subject to co-operation by the petitioner.

44. In light of the above, the writ petition is **allowed.** Consequences to follow.

(2022) 9 ILRA 1406
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2022

BEFORE

THE HON'BLE MANOJ MISRA , J.
THE HON'BLE SYED AFATB HUSAIN RIZVI, J.

Criminal Appeal No. 28 of 1994

Kare Deen & Ors. ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri H.N. Shukla, Sri Ashish Kumar Shukla, Sri Saurabh Chaturvedi, Sri I.K. Chaturvedi (Senior Counsel)

Counsel for the Opposite Party:
A.G.A., Sri Ajai Kumar, Sri Raj Kumar Yadav, Sri Rishikesh Kumar Maurya, Sri Ajai Kumar

Criminal Law - Indian Penal Code 1860 - Sections 302, 325 & 34 - Murder - Benefit of doubt - Held - Trial court failed to consider that the incident was not pre-

planned, but occurred all of sudden in the heat of moment - No deadly weapon was used - There was no common intention to commit the murder of Ram Raj(the deceased) but intended only to cause injuries - Neither in the FIR nor in the statements of witnesses any specific role has been assigned to any of the accused causing head injury to the Ram Raj (the deceased) -It is uncertain which of the accused caused the fatal head injury which resulted in his death - appellants cannot be convicted under Section 302/34 IPC. Instead, the accused-appellants are guilty of the offense under Section 325/34 IPC (Para 24, 25)

Allowed. (E-5)

List of Cases cited:

1. Richhpal Singh Meena Vs Ghasi @ Ghisa & ors., (2014) 8 SCC 918

2.Dhanraj Singh Vs St. of Jharkhand, 2019 0 Supreme (Jhk)714

3.Gajanand & ors. Vs St. of U.P., AIR 1954 SC 695

4. Bhagwan Jagannath Markad Vs St. of Mah. (2016) 10 SCC 537

5. Ram Lal Vs Delhi Administration, 1972 SC 2462

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. We have heard Sri I.K. Chaturvedi learned Senior Counsel assisted by Sri Saurabh Chaturvedi for the appellant, Sri Ajay Kumar, Sri Rishikesh Kumar Maurya and Sri Raj Kumar Yadav learned counsels appearing for the informant and Ms. Kumari Meena, learned AGA for the State.

2. This Criminal Appeal is filed against the judgment and order dated 03.01.1994 passed by second Additional District and Sessions Judge, Jaunpur in S.T. No.37 of 1987 (State vs. Kare Deen and ors) arising out of crime no.106/1986, P.S. Barsathi, District Jaunpur. By the impugned judgment and order, the learned Sessions Judge has held appellants-accused Kare Deen, Ram Bhola, Devi Prasad and Ambika Prasad guilty for offence punishable under sections 302 read with section 34 and 323 read with section 34 IPC and sentenced each of them to imprisonment for life for offence under Section 302 read with section 34 IPC and six months rigorous imprisonment for offence under Section 323 read with section 34 IPC.

3. In brief the facts are as follows:

On oral information of complainant, Shesh Mani (P.W.-1), an NCR No.106 of 1986, under sections 323, 504 and 506 IPC, was registered at P.S. Barasathi, District Jaunpur on 30.06.1986 at 19:45 hrs against four accused, namely, Kare Deen, Ram Bhola, Devi Prasad and Ambika Prasad. It was alleged that on 30.06.1986 while the complainant was returning with his bulls after ploughing his field, the bulls went near the door of the accused with whom complainant has old enmity; the complainant went to herd away the bulls; the accused started hurling abuses and launched an assault on him with fists and danda. His father Ram Raj came to rescue him. The accused assaulted him as well, with lathi. On the noise, the witnesses Ram Dular and Daya Shankar and other co-villagers intervened. The accused went away hurling abuses and extending life threats. After registration of the NCR, the injured Shesh Mani (the complainant) and Ram Raj were sent to the hospital. On 01.07.1986, injured Ram Raj succumbed to his injuries in the district hospital, Jaunpur.

On receipt of the information of death, the case was amended and section 304 IPC was added. The inquest proceeding of the dead body was conducted by S.I. Shamsher Bahadur Singh. He also prepared the related papers and sent the body for postmortem examination. The investigation was entrusted to S.I. Sankata Prasad Singh. He came to the place of occurrence, recorded the statements of witnesses and prepared the site plan. He also seized the blood stained lungi of the deceased and prepared its memo. Thereafter, on subsequent dates, he recorded the statements of other witnesses and after completion of the investigation, submitted charge sheet on 11.07.1986 under sections 304, 323, 504 and 506 IPC against all the four accused.

4. After committal proceeding, the sessions court framed charges against all the accused under Section 302 read with section 34 IPC and 323 read with section 34 IPC. The accused pleaded not guilty and claimed for trial. The prosecution examined eight witnesses and produced 16 documents Ex. Ka.1 to Ex.Ka-16 and three material exhibits 1 to 3. The statements of accused were recorded under sections 313 Cr.P.C. and incriminating circumstances were put to them. They denied the prosecution case. They have also stated that they have been implicated due to enmity. Complainant-Shesh Mani is the nephew of Ram Dular and Raj Nath is also of the same party and a professional witness. Accused have also stated that the deceased was laying roof upon his kutcha house. He fell down on a log due to which he suffered head injury and died. No evidence in defence was produced. The trial court after hearing the arguments, by the impugned judgment and order, held the accused-appellants guilty for the offence under section 302 read with section 34 and 323 read with section 34 IPC and sentenced them as above.

5. The medico-legal examination of ***Ram Raj (deceased)*** was conducted on 30.06.1986 at 10:30 pm by Dr. R.N. Srivastava. Following injuries were noted on his body:

1. Lacerated wound 5 cm X 1 cm X bone deep, present over the right side head above the right ear, bleeding fresh. Injury kept under observation and advised X-Ray Skull. Injury surrounded by traumatic swelling 5 cm X 4 cm.

2. Lacerated wound 4 cm X 1 cm X bone deep present over middle of the head, 17 cm above the bridge of nose. Injury surrounded by traumatic swelling 7 cm X 4 cm, injury kept under observation, advised X-Ray of Skull, bleeding fresh.

3. Lacerated wound 2 cm X 0.5 cm, cartilage deep, on inner aspect of right ear, bleeding fresh.

4. Contusion 17 cm X 4 cm, on left side back of chest including abdomen, starting from middle of the body of left scapula, Red in colour.

5. Contusion 12 cm X 2 cm, on back of upper part of left side of scapula, Red in colour.

6. Traumatic swelling 6 cm X 4 cm, on upper part of left shoulder.

Doctor has given the opinion that all injuries are simple in nature, except injury no.1 & 2, which are kept under observations and X-Ray of Skull advised. Injuries have been caused by blunt object and duration is fresh.

6. On the same day at 11:15 pm the medico legal examination of ***Shesh Mani*** was also conducted by Dr. R.N. Srivastava and following injuries were found:

1. Abraded traumatic swelling 5 cm X 3 cm, on back of left elbow, Red in colour.

2. Traumatic swelling 4 cm X 3 cm on dorsal aspect of middle of right foot.

3. Traumatic swelling 5 cm X 4 cm on dorsal aspect of middle of left foot.

Doctor has given the opinion that all injuries are simple in nature, caused by blunt object and duration is fresh.

Both the injury reports have been proved by Dr. R.N. Srivastava (P.W.-5) as Ex.Ka-9 & Ka-10.

Dr. R.N. Srivastava (P.W.-5) has also accepted the suggestion of prosecution that these injuries may be caused by lathi-danda, fists and kicks, on 30.06.1986 at 4:00 pm.

7. The postmortem of deceased Ram Raj was conducted on 02.07.1986 at 2:00 pm by Dr. P.N. Shukla.

AUTOPSY REPORT

External Examination:

Stout body of average built, rigor mortis present all over the body, following ante mortem injuries were found:

(i) Stitched wound 3 cm long on the head, 8 cm above right pinna to left ear.

(ii) Stitched wound 4 cm long on head mid line 5 cm above the injury no.1.

Internal Examination:

Blood clot was present in the right side of the skull and contusion in temporal lobe of right side of brain. Right contused extra dural clot was found in the right side in cerebra, clots were found in both sides. Blood clot was found at the base of skull. 200 gm clotted blood was found in the abdominal cavity. Right chamber of the heart was full while left chamber was half full. In stomach, 200 ml. digested food was found. Small intestine contains digested food. In large intestine, faecal matter was present.

In the opinion of the doctor, the cause of death was due to ante-mortem head injury. The deceased died at the district hospital on 01.07.1986 at 10:15 am.

Dr. P.N. Shukla (P.W.-6) has proved the postmortem report as Ex.Ka-8. The witness has further stated that the deceased had also suffered internal injuries and that the anter mortem injuries were sufficient in the ordinary course of nature to cause death.

Other Prosecution Evidence:

8. ***Shesh Mani (P.W.-1)*** is the complainant as well as the injured. The witness in his examination-in-chief has stated that the accused are real brothers and they live jointly. The witness has also narrated the topography of the place of the incident. The witness has further stated that the accused constructed a dalan (verandah) in the land of the complainant, north of the verandah of the complainant. He tried to restrain them from constructing the dalan (verandah) but the accused did not pay any heed. This was the reason for enmity. At that time, maar-peet took place and a

complaint case was instituted. In respect of the incident in question, the witness stated that the incident is of two and a half years ago. It was 4:30 pm. He was returning after ploughing his field and was passing through the chak road. When he reached near the door of accused's dalan then his both bulls flared up. To catch the bulls, he came at the door of the accused, then all the accused Kare Deen, Ram Bhola, Devi Prasad and Ambika Prasad started to abuse and assault him. He raised an alarm, then his father Ram Raj came to rescue him. The witnesses Daya Shankar, Ram Dulare, Raj Nath and Prabhawati (his mother) and his sister-in-law (bhabhi) also came there. The accused assaulted his father with lathi, who fell down. Then accused hurling abuses escaped from there. His father became unconscious. He brought him on a cot to Nigoh. From there, he came to the police station and lodged the oral report. He and his father were sent to the hospital by the police where their medical examination was conducted. On the next day, his father died in the district hospital due to the injuries suffered by him.

9. **Raj Nath (P.W.-2)** is the eye witness. In his examination-in-chief, the witness has stated that he knows complainant Shesh Mani and accused Kare Deen, Ram Bhola, Devi Prasad and Ambika Prasad who are co-villagers. Ram Raj was the father of Shesh Mani. Two and a half years ago Ram Raj was murdered. It was 4:00 pm. Shesh Mani was driving his bulls. When he reached in front of the door of the accused, the bulls flared up and came at the door of the accused who said that this is not a public way why you are driving your bulls from here. On this Shesh Mani said that this is the public way. On this, accused hurling abuses assaulted Shesh Mani. He made a noise, on which his father Ram Raj came there to rescue him. Then accused assaulted Ram Raj with lathi. Ram Raj became unconscious and fell down. The witness Ram Dular, Daya Shankar, father and uncle and wife of Ram Raj also reached there and witnessed the incident. Ram Raj was taken to the police station by the complainant from where he was sent to Jaunpur hospital where he died.

10. **Ram Dular (P.W.-3)** is also an eye witness. In his examination-in-chief, the witness has stated that accused Kare Deen, Ram Raj, Devi Prasad and Ambika Prasad are residents of his village. They also know Shesh Mani- the complainant. His father was murdered two and a half years ago. Shesh Mani was driving his bulls on the pathway when he reached in front of the house of the accused, the bulls flared up. Shesh Mani went to herd them away, then accused started to abuse him and said that it is not a public way, why you are driving your bulls here. The complainant said that this is a public way and there is no other way. On this, accused started to assault Shesh Mani who raised an alarm. On his alarm Ram Raj came there. Then accused assaulted Ram Raj with lathi. Ram Raj became unconscious and fell down. The incident was witnessed by Ram Dular, Raj Nath and others. Shesh Mani took his father to police station. Thereafter, his father was admitted in the District hospital where he died.

11. **Constable Shamsher Bahadur Singh (P.W.-7)** is a formal witness who has brought the dead body to police lines after inquest proceeding for postmortem examination. The witness has stated that on 01.07.1986 after inquest proceeding of the dead body of Ram Raj, it was handed over to him and constable Musafir Singh for postmortem examination. On 02.07.1986

he handed over the dead body to the Doctor.

12. **S.I. Samar Bahadur Singh (P.W.-8)** has conducted the inquest proceeding. The witness has stated that on 01.07.1986 he conducted inquest proceeding at District hospital, Jaunpur. He also prepared the other necessary papers and sealed the dead body, thereafter handed it over to the constable Sanjay Singh and Shamsher Singh for postmortem examination. The witness has proved the inquest report Ex.Ka16 and other related papers Ex.Ka-9 to Ka-15.

13. **S.I. Sankata Prasad Singh (P.W.-4)** is the Investigating Officer. The witness has stated that on 30.06.1986 the case was registered as NCR under sections 323, 504 & 506 IPC. The witness has proved by secondary evidence, the NCR and GD entry Ex.Ka.-1 and Ex.Ka-2. He has further stated that on 01.07.1986 injured Ram Raj died at district hospital, Jaunpur. On receiving the aforesaid information, the case was amended and registered as crime no.102/06 under section 304 IPC. The witness has also proved by secondary evidence, the GD of amendment Ex.Ka.-3. The witness has further stated that the investigation of this case was entrusted to him on 08.07.1986. He came to the village and recorded the statements of witnesses and on indication of the complainant and witnesses, inspected the place of occurrence and prepared the site plan (Ex.Ka-4). On 09.07.1986 he recorded the statement of complainant Shesh Mani, seized the blood stained tahmad of the deceased and prepared its memo Ex.Ka.5, recorded the statements of accused Ram Bhola, Devi Prasad and Ambika Prasad in the lockup. On 10.07.1986, he recorded the statements of constable Ram Murti and Kashi Yadav and accused Kare Deen. On 11.07.1986, he submitted the charge-sheet against all accused under Section 304, 323, 504 & 506 IPC.

Submissions on behalf of applicants.

14. Learned counsel for the appellants contended that the appellants-accused are innocent and they have been falsely implicated due to old enmity. The prosecution witnesses have admitted the fact of old enmity in their statements. It is further contended that Raj Nath (P.W.-2) is not named as a witness in the FIR. He has been introduced later on. Ram Dular (P.W.-3) is close relative of the complainant and the deceased. He has stated in his cross-examination that he is cousin of Ram Raj-the deceased. So Shesh Mani (P.W.-1) and Ram Dular (P.W.-3) are related and interested witnesses. There are material contradictions and discrepancies in the oral statements of the witnesses. The witnesses have improved their statements while deposing in the court and there are material omissions in their statements recorded by the Investigating Officer under Section 161 Cr.P.C. Ram Dular (P.W.-3) has stated that at the time of incident he was laying roof of his house and saw the incident from there. This statement is quite contradictory to the statement given to the Investigating Officer under Section 161 Cr.P.C., in which, it is recorded that at the time of incident he was working in his field. When confronted by the defence on this point, the witness has disowned the statement given to the Investigating Officer under section 161 Cr.P.C. that at the time of incident he was working in his field. He has further stated that he has told the Investigating Officer that he was laying roof from where he ran towards the place of occurrence. The

witness has further stated that he did not come to the place of occurrence but seen the entire incident from the place where he was laying the roof of his house. This witness has also stated that at the time of incident, it was drizzling. No other witness has supported this statement. It is further contended that in the first information report, it is alleged that accused assaulted him with fists, kicks and danda while in his cross-examination, the witness has stated that he was assaulted with lathi. The eye witnesses in their statement have stated that Ram Raj was taken on a cot while the Investigating Officer, Sankata Prasad Singh (P.W.-6) has stated that witnesses told him that Ram Raj was brought in a taxi from the place of occurrence. Shesh Mani (P.W.-1) has also stated that a handkerchief was tied on the head of Ram Raj which was stained with blood. But this handkerchief has not been seized by the Investigating Officer during the course of investigation. The investigating officer has also not collected the blood stained earth from the place of occurrence while Shesh Mani (P.W.-1) has stated that Ram Raj was bleeding and the blood fell down on the ground. It is further contended that all the injuries of Shesh Mani complainant are simple and superficial. The injuries of Ram Raj (deceased) are also simple in nature. There is no grievous injuries on his body. The accused in their statements under Section 313 Cr.P.C. have stated that Ram Raj- the deceased was laying chappar and he fell down on a log and suffered injuries. Dr. R.N. Srivastava (P.W.-5) has accepted that if the injured fell down from roof on a brick, then injury no.1 may be caused. Injury no.2 is also possible by falling and injury no. 4, 5 & 6 are possible by friction and are simple in nature. So the defence version that the deceased has suffered injuries by a fall from roof cannot be ruled out and is possible. Due to old enmity, a story has been cooked up and accused have been falsely implicated. Learned counsel lastly contended that from the allegations of the first information report and the statement of witnesses it appears that the incident has occurred in the heat of moment. It was not pre-planned, so Section 34 IPC will not apply. The accused persons are four in number and it is not specific from the statements of witnesses that which of the accused caused injury on head to Ram Raj (deceased). Hence accused could not be convicted for the offence punishable under section 302 IPC with the aid of Section 34 IPC. On this point, the learned counsel placed reliance on the case law of ***Richhpal Singh Meena vs. Ghasi alias Ghisa and ors, (2014) 8 SCC 918;*** and ***Dhanraj Singh vs. State of Jharkhand, 2019 0 Supreme (Jhk)714*** and ***Gajanand and ors vs. State of Uttar Pradesh, AIR 1954 SC 695.***

The submissions on behalf of respondents :

15. Learned AGA and learned counsel for the complainant submitted that three eye witnesses produced by the prosecution are natural witnesses. They are residents of the vicinity. They have fully corroborated the prosecution case. There are no material contradiction or discrepancies in their statements. The contradiction and discrepancies as pointed out by the learned counsel for the appellants are minor and natural. Shesh Mani (P.W.-1) has also received injuries in the incident. So his presence on the spot is fully established. The oral evidence is further corroborated with medical evidence. The allegations of the FIR that accused assaulted Shesh Mani and Raja Ram (the deceased) with lathi-danda and fists & kicks, stand corroborated

with medical evidence. Time of the incident also stand proved from the oral as well as medical evidence. Place of occurrence is also established and there is no doubt in it. The incident has occurred on 30.06.1986. The report was registered as NCR. After the death of Raja Ram, the case was converted into a cognizable case and Section 304 was added and thereafter investigation commenced. So when the Investigating Officer arrived at the place of occurrence, due to lapse of time, the blood stains could not be found at the place of occurrence. It is further contended that the witnesses have fully corroborated the fact that there was previous enmity between the parties. On this count, on a trivial issue, the accused-appellants with a common intention assaulted Shesh Mani and when his father- Ram Raj came to his rescue, they also assaulted him with lathi, causing him serious head injuries which became fatal. It is further contended that for application of Section 34 IPC pre-concert of mind before the incident is not necessary. It may develop at the place of occurrence itself. So section 34 IPC will apply. The appellant-accused with a common intention have caused head injury to the Ram Raj (deceased) which resulted in his death on the next day during the course of treatment. So it is a clear case of murder. The learned trial court has rightly appreciated the entire facts and evidence, the finding of the learned trial court that appellant accused are guilty for offence under section 302 IPC is just and proper. There is no illegality or perversity in the finding recorded by the learned trial court.

Analysis

16. The prosecution case is based on direct evidence and prosecution has produced three eye witnesses, Shesh Mani (P.W.-1) Raj Nath (P.W.-2) and Ram Dular (P.W.-3). From the site plan Ex.Ka-4 and from the statements of witnesses, it is fully established that the house of complainant and the accused are in the neighbourhood and there is chak road in the north of the dalan (verandah) and chappar of the accused. The prosecution case is that at the time of incident complainant- Shesh Mani was returning with bulls from his field. When he arrived in front of the house of the accused his bulls flared up and came near the door of the house of the accused. On this some altercation took place between Shesh Mani and the accused. The accused hurling abuses, started to assault Shesh Mani. On his alram, his father Ram Raj came to rescue him. Then he was also assaulted by the accused. Shesh Mani (P.W.-1) has fully supported the aforesaid prosecution case. He has received injuries in the incident. His medico legal examination has been conducted on the same day at 11:15 pm at district hospital, Jaunpur by Dr. R.N. Srivastava (P.W.-5). Three injuries have been found on his body, the first one is abraded traumatic swelling on the left elbow while second and third injuries are traumatic swelling on right leg and left leg. The duration of the injuries was fresh. Doctor has given opinion that these injuries may have been caused by lathi, danda, fists and kicks. The doctor has also accepted the prosecution suggestion that these injuries may come on 30.06.1986 at 4:00 pm. This witness being injured, his presence on the spot cannot be doubted. Hon'ble Apex Court in ***Abdul Sayeed vs. Stte of Madhya Pradesh, (2010) 10 SCC 259***, emphasizing the evidentiary value of an injured witness held:

"Where witness to occurrence was himself injured in the incident, testimony of such witness is generally

considered to be reliable as he is a witness who comes with an inbuilt guarantee of his presence at the scene of the crime and unlikely to spare his actual assailant in order to false implication to someone"

In State of Haryana vs. Krishnan, AIR 2017 SC 3125, it has been laid down that the testimony of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies. The reason for attaching such reliability for evidence of an injured witness is that his presence on the scene stands established and it is proved that in the said incident he got injured.

17. **Raj Nath (P.W.-2) and Ram Dular (P.W.-3)** have also fully corroborated the prosecution case and the statement of Shesh Mani (P.W.-1)- the injured witness. All the above three witnesses have been put to lengthy cross-examination by the defence but except some minor contradictions and discrepancies the oral testimony of these witnesses is intact. There is no major contradiction or discrepancy which makes their statements unreliable.

18. The oral statements of the aforesaid witnesses also stand corroborated from the medical evidence. According to prosecution, accused assaulted the complainant- Shesh Mani and his father Ram Raj with lathi-danda, fists & kicks. The injury reports of Ram Raj and Shesh Mani Ex.Ka-8 and Ex.Ka-7, corroborates the prosecution version in this respect. All the injuries found on the body of both the injured are lacerated wounds, traumatic swelling and abrasions. These injuries are possible only with hard and blunt object like lathi-danda, fists & kicks and friction. The medico legal examination has been conducted on the same day at 10:30 pm and 11:15 pm respectively. So the medical examination has been conducted after 6-7 hrs of the incident and the doctor has noted the injuries as fresh. This further corroborates the time of the incident. The Investigating Officer has indicated the place of occurrence with letter-A in the site plan Ex.Ka-4. The place of occurrence is in front of the chappar of the accused and on the chak road. All the three eye witnesses have supported the prosecution case that the incident has occurred in front of the door of the house of accused. So there is no doubt about the place of occurrence also. Merely because the name of Raj Nath (P.W.-2) is not mentioned in the first information report as an eye witness and that Ram Dular (P.W.-3) is the cousin of the deceased, their testimony cannot be discarded. It is established from the oral statement that these witnesses resides in the vicinity, so their presence on the spot is natural. It is settled principle of law that the testimony of the witness cannot be discarded merely because he is an interested or inimical. If the oral testimony of the witness inspires confidence and is otherwise trustworthy, his oral statement can be relied.

19. In ***Bhagwan Jagannath Markad vs State of Maharashtra (2016) 10 SCC 537,*** it has been held that:

"Generally, contradictions, inconsistencies, exaggerations and embellishments are seen in the oral testimony of witness. If there are no material contradictions in the testimony of a witness, his evidence cannot be disbelieved merely on the basis of some normal, natural or minor contradictions, inconsistencies, exaggerations or

embellishments etc. Minor contradictions in the testimony of prosecution witnesses are bound to be there and in fact they go to support the trustfulness of the witness."

20. The motive of the incident stands proved, the accused have also admitted the fact of old enmity between the parties. In this case, there is no circumstance which establishes that the accused have been falsely implicated due to old enmity. The defence case that the deceased fell down while laying roof and suffered injuries is highly improbable and unacceptable. The medical evidence fully establishes that the injuries suffered by Ram Raj- the deceased cannot be an outcome of fall from the roof. These injuries can only be caused by assault with lathi- danda, fists & kicks. Dr. R.N. Srivastava (P.W.-5) in his cross-examination has only stated that injury no.1 & 2 may come from fall. From the medico legal report, it is established that apart from injury nos.1 & 2 Ram Raj has suffered four other injuries on different parts of his body. The defence has not put any suggestion that all the injuries of Ram Raj may come by a fall from the roof. There is no explanation from the defence of the injuries sustained by Shesh Mani (the complainant). As two persons suffered injuries in the incident, the defence version that Ram Raj (the deceased) has suffered injuries by falling from the roof fails and cannot be accepted. So from the analysis of the evidence on record, it is clear that the prosecution evidence is cogent and reliable. From the prosecution evidence, it is fully established that accused appellants have assaulted the complainant- Shesh Mani and when his father Ram Raj- the deceased came to rescue him, they also assaulted him with lathi-danda, fists & kicks. Both Shesh Mani and Ram Raj suffered injuries in the incident, Ram Raj became unconscious, he was taken to the hospital and during the course of treatment, he died in the hospital due to injuries suffered by him.

21. In this case, charge-sheet was submitted under section 304, 323, 504 and 506 IPC. Learned trial court has framed charges under section 302 read with section 34 IPC and Section 323 read with section 34 IPC. Learned trial court has held the appellants-accused guilty for the charges framed by it. Now the question is what offence has been committed and as to what charges are proved against the accused persons.

22. From the facts of the present case, it is clear that the incident has occurred all of a sudden in the heat of the moment. The incident was not pre-planned, no deadly weapon has been used. So there was no common intention to commit murder of Ram Raj. The common intention was only to cause injjury. Neither in the FIR nor in the statements of witnesses any specific role has been assigned to any of the accused causing head injury to the Ram Raj (the deceased). So it is uncertain that which of the accused caused head injury to the Ram Raj (the deceased) which resulted in his death. The Apex Court in the paragraph nos.23 & 24 of the case of ***Richhpal Singh Meena vs. Ghasi alias Ghisa and ors, (supra***) has referred the case of ***Ninaji Raoji Boudha vs. State of Maharashtra (1976) 2 SCC 117*** which is quoted below:

"23. In Ninaji Raoji Boudha vs. State of Maharashtra two persons (Ninaji and Raoji) were convicted by the Trial Court for an offence punishable under Sections 325 and 147 of the IPC and sentenced to five years imprisonment. This was despite the fact that the injuries caused by them on Bhonaji had resulted in his

death. In an appeal filed by the State, the High Court convicted them for offences punishable under Section 302/34 of the IPC for causing the death of Bhonaji.

24. Ninaji and Raoji appealed to this Court and it was held that they had given several blows to Bhonaji and one of them was "a forceful blow on the head which caused a depressed fracture and fissures all over" resulting in his death. This Court noted that from the evidence on record: (a) it could not be established who had given that forceful blow; (b) the evidence established that Ninaji and Raoji did not have a common intention of causing the death of Bhonaji but there was a common intention of causing him grievous injury. Consequently, due to the lack of any conclusive or specific (1976) 2 SCC 117 evidence of who was responsible for the homicide and the absence of a common intention, Ninaji and Raoji were acquitted of the offence of murder but were convicted of an offence punishable under Section 302/34 of the IPC and sentenced to five years imprisonment. It appears to us that the principle applied by this Court, though not so stated, is to be found in Section 72 of the IPC which reads as follows:

"72. Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.--In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all." "

23. The Apex Court has also referred the case of ***Ram Lal vs. Delhi Administration, 1972 SC 2462*** in para no.25 & 26, which is quoted below:

"25. Similarly, the principle laid down in Section 72 of the IPC appears to have been invoked in Ram Lal vs. Delhi Administration in which four persons (including Ram Lal) were accused of having murdered Har Lal. The Trial Court acquitted one of them but convicted the others, including Ram Lal for an offence punishable under Section302/34 of the IPC. In appeal, the High Court upheld the conviction of Ram Lal for an offence punishable under Section 302 of the IPC, while the other two were convicted under Section 325/34 of the IPC.

26. In appeal before this Court, the question was whether Ram Lal could have been convicted for an offence punishable under Section 302 o f the IPC. It was held (by a three-Judge Bench) that the High Court had erroneously concluded that the deceased received only one injury on the head. In fact, he had suffered two injuries on the head. Additionally, it was found that the High Court also held that Ram Lal had given only one blow with a stick to Har Lal on the head. On these facts, it could not be said with any degree of certainty whether the blow delivered by Ram Lal proved fatal or the blow given by him did not prove fatal. In the absence of any clear identification of the blow given by Ram Lal, he was entitled to a benefit of doubt. However, since the common intention of the three assailants was to cause a grievous injury to Har Lal, therefore Ram Lal was liable for conviction under Section 325/34 of the IPC apparently applying the principle laid down in Section 72 of the IPC. Accordingly, he was sentenced to five years imprisonment. "

24. From the evidence on record, it is established that the appellants-accused assaulted Shesh Mani and Ram Raj with lathi-danda, fists & kicks. Two blows on the head caused internal head injury and clotting of blood which proved fatal. From the evidence on record, it is not established which accused caused the head injury. The evidence establishes that the incident was not pre-planned, it occurred all of a sudden and there was no common intention to cause death of Ram Raj. There was a common intention of causing him injuries and the nature of injuries suffered by Ram Raj the deceased is covered by Section 320 (8) of IPC. So applying the principles of law laid down by the Apex Court in the case of Ninaji Raoji Boudha vs. State of Maharashtra (Supra) and Ram Lal vs. Delhi Administration (Supra), the appellants accused cannot be convicted for the offence under Section 302/34 IPC. They can be convicted only for the offence under section 325/34 IPC and Section 323/34 IPC.

Conclusion

25. From the above discussion, it is clear that the learned trial court has overlooked the facts and evidence that the incident was not a pre-planned one. There was no common intention to commit the murder of Ram Raj. The incident occurred suddenly and the accused-appellants assaulted Shesh Mani and Ram Raj only with intention of causing injuries to them. It is also not established from the evidence that which of the accused has caused head injury to Ram Raj which proved fatal. So the appellants accused could not have been convicted for offence under section 302/34 IPC. The finding of trial court in this respect is erroneous. The trial court has committed error in convicting the accused for the offence under section 302/34 IPC and sentencing them to imprisonment for life. This part of the finding of trial court is liable to be modified with the finding that accused-appellants are guilty for the offence under section 325/34 IPC.

They are liable to be sentenced with imprisonment of 5 years and fine of Rs.25,000/- each for the offence under section 325/34 IPC. In default of payment of fine, each of the appellants-accused will have to serve simple imprisonment of six months. Half of the amount of fine if deposited shall be paid to the complainant-Shesh Mani.

26. The appeal is ***partly allowed*** to the above extent. The accused-appellants are on bail. Their bail bonds and sureties bonds are canceled and sureties are discharged, they shall surrender before the court below within two weeks failing which the court concerned will take necessary action for ensuring the compliance.

27. The lower court record along with copy of the judgment shall be transmitted immediately to the court below.

(2022) 9 ILRA 1417
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2022

BEFORE

THE HON'BLE MANOJ MISRA , J.
THE HON'BLE SYED AFATB HUSAIN RIZVI, J.

Criminal Appeal No. 57 of 2008

Hanna & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:

Sri A.N. Mishra, Sri Neeraj Mishra, Sri R.D. Dauholia, Sri Rajendra Prasad Yadav, Sri Vinod Kumar Tripathi, Ms. Ruchita Jain, Sri I.K. Chaturvedi (Sr. Adv.)

Counsel for the Opposite Party:
Govt. Advocate

Criminal Law- Indian Evidence Act, 1872- Section 3- Testimony of Injured Witness- While appreciating the oral statement of this witness it should be kept in mind that her son was beaten to death in front of her, so, it is not expected from her to disclose exactly what injuries were inflicted upon her. Further, the statement has been recorded after a gap of more than two years from the date of incident, hence some contradictions are natural and on this ground her oral testimony cannot be disbelieved. The witness, being injured, her presence at the spot cannot be doubted-Medical evidence further corroborates that the witness has suffered injuries at the time of incident which establishes her presence on the spot at the time of incident-The testimony of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies. The reason for attaching such sanctity to the evidence of an injured witness is that his presence at the scene of crime stands established.

Settled law that testimony of an injured witness is placed on a special pedestal in as much as the injuries of the witness, which stand corroborated by the medical evidence, guarantees the presence of the injured witness on the spot thus minor contradictions cannot be a ground to discard testimony of an injured witness.

Criminal Law- Indian Evidence Act, 1872- Section 3-When case of the prosecution is based on the evidence of eye-witnesses, some embellishments in the prosecution case caused by the testimony of any prosecution witness, not declared hostile, cannot by itself be a ground to discard entire prosecution case. The testimony of the witness also cannot be disbelieved merely on the ground that he has not suffered any injury in the incident and he did not react in a manner, he ought to have reacted in the circumstance or he did not come to the rescue of the deceased. Behaviour or manner of response to a particular situation varies from person to person. Some persons may be very strong hearted while some may be sensitive and emotional. Some may get terrorised by looking at the deadly attack on a person and may find themselves shocked, unable to react or respond to the situation. Therefore, such behaviour or conduct of witnesses should not be taken as a ground to discard their otherwise credible testimonies.

Behaviour and conduct of a witness is neither predictable and nor can it be placed in a straight jacket formula therefore, behaviour of a witness whose testimony is otherwise credible and trustworthy; cannot be rejected on the ground of his behaviour or conduct at the time of the occurrence. (Para 15,16)

Criminal Appeal rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Abdul Sayeed Vs St. of M.P., (2010) 10 SCC 259

2. Bhagwan Jagannath Markad Vs St. of Maha. (2016)10 SCC 537

3. St. of Har. Vs Krishnan, AIR 2017 SC 3125

4. Bhagwan Singh Vs St. of M.P., AIR 2009 SC 768

5. Sucha Singh Vs St. of Punj., (2003) 7 SCC 643

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. We have heard Sri I.K. Chaturvedi, learned Senior Counsel, assisted by Sri

Vinod Kumar Tripathi and Ms Ruchita Jain, learned counsels for the appellants and Sri J.K. Upadhyaya, learned A.G.A. for the State.

2. This criminal appeal is directed against the judgement and order dated 06.12.2007 passed by Additional Sessions Judge/Special Judge (D.A.A. Act), Lalitpur in Sessions Trial No.13 of 1996 (State Versus Hanna and others) arising out of Case Crime No.862 of 1995 under Sections 302/149, 323/149, 147 and 148 I.P.C., Police Station Kotwali, District Lalitpur. By the impugned judgement and order, learned trial court has held appellants guilty for the offences punishable under Sections 302/149, 323/149, 148 and 147 I.P.C. and sentenced each of them to undergo imprisonment for life and fine of Rs.10,000/- and in default of payment of fine, two years' additional rigorous imprisonment, under Section 302/149 I.P.C.; fine of Rs.500/- each, in default of payment of fine one month's rigorous imprisonment, under Section 323/149 I.P.C.; fine of Rs.2,000/- each on appellant nos. 3 to 6 and in default of payment of fine, three months' rigorous imprisonment, under Section 147 I.P.C., fine of Rs.4,000/- each under Section 148 I.P.C. on appellant nos. 1 and 2 coupled with a default sentence of six months' rigorous imprisonment.

3. **NARRATION OF FACTS**:

Complainant, Nanhi Bahu (PW-1) gave an application dated 05.10.1995 at Police Station Kotwali Lalitpur, District Lalitpur alleging therein that today, on 05.10.1995 at 6 a.m., her son Pappu alias Har Narayan was going to the west of the village to attend nature's call, Hanna, holding Ballam (spear), Kappu holding an axe and Daya, Duli, Prakash and Babu holding lathis in their hands were present at the shop of Pragi. There was a family dispute of her son with them. With a common intention, they started to assault her son with the weapons in their hands and killed him. When she tried to save him, then Babu assaulted her with lathi, causing injuries on her left hand. The incident was witnessed by Raj Kumar (PW-2), Lakhan (PW-6), Santosh (PW-5), Sanjai (PW-7), Devi (PW-8) and her son Santosh (PW-3). They tried to rescue, but the accused, hurling abuses, escaped towards the river side. The dead body of her son was lying on the road, north of the village.

A Chik Report No. 408 of 1995 under Sections 147, 148, 149, 302 and 323 I.P.C. was registered against six named accused on 05.10.1995 at 7.15 a.m. Station House Officer, Police Station Kotwali Lalitpur, B.B. Singh (PW-11) took up the investigation. He recorded the statement of the complainant and sent her for medical examination. Thereafter, he arrived at the spot and instructed Sub-Inspector, Shyamendra Singh to conduct inquest proceedings. The dead body was sent for the post mortem examination. He also collected blood-stained and plain concrete and prepared its memo. Thereafter, he recorded statements of other witnesses and on the indication of Santosh inspected the place of occurrence and prepared the site-plan. On 08.10.1995, he arrested the accused persons, recorded their statements in which they confessed their guilt and also disclosed that they have concealed weapons used in the crime in a field near Village Gaida. Thereafter, the Investigating Officer, accompanying police personnel and accused-persons, on the indication of accused reached near a field in Village Gaida in which no crop was sown and

recovered one axe and five lathis, buried under the ground. He also prepared its memo.

On account of transfer of S.H.O., B.B. Singh, further investigation was conducted by S.H.O., G.N. Pandey (PW-12). He recorded the statements of the remaining witnesses and after completion of the investigation submitted charge-sheet against accused on 19.11.1995. The axe was sent for forensic examination on 18.12.1995.

After committal proceedings, trial court framed charges under Sections 302/149, 323/149 I.P.C. against all the accused. It also framed charges under Section 148 I.P.C. against accused, Hanna and Kappu and under Section 147 I.P.C against accused, Daya, Duli, Prakash and Babu. The accused pleaded not guilty and claimed for trial.

The prosecution, in all, examined 13 witnesses in oral evidence while in documentary evidence 18 papers, Ext. Ka-1 to Ka-18, were produced. The statements of the accused under Section 313 Cr.P.C. were recorded and incriminating circumstances were put to them. It is stated by the accused that the statements of the witnesses are false and they have been implicated in aforesaid case due to enmity. No evidence either oral or documentary was produced in defence. Learned trial court, after hearing arguments of the parties, by the impugned judgement and order, held all the accused guilty for the offences under Sections 302/149, 323/149 I.P.C., accused Duli, Daya, Prakash and Babu for the offence under Section 147 I.P.C. and accused Hanna and Kappu for the offence under Section 148 I.P.C. and sentenced them as above.

4. **Autopsy Report:**

Post mortem examination of deceased, Pappu alias Har Narayan, was conducted on 05.10.1995 at 4 p.m.

External Examination :

According to the autopsy report, the age of the deceased was 26 years. Body of the deceased was average built, rigor mortis present all over the body. No sign of decomposition of body, both eyes normal.

Following Ante Mortem injuries were found on the body:

1. A stab wound 1.5 cm x 0.5 cm x 3.0 cm over left side face, 2.5cm below outer end of left eye, obliquely situated,shape like an eclipse, edges clean cut, angles sharp.

2. A stab wound 2 cm x 0.5 cm x 3.0 cm over left side, 2.5 cm in front of middle part of left ear, eclipse shape, edges clean cut. Both angles sharp, oblique.

3. Incised wound 2.5 cm x 1.0 cm x full thickness over middle part of left pinna, edges clean cut, both angles sharp.

4. Stab wound 2.5 cm x 1.0 cm x bone deep, left mastoid bone fractured over left mastoid area, edges clean cut.

5. Lacerated wound 2.5 cm x 1.0 cm x bone deep over middle part of left lower jaw, left mandible fractured.

6. Abrasion 2.0 cm x 0.5 cm over dorsal aspect of left wrist.

7. Abrasion 2.2 cm x 0.5 cm over posterior aspect of right shoulder.

8. Five stab wounds 2.5 cm x 1.5 cm x 9.0 cm, 2.0 cm x 1.0 cm x 8.0 cm, 2.5 cm x 1.5 cm x 9 cm, 2.0 cm x 2.0 cm x 7.5 cm and 2.5 cm x 2.0 cm x 8.0 cm over anterio-medial aspect of middle part of right thigh, shape eclipse, edges clean cut, angles sharp, all obliquely situated.

9. Lacerated wound 2.0 cm x 1.0 cm, bone deep on anterio-medial aspect of middle part of right leg, shaft of right wrist fractured at wound site.

10. Abrasion 3.0 cm x 1.0 cm front aspect of right face.

11. Deformity upper 1/3 left leg with fracture shaft of left wrist and fistula.

12. Multiple contusions overlapping each other, 21.0 cm x 12.5 cm over outer post.lateral aspect on left side chest.

Internal Examination :

Depressed fracture of left mastoid bone with blood clot present outside membranes at fracture site, fracture of 3rd, 4th, 5th, 6th and 7th ribs on the left side of the chest, left pleura ruptured at two places, left thoracic cavity filled with one litre blood, left lung ruptured at two places, adjoining fracture of 5th and 6th ribs, both chambers of the heart were empty, left mandible was fractured, stomach was empty, small intestine contained gases and in large intestine faecal matter and gases were present. Liver, spleen and kidneys were pale.

The cause of death was shock and haemorrhage as a result of ante-mortem injuries.

Dr. R.P. Gupta, PW 9, has proved the autopsy report, Ext.Ka-5. The witness has stated that the death of the deceased was possible on 05.10.1995 at 6 a.m. and that injury nos. 1, 2, 4 and 8 may be caused from sharp edged weapon like Ballam, injury no.3 from axe, injury nos.5, 9, 11 and 12 from lathis and remaining injuries may come from friction.

Injury of Nanhi Bahu, the complainant, was medically examined on 05.10.1995 at 10 a.m. at District Hospital, Lalitpur by Dr R.P. Gupta, PW 9. According to injury report, Ext.Ka-4, following injuries were present on her body:

1. Contused swelling 9.0 cm x 6.0 cm over right wrist and lower part of right forearm, deformity present. Tenderness present. Red in colour., kept under observation.

2. A lacerated wound 2.0 cm x 0.5 cm x fasia deep over finger web in between right thumb and right index finger, fresh blood clot present.

3. A contusion 14.0 cm x 2.0 cm over mid line of back at T7, T8 level obliquely situated, red in colour.

4. A contusion 17.0 cm x 2.0 cm over lower part of posterior aspect of right side wrist, obliquely situated, red in colour.

The injury report has been proved by Dr. R.P. Gupta, PW 9. The witness stated that injury no.1 was kept under observation while injury nos. 2, 3 and 4 were simple in nature. All the injuries were fresh and were caused by some hard and blunt object like lathi. The witness has also

stated that all the injuries may come on 05.10.1995 at 6 a.m.

5. Nanhi Bahu, PW 1, is the complainant and injured. In her examination-in-chief, the witness has stated that the name of her son was Har Narayan alias Pappu. He had irrigated the field of accused Kappu by his pump and Rs.6,000/ was due on him. One day before the incident, Vedi Hawan was to be performed at the house of Shanker who is Saaru (the husband of sister-in-law) of Kappu. Kappu had come to invite Har Narayan alias Pappu but her son abused Kappu and neither she, nor her son, Har Narayan went to the house of Kappu in Vedi Havan. In respect of the incident, she stated that her son was going to attend nature's call. Her son was lying on the road not near kiosk of any one. Several persons were standing there. She did not notice whether he was injured or not. In her presence accused, Hanna with Ballam, Kappu with axe, Duli, Daya, Prakash and Babu with lathis did not assault her son near the shop of Pragi. Neither she nor her son Santosh tried to save him. He was already dead. Babu has not assaulted her with lathi.

So this witness did not support the allegations of the F.I.R. in her examination-in-chief and was declared hostile.

Later, this witness was recalled on her application and her statement was again recorded on 11.03.1999. In this statement, the witness stated that what she has stated earlier was because the accused had threatened her. After that statement, the police personnel threatened her as to why has she given a false statement. The witness then stated that Hanna holding Ballam, Kappu holding axe, Daya, Duli, Prakash and Babu holding lathis caught Pappu and they all assaulted him with the weapons in their hands. The incident has occurred in the middle of the road. The accused escaped towards the river side. Her son was killed while going to attend nature's call. She had come to fetch water.

After aforesaid statement, the witness was examined by the prosecution and her statement was recorded in question-answer form. In this statement, she has stated that three years have passed since the incident. It was about 6 a.m. Her son Pappu alias Har Narayan was going to attend the nature's call. He reached on the road, Hanna was holding Ballam, Daya, Duli, Prakash and Babu were holding lathis while Kappu was holding an axe, they all assaulted Pappu alias Har Narayan with weapons they were holding in their hands. Har Narayan died. She tried to save her son, then Daya caught hold her and Babu assaulted her with lathi. Her daughter-in-law was watching the incident from a distance. She got scribed the report from Prakash Tiwari at Kotwali. Prakash Tiwari has written whatever she had dictated and thereafter read over the same to her. The witness has also stated that earlier she has given statement under threat of Shanker, Rama and Kappu. They have threatened that your one son has been killed and if she deposes against them, her other son will also be killed. Shanker is cousin of Kappu. She stated that her previous statement was false and was given under threat whereas today, she is giving true statement without any pressure.

6. Santosh, PW 3, is the real brother of the deceased. In his examination-in-chief, the witness has stated that Pappu alias Har Narayan was his real brother. He was murdered about three years ago. It was

6 a.m. His brother was going to attend the nature's call. On the way, at the shop of Pragi, accused, Hanna, Kappu, Daya, Prakash, Duli and Babu met him. Hanna was holding Ballam, Kappu an axe and the remaining accused had lathis. In front of the shop of Pragi, they encircled Pappu and started to assault him. He and his mother, on cries of his brother, arrived at the spot from his shop. They tried to rescue Pappu, but Babu assaulted his mother with lathi. When they tried to rescue him, accused threatened them. Raj Kumar, Lakhan, Santosh, Sanjai and Devi also arrived at the spot and they forbade the accused not to assault his brother. His brother died. In respect of location of his shop, PW-3 stated that his shop was at 4-5 paces from the place of occurrence. The witness has further stated that Kappu and Hanna are cousins. Prakash is real brother of Kappu. Daya and Duli are real brothers and cousin of Kappu while Babu is the Saaru of Kappu. Rs.6,000/- was due on Kappu which he did not return despite several demands. Earlier also, Kappu has committed marpeet with PW-3 and his brother (the deceased) on demand of money regarding which a case is pending in the court of Chief Judicial Magistrate. Due to aforesaid enmity, the accused committed murder of his brother.

7. Raj Kumar, PW 2, Santosh, PW 5, Lakhan Lal, PW 6, Sanjai, PW 7 and Devi, PW 8, the eye-witnesses have not supported the prosecution version and were declared hostile. In their examination-in-chief they have stated that they have not seen the incident. With the permission of court, the prosecution has conducted cross-examination of the aforesaid witnesses. In their cross-examination, the witnesses have reiterated the statement given in the examination-in-chief that they have not seen the occurrence. They have also disowned their statements under Section 161 Cr.P.C.

8. Head Constable, Sarjoo Prasad, PW 4, is the chik and General Diary writer. The witness has stated that on 05.10.1995, on the written information of Nanhi Babu, he registered Case Crime No.862 of 1995 under Sections 147, 148, 149, 302 and 323 I.P.C. of Chik No.408 of 1995 and made General Diary entry of it. The witness has proved Chik F.I.R. and copy of general diary, Exts.Ka-2 and Ka-3.

9. Constable, Luvkush Kumar, PW 10, has proved inquest report and related paper which is in the writing of Sub Inspector, Shyamendra Singh by secondary evidence. These papers are Exts. Ka-6 to Ka-11. The witness has also stated that after inquest proceedings, body of the deceased was handed over to him for post mortem examination which he handed over to the doctor in a sealed condition.

10. B.B. Singh, PW 11, is the first Investigating Officer. The witness has stated that on 05.10.1995, he was posted as Station House Officer, Kotwali Lalitpur and the F.I.R. of this case was registered in his presence. He took up the investigation. Recorded statement of the complainant and sent her for medical examination. Thereafter, he with Sub Inspector, Shyamendra Singh and other police force arrived at the spot. Inquest proceeding was conducted by Sub Inspector, Shyamendra Singh, on his instructions. The dead body was sent for post mortem examination. The witness has further stated that he collected blood-stained and plain concrete from the place of occurrence and prepared its memo Ext. Ka-13. He recorded statement of other witnesses and on the pointing out of Santosh, brother of the

deceased, inspected the place of occurrence and prepared its site-plan, Ext. Ka-14. The witness has further stated that on 08.10.1995, he arrested accused, Hanna, Kappu, Daya, Duli and Prakash and recorded their statements. The accused confessed and disclosed that they have concealed the weapons used in the commission of the crime in a field near Village Gaida. He along with the police force and the accused came at Village Gaida and on the pointing out of the accused, from a field, which had no crop, recovered blood-stained axe and lathis buried under the ground. He prepared its memo, Ext. Ka-15. On the same day, he arrested accused, Babu. He also prepared site-plan of the place of recovery, Ext. Ka-16. The witness has also produced, the axe, lathis, blood-stained and plain concrete and clothes of the deceased which he was wearing at the time of the incident as Material Exts. Ka-1 to Ka-12. The witness has further stated that after that he was transferred.

11. G.N. Pandey, PW 12, is the second Investigating Officer. The witness has stated that after transfer of B.B.Singh, the then S.H.O, he took the investigation of this case on 19.10.1995. He recorded statements of inquest witnesses and after completion of investigation, submitted charge-sheet, Ext.Ka-17. The witness has also proved Forensic Lab report, Ext. Ka-18.

12. Constable, Ram Charan, PW 1, is also a formal witness. He has taken the case property to Forensic Science Laboratory, Agra for examination.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

13. Learned counsel for the appellants has contended that Smt. Nanhi Bahu, PW 1, complainant and Santosh, PW 3, claim themselves to be the eye-witnesses of the incident. In her first statement, Nanhi Bahu has not corroborated the allegations of F.I.R. and turned hostile. She has specifically stated that the accused persons did not assault her son Pappu with Ballam, axe and lathis in front of her. She has stated that neither she nor her son Santosh tried to rescue him because he was already dead. Later on, after examination of all the witnesses, she moved an application on which she was recalled and in that statement she completely resiled from her earlier statement and implicated the accused persons. She stated that now she is deposing as police has threatened her. So, her subsequent statement is under threat of police. Learned counsel also contended that there are also serious infirmities and contradictions in her statement. At one place she has stated that at the time of the incident she and her son Santosh were taking water from hand-pump while at another place she has stated that she and her daughter-in-law were out to take water. No hand-pump is shown in the site-plan. She has stated that only one lathi blow on her left hand was inflicted. In the medical examination report, Ext.Ka-4, no injury on her left hand is mentioned. So, the testimony of this witness is wholly unreliable. It is further contended that presence of Santosh, PW 3, on the spot is highly doubtful. He had stated that at the time of incident he was at his shop (kiosk) which was 4 paces from the place of occurrence but in the site-plan no shop of witness, Santosh, has been shown. The witness has also stated that he has not indicated his shop at the time of inspection by the Investigating Officer. He has also stated that there was previous enmity with the accused persons and before the incident the accused persons had assaulted him and his deceased brother Pappu in respect of which a case is pending in the court of Chief Judicial Magistrate. If the

witness was present on the spot, he would not have been spared. It is also highly improbable and unnatural that he would not make any effort to rescue his brother who was being beaten to death in front of him. He has not suffered any injury even a scratch in the incident, which also makes his presence on the spot highly doubtful. There are other infirmities and contradictions in his statements also. He has stated that near his shop, there is Imali tree but in the site-plan neither shop nor any *Imali* tree has been shown. At one place he has stated that at the time of incident, he was at his shop, his mother and sister-in-law *(Bhabhi*), Malti and other witnesses were also there whereas at another place he has stated that his mother and sister-in-law were at the hand-pump to fetch water. Changing his statement, he has further stated that when the accused persons came he was sitting at his shop while earlier he has stated that when the accused persons came he was opening his shop. He is not a witness of inquest. He has also not accompanied his mother to the police station. All the facts and circumstances make his presence at the spot highly doubtful. Learned counsel further contended that all other eye-witnesses, examined by the prosecution, have not supported the prosecution case and have turned hostile. It is further contended that alleged recovery of one axe and five lathis made by the Investigating Officer on 08.10.1995 on the pointing out of five accused persons is totally false and fabricated. No disclosure statement has been recorded. There is no public witness of the recovery. The memo of the recovery is neither signed by the accused nor copy of it has been provided to them. The recovery of one axe and five lathis are shown in the recovery memo while according to the prosecution case only four accused were armed with lathis. Forensic report does not confirm the use of aforesaid weapons in the commission of the offence. The origin of blood could not be ascertained in the Forensic test. Hence, this evidence adduced by the prosecution has no evidenciary value and it does not support the prosecution case in any way. Learned counsel for the appellants further contended that the incident is alleged to be of 6 a.m. The post mortem of the deceased was conducted on the same day, at 4 p.m. It is mentioned in the post mortem report that rigor mortis was present all over the body and estimated time of death is 12 hours. Learned counsel submitted that rigor mortis spreads over the entire body after 12 hours of death. It suggests that the incident had occurred in the night or at wee hours of the morning, by some unknown miscreants and due to previous enmity the appellants have been falsely implicated. It is also contended that the F.I.R. has been scribed by Ram Prakash Tiwari at police station in the presence of S.O., so there are chances of false implication of the applicants. Learned counsel, lastly, contended that the learned trial court has erred in relying on oral testimony of Nanhi Bahu, PW 1 and Santosh, PW 3. The finding recorded by the lower court is erroneous and unjustified. There is no cogent evidence on record to prove the prosecution case and trial court has failed to properly appreciate the evidence on record and committed material illegality while believing the prosecution evidence. Hence, the finding of conviction and sentence recorded by the trial court cannot be sustained and is liable to be set aside. The appellants are liable to be acquitted.

SUBMISSIONS ON BEHALF OF THE STATE

14. Learned A.G.A. contended that the prosecution has produced ocular version of the incident. Nanhi Bahu, PW 1, is the eye-witness. She is also injured. Her

medical examination report has been proved, so her presence at the spot cannot be doubted. Merely because in her first statement she turned hostile and did not support the prosecution case, her oral testimony cannot be discarded. From her oral testimony it is established that threat was extended to her from the appellants' side and under that threat she turned hostile and did not support the prosecution case. It has come in her statement that she was threatened that if she deposes against the accused-appellants, then her other son will also be killed. Her subsequent statement is not under pressure or threat of the police. She has stated that police asked her as to why has she given a false statement. This clearly establishes that her previous statement was not true. In her subsequent statement she has clearly stated that her son was assaulted by the accused who were armed with Ballam, axe and lathis and when she tried to rescue her son she was also assaulted with lathi. Learned A.G.A. also contended that Santosh, PW 3, is the eye-witness and he has also fully corroborated the prosecution case. Omission by the Investigating Officer in not showing hand-pump and Kiosk of witness is laches on his part, on account of which, the ocular testimony of the witness cannot be disbelieved. The witness has also explained that when he tried to save his brother, then accused-persons wielding their weapons pushed him away that is why he has not suffered any injury in this incident which also cannot be a ground to disbelieve him. There may be some discrepancy and contradiction in the oral testimony of the witnesses which are natural as the witnesses are illiterate and rustic villagers. Oral testimony of the eye-witnesses stands corroborated from the medical evidence on record. Learned A.G.A. also contended that in the post mortem report the estimated time of death is 12 hours. This time may have variance of four hours on either side, so on this ground, the time of the incident cannot be doubted. Learned trial court has rightly relied on ocular testimony of PW 1, Nanhi Babu and PW 3 Santosh. There is no sufficient ground to discard their testimony. Learned A.G.A. submitted that even if the evidence of recovery of weapons is discarded, there is sufficient evidence in the form of ocular testimony to prove the prosecution case. The F.I.R. has been lodged promptly at 7.15 a.m. So, there is no chance of false implication of the accused by way of consultation. All the accused are named in it with specific averment about weapons used by them which stands corroborated from the oral as well as medical evidence There is no illegality or infirmity in the findings of the learned trial court.

ANALYSIS :

15. The prosecution has relied on ocular version. Seven eye-witnesses have been examined by the prosecution. Except complainant, Nanhi Bahu, PW 1 and Santosh, PW 3, the brother of the deceased, all other eye-witnesses turned hostile.

Complainant,Nanhi Bahu, PW 1, is also the mother of the deceased. In her examination-in-chief, the witness has only corroborated the motive. She has stated that her son Pappu alias Har Narayan had irrigated the field of accused, Kappu, of which Rs.6,000/- was due on him. Due to this, the relations of her son with accused were sour. She also stated that a day before the incident accused, Kappu has come to invite her son for Vedi Hawan, on which her son abused Kappu. In her first statement, the witness has not supported the prosecution case that in front of her,

accused, Hanna with ballam, Kappu with axe and Daya, Duli, Prakash and Babu with lathis assaulted Pappu alias Har Narayan and that she and her son Santosh tried to save him; she also stated that neither Babu assaulted her nor did she try to rescue Pappu alias Har Narayan. In the cross-examination conducted by the prosecution, the witness has admitted that her medical examination was conducted at District Hospital. She has also stated that her son has left the house in front of her. At that time, she and her son, Santosh were drawing water from the handpump. She has also stated that her son was lying four paces from the handpump. The witness has disowned her statement recorded under Section 161 Cr.P.C. She has also denied the suggestion of prosecution with regard to the incident. Thereafter, on 05.02.1999 the witness moved an application before the trial court alleging therein that she has witnessed the incident and she was also assaulted by the accused and suffered injuries in the incident. She had lodged the report and had also given statement to the Investigating Officer, which is true. She also stated that earlier she has given statement in the court under the threat of accused-persons and now she wishes to depose correct facts before the court. On the aforesaid application, the witness was recalled by the trial court. Her statement was again recorded on 11.03.1999. In this statement, she has stated that she was threatened and due to this reason she has given earlier statement. Thereafter the police threatened her as to why has she given a false statement. Now, she has come to depose again. The witness was asked to depose, whatever, she wanted. Then the witness has stated that Hanna, holding Ballam, Kappu holding an axe and Daya, Duli, Prakash and Babu, holding lathis, assaulted her son when he had gone to attend the call of nature. She with her daughter-in-law had come to fetch water. The witness was examined by the prosecution again in question-answer form. In this statement she has clearly stated that her son was assaulted by the accused and when she tried to rescue, she was also assaulted with lathi. She has also stated that on the previous occasion she has given statement under threat of Shankar, Rama and Kappu. She was threatened that her one son has died and if she deposes against the accused, her second son will also be killed. She has also stated that Rama is the son of the uncle (Kaka) of accused Kappu. Shankar is cousin of Kappu. She has also stated that today, she is deposing true facts before the court and no one has threatened her for deposing. In cross-examination, conducted by the defence counsel, the witness had stated that she came by tractor to lodge the report at the police station. Tiwariji was with her. Tiwariji scribed the report at the police station, where Sub Inspector was sitting and had written whatever, she stated. The report was handed over to the Sub Inspector and she went to the hospital with a policeman. The witness has denied the suggestion of defence that she has not witnessed the incident and report was not scribed on her dictation by Ram Prakash Tiwari. The witness has not been cross-examined by the defence on the material facts regarding the incident. So, her aforesaid statement is intact.

Nanhi Bahu, PW 1, is also injured. Her medico-legal examination report, Ext. Ka-4, has been proved by Dr R.P. Gupta, PW 9.Three contusions and one lacerated wound have been found on different parts of her body. Medico-legal examination was conducted on the day of the incident at 10 a.m. and duration of

injuries was fresh. The witness has stated that when she tried to rescue her son, she was assaulted with lathi. The doctor has accepted the suggestion put by the prosecution that injuries may come on 05.10.1995 at 6 a.m. So, medical evidence further corroborates that the witness has suffered injuries at the time of incident which establishes her presence on the spot at the time of incident. There is no specific statement that only one lathi blow was inflicted on her. The witness has stated that when she tried to rescue her son, she was assaulted with lathi. It is correct that the witness has stated that lathi blow was inflicted on her left hand while injury nos.1 and 2 are on right hand and there is no injury on the left hand. While appreciating the oral statement of this witness it should be kept in mind that her son was beaten to death in front of her, so, it is not expected from her to disclose exactly what injuries were inflicted upon her. Further, the statement has been recorded after a gap of more than two years from the date of incident, hence some contradictions are natural and on this ground her oral testimony cannot be disbelieved. The witness, being injured, her presence at the spot cannot be doubted. The Apex Court in A**bdul Sayeed Versus State of Madhya Pradesh (2010) 10 SCC 259** has held that,

"Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone".

In Bhagwan Jagannath Markad Versus State of Maharashtra (2016)10 SCC 537 and State of Haryana Versus Krishnan, AIR 2017 SC 3125, it has been laid down that the testimony of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies. The reason for attaching such sanctity to the evidence of an injured witness is that his presence at the scene of crime stands established.

Complainant, Nanhi Bahu, PW 1, has explained the circumstances under which her previous statement was recorded. She has also explained circumstances under which she has come to depose before the court again. Her statement that she was threatened by the police as to why has she given false statement does not indicate that her subsequent statement is a result of police threat and therefore false, rather it establishes that her earlier statement was not based on true facts. The aforesaid statement only indicates that the police asked her as to why has she given false statement before the court. The rule for appreciation of statement of a witness is that the statement is to be read as whole and then any inference can be drawn. If the statement of this witness is read as a whole, then her subsequent statement inspires confidence.

16. The other witness Santosh, PW 3, has also supported the prosecution case. It is correct that this witness is the real brother of the deceased, hence an interested witness. It is also correct that there are some discrepancies and contradictions in his statements. He has stated that his brother was killed four paces from his shop. In the site-plan, the Investigating Officer has not shown the shop of the witness. The witness has also stated that his mother and sister-in-law (Bhabhi) had

come to draw water from the hand-pump and the hand-pump is 3-4 paces from the place of occurrence but no hand-pump is shown in the site-plan. The witness has admitted that he has not shown his shop (kiosk) to the Investigating Officer at the time of inspection of the place of occurrence. The contradictions and discrepancies as pointed by the learned counsel for the appellants are not on material points i.e. the time, place of occurrence and manner of assault, which stands corroborated from his oral testimony. The witness has accompanied his mother to the police station at the time of lodging of the F.I.R. and his presence is noted in General Diary. His statement has also been recorded by the Investigating Officer on the day of the incident after the registration of the F.I.R. General contradictions, inconsistencies, exaggerations and embellishments are seen in the oral testimony of a witness. If there are no material contradictions, his evidence cannot be disbelieved. In **Bhagwan Singh Versus State of Madhya Pradesh, AIR 2009 SC 768**, the Hon'ble Apex Court has observed that there may be cases when two witnesses make contradictory statements on the same facts. When case of the prosecution is based on the evidence of eye-witnesses, some embellishments in the prosecution case caused by the testimony of any prosecution witness, not declared hostile, cannot by itself be a ground to discard entire prosecution case. The testimony of the witness also cannot be disbelieved merely on the ground that he has not suffered any injury in the incident and he did not react in a manner, he ought to have reacted in the circumstance or he did not come to the rescue of the deceased. Behaviour or manner of response to a particular situation varies from person to person. Some persons may be very strong hearted while some may be sensitive and emotional. Some may get terrorised by looking at the deadly attack on a person and may find themselves shocked, unable to react or respond to the situation. Therefore, such behaviour or conduct of witnesses should not be taken as a ground to discard their otherwise credible testimonies.

In **Sucha Singh Versus State of Punjab (2003) 7 SCC 643**, the Apex Court has held that when eye-witnesses did not come to the rescue of the deceased, such reaction or conduct of a witness cannot be a ground to discard their evidence particularly, when they are unarmed and accused are armed with deadly weapons.

17. Raj Kumar, PW 2, although has turned hostile but the witness has corroborated the time and place of the occurrence in his examination-in-chief. This witness has stated that incident is of 6-7 a.m. He saw that Pappu alias Har Narayan was lying dead on the road. He has also stated about the presence of the accused, Babu and stated that Babu was at the shop of Pragi. In his cross-examination also the witness has stated that when he reached there, Babu was sitting at the shop of Pragi. The witness has also admitted his statement recorded under Section 161 Cr.P.C. The witness has stated that the Investigating Officer interrogated him and he has told him that at 6 a.m. the accused assaulted Pappu alias Har Narayan with *Ballam*, axe and lathis. Although he has further stated that as other persons were telling this to the Investigating Officer, so he also told this to I.O. It is settled law that the evidence of a hostile witness cannot be rejected outrightly and such part of the evidence which assists any of the parties may be relied on by that party.

18. The autopsy report also supports ocular version. According to the autopsy report, the deceased has received 12 injuries. Injury nos.1, 2, 4 and 8 are stab wounds, injury no.3, an incised wound and injury nos.5 and 9 are lacerated wounds while remaining injuries are abrasions. The autopsy surgeon, Dr. R.P. Gupta, PW 9, has stated that injury nos. 1, 2, 4 and 8 were possible from Ballam while injury no.3 from axe and remaining injuries from lathis and friction and they might have been caused on 05.10.1995 at 6 a.m. So, the medical evidence corroborates the ocular version.

19. The place of occurrence is fully established from the prosecution evidence and there is no doubt about it. The deadbody has been found on the road and the Investigating Officer has collected plain and blood-stained concrete from there. The prosecution case about the time of incident is also consistent. Nanhi Bahu, PW 1, in her statement, has corroborated the allegations of F.I.R. that the incident has occurred at 6 a.m. The other eye-witness, Santosh, PW 3, has also corroborated it. The post mortem of the deceased was conducted on the day of the incident at 4 p.m. and duration of death is mentioned as about half day (12 hours). In the autopsy report the estimated time of death is mentioned on the basis of signs present on the body, particularly rigor mortis. There may be variance of 2 to 4 hours in the estimated time of death. So, from the autopsy report it cannot be ruled out that the incident may not have occurred at 6 a.m. as alleged by the prosecution. The autopsy surgeon, Dr R.P.Gupta, PW 9, has given opinion that the death of the deceased was possible on 05.10.1995 at 6 a.m. So, it cannot be said that there is any discrepancy in the prosecution evidence with regard to the time of the incident. There is no reason to doubt or disbelieve the ocular version in this respect. The contention of the learned counsel for the appellants that as post mortem has been conducted at 4 p.m. and duration of death is recorded as about half day, the incident might have occurred in the night or wee hours of the morning cannot be accepted.

20. The prosecution has also produced the evidence of the recovery of weapons used in commission of crime. B.B. Singh, PW 11, the Investigating Officer is the only witness of this fact. This prosecution evidence is not cogent and submissions made by the learned counsel for the appellants in this regard are tenable. No reliance can be placed on this evidence and it is not taken into consideration.

21. From ocular testimony of Nanhi Bahu, PW 1 and Santosh, PW 3, the prosecution case stands proved. Oral testimony is supported with the medical evidence. Nanhi Bahu, PW 1, is also the injured witness. So, her presence at the spot cannot be doubted. Even if the oral testimony of Santosh, PW 3, the other eye-witness is disbelieved, the oral testimony of complainant, Nanhi Bahu, PW 1, the injured witness in itself is sufficient to prove the prosecution evidence as her testimony stands corroborated from medical evidence. There is no material contradiction in her statement regarding date, time, place of occurrence and manner of assault, etc.

22. Learned trial court has properly appreciated the evidence on record. There is no illegality or infirmity in the finding of the learned trial court. From the prosecution evidence it is proved that the appellants-accused, forming an unlawful

assembly, armed with deadly weapons, in furtherance of their common object, assaulted Pappu alias Har Narayan, causing his death at the spot. So, the charges framed against them stand fully proved. Learned trial court has not committed any error in holding them guilty. The sentence imposed by the learned trial court is also appropriate. There is no illegality or perversity in the finding recorded by the learned trial court. There is no ground to interfere in the finding recorded by the learned trial court. The appeal is liable to be dismissed.

23. The criminal appeal is, accordingly, dismissed. Appellant no.1, Hanna is in jail. Appellant nos. 2 to 6, namely, Kappu, Daya, Tuli, Prakash and Pappu are on bail. Their bail bonds and surety bonds are cancelled. The sureties are discharged. They shall surrender before the court below within two weeks to serve out the remaining sentence, failing which the trial court will take appropriate steps for compliance.

24. The lower court record along with copy of the judgement shall be transmitted to the trial court immediately.

(2022) 9 ILRA 1431
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA , J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 226 of 2005

Suresh Viyar ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri M.P. Yadav, Sri Ankur Singh Kushwaha, Sri Ravi Anand Agarwal, Sri Sudist

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

(A) Criminal Law - Criminal Procedure Code, 1973 – Sections 161 & 313, - Indian Penal Code, 1860 - Sections 201 & 302 - Jail Appeal – against conviction and sentenced – Offence of Murder – - circumstantial evidence - it is well settled law that onus to established that the chain of events pointing only to the hypothesis of guilt of accused rests upon the prosecution - only two witnesses were examined to support the story of prosecution and both are consistent with regards to the incident of previous night in which accused had a fight with his wife - inconsistency in the St.ment of prosecution witnesses about manner of offence, time, source of knowledge of incident, recovery of body etc. remains unanswered - thus, possibility of existence of an alternative hypothesis cannot be ruled out - mere suspicion, howsoever strong, cannot be a ground for conviction of the accused in absence of cogent evidence beyond the reasonable doubt - prosecution version is not rendered unreliable on such ground - court held that, prosecution failed to prove the guilt of accused appellant beyond reasonable doubt - consequently appeal succeeds and is allowed. (Para 34, 38, 39, 40, 41, 42)

Appeal allowed. (E-11)

List of Cases cited:

1. Nagendra Shah Vs St. of Bihar, (2021) 10 SCC 725

2. Sharad Birdhichand Sarda Vs St. of Mah., (1984) 4 SCC 116 : 1984 SCC (Cri) 487

3. Shivaji Sahabrao Bobade Vs St. of Mah., (1973) 2 SCC 793 : 1973 SCC (Cri) 1033

(Delivered by Hon'ble Ashwani Kumar Mishra, J.

&
Hon'ble Shiv Shanker Prasad, J.)

1. This jail appeal arises out of a judgment of conviction and sentence passed by the Special Judge, S.C./S.T. Act, Mirzapur in Session Trial No.276 of 2001, dated 09.09.2002, whereby the appellant Suresh Viyar has been convicted and sentenced to life imprisonment under Section 302 IPC with a fine of Rs. 1,000/- and in default thereof to undergo fifteen days additional imprisonment. The appellant has also been convicted and sentenced to one year rigorous imprisonment under Section 201 IPC with a fine of Rs. 500/- and in default thereof to undergo seven days additional imprisonment, with the stipulation that all the sentences shall run concurrently.

2. Prosecution case, in brief, is that the first informant Raghuveer Viyar (PW-1) worked in a mining site at Mirzapur and was living in a hutment near Sonpur Pahadi. Other workers resided nearby including accused appellant Suresh Viyar son of Chan Dev. It is alleged that on the eventful night i.e. on 25.02.2001, at about 10.00 PM, the accused appellant Suresh Viyar had a fight with his wife and he also beat her. Being a neighbour of Suresh Viyar, the first informant (PW-1) intervened and objected to the accused beating his wife and also scolded him. This act of PW-1 is stated to have annoyed the accused appellant, who turned inimical. The accused appellant threatened the first informant that he would finish his family.

The first informant, accordingly, asked his son Arjun to sleep that night in the hutment of PW-2 Rameshwar (nephew of PW-1). In the early morning when PW-1 enquired about his son from PW-2 he informed the first informant that Suresh Viyar, Puttu Viyar and Button Viyar came to his hutment armed with knife, iron rod and stone etc. at about 12.00 in the night and took away his son, who was killed by these persons and his dead body has been hidden in a plastic sack and thrown in the Arhar field (red gram) of Shyam Narayan Pandit.

3. A first information report, on the basis of oral report of first informant PW-1, was lodged at 04.40 PM on 26.02.2001 at Police Station Ahraura, District Mirzapur. Distance of the place of occurrence from the police station was 05 kilometers. The Investigating Officer reached the spot and retrieved the dead body from plastic sack and prepared recovery memo (Ex. Ka.14) of dead body; bloodstained plastic bag; bloodstained earth and plain earth. The samples collected were sent for forensic examination. The inquest followed. The inquest witnesses were of the view that the deceased died on account of ante-mortem injuries caused to him and his dead body was packed in a plastic bag and thrown in the agricultural field and that the death is homicidal. The dead body was accordingly sealed and sent for postmortem. Dr. Captain Ashutosh Kumar (PW-5) performed the autopsy on the cadaver. The autopsy doctor opined the cause of death to be asphyxia due to haemorrhage as a result of following ante-mortem injuries:-

"1. A lacerated wound on back of head 1x.5, .5x.5 cm.

2. Multiple contusion injuries variation dimension for an area of 21x16 cm on right side of back upper half.

3. Contusion injury on left side of scapula 10x3 cm.

4. Contusion injury on left side chest, front Neck, face left side. Blue to blackish colour 25x8 cm.

5. An incised wound on neck right side platysma fascia cut elliptical margin clean everted, gapping 6x1"2 cm 2cm below chin.

6. A lacerated wound on chin 1x.5 cm 4 cm below lower lip."

4. Statements under section 161 Cr.P.C. were recorded of first informant, Rameshwar (PW-2) and Gulbadan (PW-3) mining licencee, for whom they worked. In the statement under section 161 Cr.P.C. Gulbadan (PW-3) disclosed that the accused appellant confessed having murdered the deceased and requested him utilize his connections to save him. After concluding the investigation a charge sheet has been filed against the accused appellant Suresh Viyar under Section 302/201 IPC.

5. The concerned Magistrate took cognizance in the matter and committed the offence to the court of sessions, which got registered as Session Trial No.276 of 2001. The Presiding Officer charged the appellant of murdering the son of PW-1. The accused appellant denied the charge and consequently trial commenced.

6. The prosecution in order to establish the charge of murder against accused appellant produced oral testimonies of Raghuveer Viyar PW-1 (first informant), Rameshwar PW-2 and Gulbudon PW-3. PW-3, however, turned hostile during trial. Dr. Captain Ashutosh Kumar appeared as PW-5 and the Investigating Officer has been adduced as PW-6. The scribe of FIR, namely, Constable Ram Naresh Sharma has been adduced as PW-4, who has proved the Chik FIR.

7. PW-1 has supported the prosecution case in his deposition by stating that he was staying next to the hutment of other workers, including Suresh Viyar, and on the preceding night the accused appellant had a fight with his wife at about 10.00 PM when he physically assaulted her. The first informant objected to it and scolded the accused appellant. He has deposed that only for such reason his son has been done to death by the accused appellant. He has also disclosed in his examination-in-chief that a threat was extended by the accused appellant of killing his family and for the fear of life of his son he had asked him to sleep in the hutment of PW-2 Rameshwar. PW-1 also deposed that when he went looking for his son early in the morning he was informed by PW-2 that at about 12.00 in the night Suresh Viyar, Puttu Viyar and Button Viyar came to his hutment armed with knife, iron rod and stone etc. and took away the deceased towards Sonpur Pahadi and thereafter killed him. His dead body was also hidden in a plastic sack and thrown in the field of Shyam Narayan Pandit. PW-1 further deposed that he tried to look for his son but could not trace him and even the accused persons were not present in their hutments. PW-1 claims to have given oral intimation of the incident to the police and that his report was scribed by the concerned Sub Inspector on the basis of facts narrated by him. The written report was also read out to the informant who affixed his thumb impression upon it. Copy of the Chik FIR was also given to the first informant. He has also stated that the place where the dead body was found has been shown to the concerned Investigating Officer, who had also drawn a site plan on his instructions.

In the examination-in-chief PW-1 has clearly stated that when he went towards Sonpur Pahadi looking for his son he found the body of his son lying in a plastic sack in the field of Shyam Narayan Pandit whereafter he lodged the report at the police station. He also disclosed that the Investigating Officer reached on the spot thereafter and retrieved the body from the plastic sack whereafter inquest report was prepared.

8. PW-2 is the nephew of PW-1 and has also supported the prosecution story about the incident of 10.00 PM in which accused appellant beat his wife and was objected to by the first informant. He has stated that because of threat extended to PW-1 he sent deceased to sleep in his hutment. He also deposed that at about 12.00 in the night Suresh armed with knife, Puttu armed with iron rod and Putton armed with stone (patthar thoka) came to his hutment and took the deceased and while returning were discussing that the boy be done to death and out fear he did not object and kept lying. He has also stated that for such reason it is only the accused persons who have killed the deceased and have hidden the body in a plastic sack in the agricultural field of Shyam Narayan Pandit. He has also deposed that he has seen injury on the neck of the deceased.

9. PW-3 has also appeared as prosecution witness who was confronted with his statement under section 161 Cr.P.C. that accused appellant had admitted his guilt before him but he has denied having given such statement to police and has turned hostile.

10. Documentary evidences have also been adduced by the prosecution consisting of FIR; statements recorded under section 161 Cr.P.C. as Ex.Ka. 16; recovery memo of blood stained, plain earth and blood stained plastic sack as Ex. Ka. 14; postmortem report Ex.Ka. 3; laboratory Report as Ex. Ka. 18, inquest report as Ex. Ka.4; and charge sheet as Ex. Ka.1.

11. On the basis of oral and documentary evidence, thus adduced, the trial court has found the accused appellant guilty of murdering the deceased beyond reasonable doubt, and has consequently convicted him.

12. Aggrieved by the judgement of conviction and sentence the accused appellant has preferred this appeal from jail. The accused appellant has been enlarged on bail during pendency of appeal. Since none had appeared for the appellant previously, this Court had appointed Sri Ankur Singh Kushwaha as Amicus Curiae, who has argued this jail appeal on behalf of the accused appellant.

13. Learned Amicus Curiae for the accused appellant states that prosecution has not been able to establish the guilt of accused appellant beyond reasonable doubt, inasmuch as chain of events required in a case of circumstantial evidence has not been proved pointing only to the hypothesis of guilt of accused and that inconsistencies in the statement of two witnesses of fact, namely PW-1 and PW-2, have been overlooked. He further argues that the case setup by the prosecution witnesses is self-contradictory and

14. Learned Amicus has placed the statement of PW-1 and PW-2 to submit that they are consistent on the factual aspect that the accused appellant also accompanied PW-1 and PW-2 to the police

station for lodging the report, where accused appellant was detained and challaned, but, on the contrary the Investigating Officer has not shown the presence of accused appellant alongwith PW-1 and PW-2 at the time of lodging of the FIR. Instead, the accused appellant is shown to have been arrested from Chunar after two days i.e. on 28.02.2001.

15. It is also argued that the FIR is anti-timed since PW-1 and PW-2 in their statement claim to have lodged report in the morning itself, whereafter the Investigating Officer came on the spot at about 03.00 PM, but the prosecution case is totally contrary to it. It is also stated that the prosecution story is full of contradictions and the trial court has failed to advert to such omissions which renders the judgement and order of conviction bad in law. It is also argued that there are various cuttings in the inquest report which shows that the timing of the incident has been subsequently changed.

16. Sri Arunendra Singh, learned A.G.A. for the State, per contra, states that the prosecution has established the guilt of accused appellant beyond reasonable doubt inasmuch as the statements of PW-1 and PW-2 are consistent that the deceased was taken by three accused persons from the hutment of PW-2 at 12.00 in the night and that there is strong motive for the accused appellant to commit the offence. Learned A.G.A. further argues that no credible defence has otherwise been put forth by the accused appellant in his statement under section 313 Cr.P.C. and thus the judgment and order of conviction suffers from no illegality.

17. We have heard learned counsel for the parties and have perused the records brought on record. We are required to consider in this jail appeal whether the prosecution has succeeded in establishing guilt of accused appellant beyond reasonable doubt, on the basis of circumstantial evidence adduced, and the chain of event points exclusively to the hypothesis of guilt attributed to the accused appellant?

18. The charge against the accused appellant under section 302/201 IPC is sought to be established by the prosecution on the basis of circumstantial evidence. There is no eye witness who has otherwise seen the occurrence of murder.

19. Motive for the offence assumes importance in a case of circumstantial evidence. According to prosecution, it was the incident of preceding night when accused appellant beat his wife after a fight and was objected to by the first informant on account of which the accused appellant became inimical to him. PW-1 for the safety of his son accordingly asked the deceased to spend the night in the hutment of PW-2. It is then asserted by the prosecution that the accused appellant alongwith two other accomplice came to the hutment of PW-2 at 12.00 in the night and took away the deceased from the hutment of PW-2, who did not raise an alarm as the accused persons were armed with knife, iron rod and stone etc. and informed of it to PW-1 in the morning, when PW-1 enquired about his son.

20. PW-1 in his cross-examination has stated that he knew the three accused (including the accused appellant) all of whom were working with him in the mining site of PW-3 Gulbadan.

21. In the morning of 26.02.2001 PW-1 enquired about his son, from PW-2, before sunrise and received information

about disappearance of his son from PW-2 at 05.00 AM. PW-2 also informed PW-1 that he was terrified at seeing the accused persons armed with knife etc. and, therefore, did not raise an alarm when they took away the son of PW-1, and later killed him and have hidden the dead body in a sack in the agricultural field of Shyam Narayan Pandit.

22. PW-1 further claims that he and PW-2 searched the deceased and reported the incident to police 2-3 hours later.

23. The prosecution story, however, is different on this count. As per the prosecution witness PW-6 (Investigating Officer) the information about the offence was received at police station at 04.40 PM only and not before it. PW-1, however, claims to have lodged the report 2-3 hours after getting information of crime from PW-2 at 05.00 AM. The approximate time for lodging report with police as per PW-1 would thus work out to 7-8 AM. The anomaly with regard to time of lodging of report with the police is not explained, nor is dealt with by the court below.

24. The statement of PW-1, in this regard, is extracted hereinafter:-

"घटना स्थल से थाना 5-6 किलोमीटर की दूरी पर है। रमेसर के बताने के बाद करीब 2-3 घन्टे के बाद मैं थाने पर पहुँचा। जिस समय रमेसर अर्जुन के बारे में बताये उस समय सुबह 5 बज रहा था। सुरेश वियार भी मेरे साथ थाने गये थे। थाने जाकर रपट बोलकर लिखवाये। रपट के बाद सुरेश वियार को दरोगा जी ने चलान कर दिया था। रपट दरोगा जी ने लिखा था। मैं दीवान जी बोला तब दीवान जी रपट लिखे थे। रपट करने के उल्टीया टाइम शाम को 4 बजे के लगभग दरोगा जी पहुँचे थे।"

25. PW-1 and PW-2, moreover, have stated categorically in their statement that accused appellant Suresh Viyar also accompanied them to police station for lodging the FIR, where he was challaned by the police. This statement of PW-1 and PW-2, who are the only witnesses of fact remains unexplained by the prosecution.

26. The deposition of prosecution witnesses PW-1 and PW-2 about accused appellant accompanying them to the police station, for lodging the report also contradicts the prosecution version, inasmuch as PW-1 was already informed by PW-2, by then, that the deceased was taken by accused appellant; and killed; and his dead body was hidden in the agricultural field of Shyam Narayan Pandit. There was thus no occasion for PW-1 and PW-2 to take the accused appellant with them to the police station for lodging the report. Statement of PW-2, in this regard, is extracted hereinafter:-

"मैंने रघुवीर से बताया था कि आपके लडके को मुलजिमान उठा ले गये हैं। यह मैंने सुबह बताया था। मैंने 6 बजे सुबह बताया था। जिस समय मैंने बताया उस समय अभियुक्त सुरेश वियार अपने डेरे में था। वहां से हम लोग यह बात बताने के लिये थाने गया। मेरे डेरे से थाना एक कोस की दूरी पर है। हम लोग पैदल थाने गये। सुरेश वियार भी साथ में थाने गया था। थाने जब सुरेश वियार गये तब दरोगा जी ने पकड लिया थाने जाने में आधा घण्टा लगा था। मैं अर्जुन को मुल्जिम द्वारा मारते हुये नहीं देखा था। टांग कर ले जाते देखा था। मैं डर के मारे को सो गया था। इस वाक्या को मैंने केवल रघुवीर वियार से बताया था और किसी से नहीं बताया था। रात में ले गये तो मारेगे कौन।"

27. A question also arises as to why accused appellant would accompany PW-1

and PW-2 to police station for lodging the report when he has himself taken the deceased from the hutment of PW-2, in his presence, for murdering him. It is difficult to conceive as to why would an accused go to police station for lodging report of a crime committed by him, particularly when he knows that his complicity in the crime is known to PW-1 and PW-2. This clearly puts a serious doubt on the prosecution story.

28. There is also a clear contradiction in the stand of prosecution witnesses as to when was the dead body seen first, and by whom?

29. PW-1 claims to have received information from PW-2 about accused persons murdering his son and hiding his dead body in the agricultural field of Shyam Narayan Pandit whereas in his cross-examination, PW-2, to the contrary, has stated that he had not seen the dead body in the field of Shyam Narayan Pandit and he could thus not have shown the dead body and he had also not accompanied PW-1 for searching the dead body. He has clearly stated that he saw the dead body only at 03.00 PM and then taken PW-1 to the place of dead body.

30. It remains unexplained as to how PW-2 came to know at 05.00 AM in the morning that the deceased was already killed by accused appellant and his dead body was hidden in the agricultural field of Shyam Narayan Pandit when he saw the dead body only at 03.00 PM?

31. PW-2 has otherwise stated clearly that he had not seen the killing of deceased and, therefore, a question arises as to how he could know about the murder and place where dead body was hidden early in the morning at 05.00 AM?

32. The testimony of PW-2 is otherwise shaky when he states that accused persons took away the son of PW-1 from his hutment at 12.00 in the night and due to fear he did not raise an alarm. This is so as PW-2 had his hutment near the cluster of hutments belonging to other mining workers and there is no reason why PW-2 could not raise an alarm when the deceased was being taken or soon after the accused appellant left and why he waited the entire night before informing PW-1 about the incident that occurred at 12.00 in the night.

33. According to the statement of prosecution witnesses as also the site plan the workers engaged in the mining site were living in adjoining hutments and the deposition of PW-2 that he did not inform any of the neighbours about such a serious incident also raises a doubt.

34. In a case of circumstantial evidence it is by now well settled that onus to establish that the chain of events pointing only to the hypothesis of guilt of accused rests upon the prosecution. The prosecution is also expected to prove that no other hypothesis is available and that the evidence adduced is such that it leads to only one hypothesis i.e. guilt of accused.

35. Law with regard to the principles to be followed for conviction in a case of circumstantial evidence has been summed up by the Supreme Court in Sharad Birdichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116, which has acquired the status of a locus classicus on the issue. The judgment has been followed recently by the Supreme Court in Nagendra Shah vs. State of Bihar, (2021) 10 SCC 725 for applying the five golden principles to observe as under in paragraph 17 of the judgment:-

"17. As the entire case is based on circumstantial evidence, we may make a useful reference to a leading decision of this Court on the subject. In Sharad Birdhichand Sarda v. State of Maharashtra [Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] , in para 153, this Court has laid down five golden principles (Panchsheel) which govern a case based only on circumstantial evidence. Para 153 reads thus : (SCC p. 185)

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court inShivaji Sahabrao Bobade v. State of Maharashtra [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033] wherein the following observations were made : (SCC p. 807, para 19)

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

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

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

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

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

36. It is in the above settled legal position that this Court is required to examine as to whether prosecution has discharged its burden in the facts of the present case of establishing the guilt of accused appellant beyond reasonable doubt?

37. On facts, there are only two witnesses who have supported the prosecution story i.e. PW-1 and PW-2. Both the witnesses were consistent with regard to the incident of previous night in which accused had a fight with his wife. PW-1 resisted/objected to such conduct of the accused appellant which irritated/annoyed the accused appellant and he extended threat to the family member of PW-1. On account of such threat PW-1 asked his son to sleep in the hutment of PW-2. The deceased accordingly slept in the hutment of PW-2 and upto this stage the version of PW-1 and PW-2 are consistent with each other. The prosecution story thereafter is not consistent and leaves behind many loose ends. Many questions

remain unanswered, as has been noticed above.

38. Anomaly in the prosecution version with regard to the time when police was informed of the offence; inconsistency in the statement of prosecution witnesses about the time of lodging of FIR; the source of knowledge to PW-2 about murder of deceased and throwing his body in a plastic sack in the field of Shyam Narayan Pandit early in the morning; who had seen/spotted the dead body and when; conduct of accused appellant in accompanying PW-1 and PW-2 to police station for lodging the report knowing well that his guilt is known to them; inconsistency in the stand of PW-1 and PW-2 about the time when dead body was found etc. etc. remains unanswered. Possibility of existence of an alternative hypothesis thus cannot be ruled out and it cannot be said that chain of events lead only to hypothesis of guilt on part of accused appellant.

39. Trial court while holding the prosecution to have proved the guilt of accused appellant beyond reasonable doubt has not noticed the anomalies, referred to above, in the prosecution story. Rather, the trial court has brushed aside such issues by observing that the prosecution version is not rendered unreliable on such grounds.

40. In view of the aforesaid discussions we find ourselves unable to accept the view taken by the trial court that the prosecution has succeeded in proving the guilt of accused appellant beyond reasonable doubt on the basis of circumstantial evidence placed on record by the prosecution and that the chain of events leads only to hypothesis of guilt of accused appellant. It is, otherwise, settled that mere suspicion, howsoever strong, cannot be a ground for convicting the accused in the absence of cogent evidence pointing to the guilt of accused appellant beyond reasonable doubt.

41. We, therefore, have no hesitation in coming to the conclusion that prosecution has failed to prove the guilt of accused appellant beyond reasonable doubt. The accused appellant is thus held entitled to the benefit of doubt and consequently, this appeal succeeds.

42. Accordingly, this appeal succeeds and is allowed. Conviction and sentence of the appellant Suresh Viyar, vide impugned judgment and order dated 09.09.2002, passed by the Special Judge, S.C./S.T. Act, Mirzapur in Session Trial No.276 of 2001, under Sections 302, 201 IPC arising out Case Crime No.13 of 2001, Police Station Ahraura, District Mirzapur is hereby set aside. Appellant is acquitted of the charges noticed above. Since the appellant has been enlarged on bail on 25.10.2016 as such his sureties and bonds shall stand discharged.

43. Learned Amicus Curiae has ably assisted the Court in deciding the appeal and we fix a sum of Rs.15,000/- as remuneration payable to him by the High court Legal Service Authority.

(2022) 9 ILRA 1439
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.09.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 296 of 1990

Mahesh & Ors. ...Appellants

Versus

State of U.P. ...Opposite Party

Counsel for the Appellants:

Mr. Brij Mohan Sahai

Counsel for the Opposite Party:
Mr. Chandra Shekhar Pandey, A.G.A.

(A) Criminal Law – Criminal Procedure Code, 1973 - Section - 313 - Indian Penal Code,1860 - Sections 34, 300, 300(4), 302, 304 & 307 - Arms Act, 1959 - Sections 25 & 27 - Appeal against conviction and Sentence - complaint - FIR - offence of murder - appellant taken plea that they have been falsely implicated due to enmity and further trial court disbelieved about recovery of weapons of offence - Appreciation of evidence - evidence on record established that feud ensued over the alleged damage to the boundary of the field and after exchange of abuses, convict/appellants went to the house and came back with planning, armed with firearm weapons, fired upon the complainant's side wherein moth of complainant died - court, held that, where there is direct evidence of crime is exist and same were also corroborated by the medical evidence - the plea of appellants has no merits - appeal deserve to be dismissed. (Para 22, 24)

Appeal dismissed. (E-11)

List of Cases cited:

1. St. of Uttarakhand Vs Sachendra Singh Rawat, (2022) 4 SCC 227,

2. Jangaliya & ors. Vs St. of U.P., 2022 SCC OnLine All 356.

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This criminal appeal has been preferred by the appellants against the judgment and order dated 03.05.1990 passed by Special Judge, Unnao in Sessions Trial No.602 of 1985 (State vs. Mahesh and Others) arising out of Case Crime No.183 of 1985, under Sections 302/34, 307/34 of the Indian Penal Code, (in short I.P.C.), Police Station Fatehpur Chaurasi, District Unnao and Sessions Trial No.67 of 1985 (State vs. Santosh) arising out of Case Crime No.184 of 1985, under Sections 25/27 of Arms Act, Police Station Fatehpur Chaurasi, District Unnao.

2. The appellant No.1 **Mahesh died** during the pendency of the appeal and his appeal was abated vide order dated 04.04.2022, now this appeal survives only for the appellants **Santosh and Ashok.**

3. Shorn of unnecessary details, the facts necessary for disposal of this appeal are as under:-

A First Information Report (in short F.I.R.) was registered at Case Crime No.183 of 1985 on 03.11.1985 at 22:30 hours at Police Station Fatehpur Chaurasi, District Unnao on the basis of written report submitted by the complainant Ganga Ram. It was stated in the written report that on 03.11.1985 at about 3 O'Clock during the day, the complainant and his uncle Dayal were standing at front door of their house. His uncle Dayal came back after ploughing his field. Mahesh, Santosh and Ashok came there and said to Dayal that he (Dayal) had ploughed the boundary of their field. On this his uncle Dayal replied that he did not plough over their boundary and if they had any doubt then they can get it measured. Adjoining to the field of the complainant there is a field of Devi Charan and these people (accused persons) were ploughing the field of Devi Charan and they were complaining about the boundary of the same field. Thereafter these persons asked to accompany them to the field. On this the complainant and his uncle Dayal accompanied these persons to the field and all were inspecting the boundary. At the same time, these people started hurling abuses, and the complainant and people of

his side also hurled abuses as a retort. Then Mahesh, Ashok and Santosh left the place challenging them (complainant' side) to wait and they (accused) would come back and see them. Saying this they started running towards their village. After sometime, at about 4 O'Clock Mahesh, Ashok and Santosh armed with country made short-guns came there and all the three persons fired upon them (complainant and his uncle). The pellets of those fires hit the complainant and wife of one Bihari who was working in her field nearby. His uncle Dayal lied down in the field and when they raised alarm and the villagers heard the sound of firing, then to save them the mother of the complainant Sukhrani, Bahadur, Jiya Lal, Lallu Mallah, Shyam Lal Gadariya and nephew of the complainant namely Rakesh, aged about 6 years, rushed to the spot. As soon as they all reached near the complainant the accused persons fired upon them also 6-7 times with the intention to kill them. They all suffered pellet-injuries. Many persons came there raising noise on which the accused persons ran away. The condition of the mother of the complainant was serious so he was carrying her and also other injured persons on two bullock-carts for treatment but his mother died on the way. He reached the police station with the dead body and other injured persons for lodging the F.I.R.

4. After investigation, charge sheet was submitted against Mahesh, Santosh and Ashok. The Magistrate concerned took cognizance and committed the case for trial to the Sessions Court. The Sessions Court framed the charges against all the three accused persons under Sections 302/34 and 307/34 of I.P.C. All the accused persons denied the charges and claimed to be tried.

5. In order to prove its case, the prosecution examined 15 witnesses which are as under:-

(i) P.W.1- Ganga Ram;

(ii) P.W.2- Shyam Lal;

(iii) P.W.3- Jiya Lal;

(iv) P.W.4- Dr. R.K. Sachan;

(v) P.W.5- Head Constable Ram Asre Tiwari;

(vi) P.W.6- Dr. J.D. Jain;

(vii) P.W.7- Kailash;

(viii) P.W.8- SO Mr. Purshottam Narayan Chaturvedi;

(ix) P.W.9- S.I. Ms. Komal Singh;

(x) P.W.10- Dr. (Mr.) S.K. Saxena;

(xi) P.W.11- CP Mr. Tegaram Yadav;

(xii) P.W.12- Omprakash Mani Tripathi;

(xiii) P.W.13- Head Constable Mr. Pratap Narain Singh;

(xiv) P.W.14- CP Mr. Mata Prasad Awasthi and

(xv) P.W.15- CP Mr. Raghunandan Prasad.

6. Apart from above oral evidence relevant documents were also proved as exhibits which are as under:-

(i) Exhibit Ka-1- Written report;

(ii) Exhibit Ka-2- X-ray report of Ganga Ram;

(iii) Exhibit Ka-3- X-ray report of Smt. Sitala;

(iv) Exhibit Ka-4- X-ray report of Shyam Lal;

(v) Exhibit Ka-5- X-ray report of Lallu;

(vi) Exhibit Ka-6- X-ray report of Bahadur;

(vii) Exhibit Ka-7- X-ray report of Jiya Lal;

(viii) Exhibit Ka-8 X-ray report of Rakesh;

(ix) Exhibit Ka-9 Chick F.I.R.;

(x) Exhibit Ka-10- Nakal Rapat G.D. No.42, 22:30 hours dated 03.11.1985;

(xi) Exhibit Ka-11- Nakal Rapat G.D. No.4, 05:00 hours dated 04.11.1985;

(xii) Exhibit Ka-12- Letter for medical examination of injured Lallu;

(xiii) Exhibit Ka-13- Letter for medical examination of injured Ganga Ram;

(xiv) Exhibit Ka-14- Letter for medical examination of injured Bahadur;

(xv) Exhibit Ka-15- Letter for medical examination of Jiya Lal;

(xvi) Exhibit Ka-16- Post mortem examination report of the deceased Sukhrani;

(xvii) Exhibit Ka-17- Inquest of Sukhrani;

(xviii) Exhibit Ka-18- Photo Laash (Police form No.379);

(xix) Exhibit Ka-19- Police form No.13;

(xx) Exhibit Ka-20- Letter to Reserve Inspector for post mortem examination;

(xxi) Exhibit Ka-21- Letter to Chief Medical Officer for conducting the post mortem examination;

(xxii) Exhibit Ka-22- Recovery memo;

(xxiii) Exhibit Ka-23- Site plan of the place of occurrence;

(xxiv) Exhibit Ka-24- Recovery memo of blood soaked in plain soil from the place of occurrence;

(xxv) Exhibit Ka-25- Recovery memo of two empty cartridges;

(xxvi) Exhibit Ka-26- Recovery memo of arrest and recovery of weapon of offence;

(xxvii) Exhibit Ka-27- Carbon copy of G.D. No.35, 20:25 hours dated 04.11.1985;

(xxviii) Exhibit Ka-28- Charge sheet;

(xxix) Exhibit Ka-29- Site plan relating to recovery of weapons;

(xxx) Exhibit Ka-30- Prosecution Sanction;

(xxxi) Exhibit Ka-31- Charge sheet in Crime No.184 of 1985;

(xxxii) Exhibit Ka-32- Injury report of Smt. Sitala;

(xxxiii) Exhibit Ka-33- Injury report of Shyam Lal;

(xxxiv) Exhibit Ka-34- Injury report of Rakesh;

(xxxv) Exhibit Ka-35- Injury report of Ganga Ram;

(xxxvi) Exhibit Ka-36- Injury report of Lallu;

(xxxvii) Exhibit Ka-37- Injury report of Bahadur;

(xxxviii) Exhibit Ka-38- Injury report of Jiya Lal;

(xxxix) Exhibit Ka-39- Ballistic expert report;

(xxxx) Exhibit Ka-40- Chick F.I.R. of Case Crime No.184 of 1985, under Sections 25/27 of Arms Act and

(xxxxi) Report of Forensic Science Laboratory, Taj Road, Agra.

7. After completion of the prosecution evidence, the statements of the accused persons were recorded under Section 313 of The Code of Criminal Procedure, 1973 (in short Cr.P.C.) wherein all the three accused persons denied the crime and stated that witnesses have deposed falsely. The police has submitted the charge sheet wrongly. The case was registered due to enmity and also stated that a dacoity took place in the house of Ganga Ram and therein all the injured persons suffered injuries and they (accused persons) have been falsely implicated due to enmity. The accused persons did not produce any witnesses in defence though opportunity was given by the trial court, however, the accused persons filed some documents in their defence. These documents are mainly related to the Court pleadings, judgments, orders etc. and have been filed to show previous enmity between the parties.

8. After hearing arguments of both the sides the learned trial court on the basis of evidence available on record found the witnesses of facts reliable. The weapon of offence was recovered on the pointing out of the accused persons. The empty cartridges recovered from the place of occurrence were found fired from the weapons recovered, in the ballistic test report. The learned trial court came to the conclusion that the accused persons fired upon Sukhrani as a result she died and assaulted other injured persons with the intention to kill them and found them (accused persons) guilty under Sections 302/34 and 307/34 of I.P.C. sentencing them under Section 302/34 I.P.C. with imprisonment for life coupled with a fine of Rs.500/- each and in default of payment of fine additional imprisonment of 3 months each. The learned trial court sentenced the accused persons under Sections 307/34 I.P.C. with rigorous imprisonment of 5 years coupled with a fine of Rs.300 each and in default of payment of fine further imprisonment of 3 months each. Being aggrieved of the above conviction and sentence, this appeal has been preferred.

9. Heard Shri Brij Mohan Sahai, learned counsel for the appellants and Shri Chandra Shekhar Pandey, learned Additional Government Advocate for the State-respondent.

10. Learned counsel for the appellants argued that the appellants have falsely been implicated in the crime due to enmity and they are innocent. There was no motive to commit the crime. The evidence of witnesses of facts is not trustworthy as there are contradictions in their evidence. The injuries suffered by the deceased were not of serious nature nor fatal. According to post mortem examination report the injuries were sustained before 12 hours of post mortem examination. The firearm injury is of pellets. Verbal abuses took place from both the sides and the incident occurred in a heat of passion. Therefore, the offence is attributable only under Section 304 of I.P.C. The learned counsel also argued that all the three accused persons also sustained injuries in the incident but their report was not registered. The learned counsel drew attention of the Court towards the General Diary wherein the entry of there injuries was made. Learned counsel further submitted that the trial court has disbelieved the recovery of weapon of offence and acquitted the accused of the charges under Sections 25/27 of Arms Act but convicted and sentence the appellants under Sections 302/34 and 307/34 of I.P.C. which is erroneous and liable to be set aside.

11. Contrary to it, learned A.G.A. submitted that in the incident, the mother of the complainant died and seven persons were injured. The death of Sukhrani and the injuries suffered by the injured persons have been proved. The complainant also suffered injuries. The injured persons have proved the incident, their presence at the spot cannot be doubted as they are injured witnesses. No major contradiction in the statements of witnesses of facts has been found. The learned trial court has considered and analyzed the evidence of witnesses in a right perspective and punished the accused persons accordingly. The prosecution has proved its case beyond all reasonable doubt. Hence the appeal deserves to be dismissed.

12. Considered the arguments of both the sides and perused the original record of trial court as well as the record of appeal.

13. In the present matter, the complainant Ganga Ram who also brought persons injured in the incident, to lodge the report, has lodged the report wherein he stated that on 03.11.1985 at about 3 O'Clock in the day, the complainant and his uncle Dayal were standing at the front door of their house. His uncle Dayal came back after ploughing his field. Mahesh, Santosh and Ashok came there and said to Dayal that he ploughed the boundary of their field. His uncle Dayal denied any such act and suggested the appellants that if there was any doubt then the field could be measured, then all the three appellants and the complainant and his uncle went to the field to inspect the boundary of the field. On the spot, the appellants started hurling abuses on the complainant's side, as a retort the complainant also hurled abuses. Thereafter, the appellants left the place having told the complainant's side to wait at the spot, they were coming and would teach them a lesson. Thereafter at about 4 O'Clock all the three appellants, armed with country made short-guns, reached there and started firing upon the complainant and his uncle. The pellets of those fires hit the complainant and Sitala, the wife of Bihari.

His uncle lied down in the field to save himself. The complainant raised alarm. Hearing the sound of firing, the mother of the complainant, namely Sukhrani, Bahadur, Jiya Lal, Lallu, Shyam Lal Gadariya and the nephew of the complainant, namely Rakesh, aged about 6 years, came there running. When they all reached near the complainant, the appellants fired upon them also, 6-7 times with the intention to kill them. They all suffered injuries. Thereafter, many persons reached at the spot hearing the noise and the accused persons fled away. The mother of the complainant got seriously injured. The complainant arranged two bullock-carts and carried his mother and other injured persons for treatment by the bullock-carts but his mother Sukhrani died while on way to the hospital.

14. In this incident one Sukhrani died, Smt. Sitala, Shyam Lal, Rakesh (nephew of the complainant aged about 6 years), Ganga Ram, Lallu, Shri Bahadur, Jiya Lal, in total 7 persons sustained injuries. This is a day light incident and the injured persons have deposed in the Court to prove the incident. The complainant has been examined as P.W.1, he has narrated the incident step by step before the trial court. A lengthy cross-examination has been made but nothing adverse could be brought by the defence counsel. In his (complainant) examination-in-chief he has proved all the facts written in his First Information Report about the incident. P.W.2- Shyam Lal was also injured in the incident. He reached at the spot after hearing the sound of firing and noises. He has stated in the Court that when he heard the sound of fire and noise then he rushed towards the field of Dayal. Sukhrani, Lallu, Bahadur and Jiya Lal also reached there with him and he saw that Mahesh, Santosh and Ashok, who were present in the court, were standing with short-guns in their hands and Ganga Ram and Sitala were lying on the ground, in pain.

15. In the case in hand, one person died and 7 sustained firearm injuries. The feud ensued on the alleged damage caused to a boundary of field, which was in possession of/ploughed by the miscreants. The incident has very well been proved by the witnesses of facts i.e. P.W.1, P.W.2 and P.W.3 who sustained injuries in the incident, corroborated by the medical evidence. The eye witnesses have sustained firearm injuries in the incident, hence their presence on the spot cannot be doubted. The complainant has been examined as P.W.1, who also sustained injuries in the incident along with the others, has narrated the incident before the trial court step by step i.e. how the feud ensued and culminated into death of Sukhrani (the mother of the complainant) and injuries to 7 others. Lengthy cross-examinations have been made of the witnesses produced to prove the fact but no major contradictions could be brought in their cross-examinations.

16. The learned counsel for the appellants argued that the incident occurred in a heat of passion without any premeditation, due to sudden provocation as the complainant himself has stated in his written report that the complainant's side also hurled abuses on the accused persons. Thus the incident occurred in the spur of moment in a heat of passion, in such situation the offence can travel at the most to the offence punishable under Section 304 I.P.C. and not under Section 302 I.P.C.

This argument of learned counsel for the appellants has been countered by the

learned A.G.A. by submitting that the incident did not take place at the spur of moment in a heat of passion. The appellants after exchange of abuses went to there houses and returned at the place of occurrence with the intention to kill them (complainant's side). Dayal lied down in the field in order to save himself but the complainant and one Sitala who was working in her field nearby, sustained injuries. When Sukhrani the mother of the complainant and others rushed at the spot after hearing the sounds of firing, the appellants also fired upon them. One of the fires hit Sukhrani (the deceased) and she died, while other sustained injuries. Hence this offence cannot be constrained to the offence punishable under Section 304 I.P.C. It is a clear case of murder i.e. offence punishable under Section 302 I.P.C. and of offence punishable under Section 307 I.P.C. read with Section 34 of I.P.C.

17. In this regard it will be proper to have a look at Exception 4 to Section 300 of I.P.C. This runs as under:-

"Exception 4.- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.- It is immaterial in such cases which party offers the provocation or commits the first assault."

The perusal of this exception shows that for getting the benefit of this exception four essentials must be established which are as under:-

(i) A Sudden fight;

(ii) The fight was without premeditation;

(iii) the act was done in a heat of passion and

(iv) the person who committed the act had not taken any undue advantage or acted in a cruel manner.

All the above requisites must co-exist. If these conditions are established then the cause of quarrel is immaterial. It is also not relevant who gave provocation or who started feud or assaulted first. The incident must have occurred in heat of passion and in unpremeditated manner or to say the offender should have acted in a fit of wrath. In a heat of passion a person looses power of thinking reasonably as faculty of reasons is clouded by extreme anger and he or she acts in a manner he/she would not act otherwise. In other words the wrong act is committed during intense emotional stage induced by displeasure or loss of self control as a result of an act not liked by the person.

19. The **Hon'ble Apex Court** recently in the case **State of Uttarakhand vs. Sachendra Singh Rawat (2022) 4 SCC 227** has explained the relevant provision quoting as follows:-

"9. In Dhirajbhai Gorakhbhai Nayak [Dhirajbhai Gorakhbhai Nayak v. State of Gujarat, (2003) 9 SCC 322 : 2003 SCC (Cri) 1809] , on applicability of Exception 4 to Section 300 IPC, it was observed and held in para 11 as under : (SCC pp. 327-28)

"11. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with

a case of prosecution (sic provocation) not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused : (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage"."

10. In Pulicherla Nagaraju [Pulicherla Nagaraju v. State of A.P., (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500] , this Court had an occasion to consider the case of culpable homicide not amounting to murder and the intention to cause death. It was observed and held by this Court that the intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances:

(i) nature of the weapon used;

(ii) whether the weapon was carried by the accused or was picked up from the spot;

(iii) whether the blow is aimed at a vital part of the body;

(iv) the amount of force employed in causing injury;

(v) whether the act was in the course of sudden quarrel or sudden fight or free-for-all fight;

(vi) whether the incident occurs by chance or whether there was any premeditation;

(vii) whether there was any prior enmity or whether the deceased was a stranger;

(viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation;

(ix) whether it was in the heat of passion;

(x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;

(xi) whether the accused dealt a single blow or several blows."

20. In J**angaliya and Others vs. State of U.P. 2022 SCC OnLine All 356**, the Hon'ble Allahabad High Court has also observed as under:-

"42. Now, we shall examine the applicability of Exception 4. The ingredients for applicability of Exception 4 are : (i) there must be a sudden fight; (ii) there was no pre-meditation; (iii) the act was committed in heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. If the said ingredients are present, the cause of quarrel would not be material as to who offered the provocation or started the fight. Although the term fight has not been defined in IPC but the consistent view is that it implies mutual assault by use of criminal force and not mere verbal duel. In Bhagwan Munjaji Pawade v. State of Maharashtra, (1978) 3 SCC 330 (Para 6), it was observed that where the accused is armed and the deceased is unarmed, Exception 2 can have no application and Exception 4 to Section 300 would not apply if there is sudden quarrel but no sudden fight between the deceased and the accused. It was held that "Fight' postulates a bilateral transaction in which blows are exchanged."

21. Now we have to examine the present case in this light. In the present case, the feud ensued for the reason of alleged damage to the boundary of the field of the accused. At that time both the parties hurled abuses on each other as is clear from the written report itself. Thereafter, the appellants left the spot and went to their house challenging the complainant and his uncle Dayal to wait at the place and they would come back. After some time i.e. at 4 O'Clock they (accused persons) again reached at the spot armed with deadly weapons and assaulted the complainant's side with firearms. This act of the appellants cannot be termed as the act committed in a heat of passion or fit of anger. These appellants reached the spot armed with deadly weapons together, which means they came with a planning to kill the complainant and his uncle Dayal but the mother of the complainant along with other reached at the spot. The appellants also fired upon her with intention to kill her and she died of that injury and any other person who came ahead got injured. All these facts and circumstances make it crystal clear that the incident was not committed in a

sudden fight in a heat of passion and without premeditation. Hence this argument of the learned counsel for the appellants has no force.

22. The post-mortem examination report of the deceased Sukhrani shows that following ante-mortem injuries were found on her person:-

"1. Multiple firearm injuries over the front part of chest, ... left thigh upper 1/3 also on lateral side and front part of Rt thigh ...;

2. Firearm injuries (Two) on medial side of Rt elbow joint;

3. One Firearm injury on Lt side of chest at the ... of 6th intercostal space in mid axillary line;

4. One Firearm injury on lower border of Rt eye socket.

Laceration of intercostal muscle of Rt 3rd, 4th & 6th Lt 3rd, 4th & 8th was found. Lungs (both) were found ruptured and semi clotted blood was present in both chest cavities. The amount was 300 ml. Small intestine loops, liver, spleen were found lacerated and semi clotted blood was present in abdominal cavity. The amount was 400 ml.

The cause of death as noted in the post-mortem examination report is "shock and haemorrhage as a result of ante-mortem injuries.""

The injury-reports of others including a 6 year old child show that they all sustained firearm injuries. The facts and evidences available on record very well establish beyond reasonable doubt that this incident was not committed in a sudden fight, in a heat of passion and without premeditation. The evidence on record establishes that the feud ensued over the alleged damage to the boundary of the field and after exchange of abuses, the appellants went to their house and came back with planning, armed with firearm weapons, and fired upon the persons of complainant's side with the intention to kill them wherein Sukhrani the mother of the complainant died and 7 others persons got injured.

23. The learned counsel for the appellants also argued that the appellants also suffered injuries in the incident and that was noted in the General Diary Entry No.27. Hence it should be considered that they caused the injuries to the other side while defending themselves.

This argument of learned counsel for the appellants is also not sustainable because no such question has been put to any witness nor has been stated in the statement recorded under Section 313 Cr.P.C. In the statement recorded under Section 313 of Cr.P.C. the appellants have taken the defence that some dacoity occurred in the house of Ganga Ram and there the injured persons suffered injuries. Further more they have not put any question to the witnesses examined as to give them the opportunity to explain the injuries on the person of the appellants.

24. Learned counsel for the appellants further argued that the recovery of weapon of offence has been disbelieved by the learned trial court but the conviction has been made for the offence under Sections 302 and 307 I.P.C. read with Section 34 of I.P.C. He further submitted that once the recovery of weapon has been disbelieved then the offence itself cannot be deemed proved.

This argument of the counsel for the appellants is also not acceptable because where there is direct evidence of the offence then recovery of the weapon of offence is not necessary. In the present matter there is direct evidence of the crime, the witnesses have sustained injuries in the incident which is corroborated by the medical evidence. Hence this appeal has no merits and deserves to be dismissed.

25. Accordingly, the present criminal appeal is hereby **dismissed**. The impugned judgment and order dated 03.05.1990 is **confirmed.**

26. The appellants are on bail. Their bail bonds are canceled and sureties discharged. They are ordered to surrender before the trial court within two weeks from today to serve out the sentence awarded by the trial court failing which the trial court is directed to get them arrested and sent to jail.

27. Office is directed to send a copy of this order along with lower court record to the trial court concerned for necessary information and compliance forthwith.

(2022) 9 ILRA 1450
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.09.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 435 of 2016
With
Criminal Appeal No. 407 of 2016

Deepak Kumar Yadav ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Rajesh Kumar Dwivedi

Counsel for the Opposite Party:
A.G.A., Mr. Umesh Chand Verma

(A) Criminal Law – Criminal Procedure Code, 1973 - Sections 313 & 437(a) - Indian Penal Code, 1860 - Sections 34, 201, 302 & 363 - Evidence Act, 1872 - Section 27 - Appeal against conviction and Sentence - complaint about missing - unnamed FIR was registered after seven days - offence of murder - evaluation of evidence - during investigation angle of love affair between the deceased and a girl but there is no evidence on record to established the same - dead body was recovered after ten days in rotten St. - the identity of the body is not proved beyond reasonable doubt , even though DNA sample was preserved but no DNA test was conducted - no motive has been disclosed - Chain of circumstances is not complete - hence, it cannot be said that the prosecution has proved the case beyond reasonable doubt - accused appellant deserve the 'benefit of doubt' - impugned order is set aside - direction issued in favour of appellants accordingly subject to compliance of section 437-A of Cr.P.C. (Para 29, 30, 31)

Criminal Appeals are allowed. (E-11)

List of Cases cited:

1. Sharad Birdhichand Sarda Vs St. of Mah., AIR 1984 SC 1622 : 1984 SCC (Cri) 487,

2. Ganpat Singh Vs St. of M.P., (2018) 2 SCC (Cri) 159 : (2017) 16 SCC 353,

3. Anil Kumar Singh Vs St. of Bihar, 2004 SCC (Cri) 1167,

4. Padala Veera Reddy Vs St. of Andhra Pradesh, AIR 1990 SC 79 : 1990 ACC 32 (SC),

5. Gargi Vs St. of Har., (2019) 9 SCC 738,

6. Hanumant Govind Nargundkar Vs St. of M.P., AIR 1952 SC 343,

7. Anjan Kumar Sarma Vs St. of Assam, (2017) 14 SCC 359,

8. Joydeb Patra & ors. Vs St. of West Bengal, 2013 (3) JIC 548 (SC),

9. Pulukuri Kottaya & ors. Vs Emperor, AIR (34) 1947 Privy Council 67,

10. Bahadul Vs St. of Orrisa, AIR 1979 SC 1262,

11. Anter Singh Vs St. of Raj., (2004) 10 SCC 657,

12. Sonu Sharma Vs St. of U.P., 2011 (1) JIC 381 (All D.B.),

13. Navaneethakrishnan Vs St. by Inspector of Police, AIR 2018 SC 2027,

14. Kusal Toppo& anr. Vs St. of Jharkhand, 2019 (106) ACC 964,

15. Ram Chander Vs St. of Har., (1981) 3 SCC 191,

16. Samsul Haque Vs St. of Assam, 2019 (3) JIC 432 (SC),

17. Ram Niwas Vs St. of Har., (2022) SCC OnLine SC 1007,

18. Sujit Biswas Vs St. of Assam, (2013) 12 SCC 406,

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. The Criminal Appeal No.435 of 2016 (Deepak Kumar Yadav vs. State of U.P.) has been filed by the convict/appellant Deepak Kumar Yadav and the Criminal Appeal No.407 of 2016 (Arvind Kumar Maurya vs. State of U.P.) has been filed by convict/appellant Arvind Kumar Maurya against the judgment and order dated 29.02.2016 passed by Additional District & Sessions Judge, Court No.5, Faizabad in Sessions Trial No.25 of 2014, under Sections 302/34 and 201 of Indian Penal Code, 1860 (in short I.P.C.) arising out of Case Crime No.338 of 2013, Police Station Kotwali Rudauli, District Faizabad.

2. The facts shorn of unnecessary details are as under:-

A First Information Report (in short F.I.R.) was registered at Case Crime No.338 of 2013, under Section 363 I.P.C. on 10.11.2013 at Police Station Rudauli, District Faizabad on the basis of the written report presented by Mihi Lal wherein, he stated that his elder son, Anil Kumar, aged about 18 years, went somewhere on 02.11.2013 around 08:00 P.M. Since then his whereabouts are unknown. The complainant searched for him (Anil Kumar) at his relatives' places but no information could be found. His son had a mobile No.7388080774 which was switched off.

3. The above noted information given by the complainant was entered in General Diary at No.19, at 12:40 hours and thereafter a case was registered at Case Crime No.338 of 2013, under Section 363 of I.P.C. and the Investigating Officer went to the spot, prepared the site plan, recorded the statements of witnesses, prepared the inquest report and sent the dead body for post mortem examination and after completing the investigation submitted the charge sheet against accused persons Deepak Kumar Yadav and Arvind Kumar Maurya, under Sections 302 and 201 of I.P.C.

4. The learned Chief Judicial Magistrate, Faizabad took cognizance of the matter and committed the case to the court of Sessions for trial. The court of Sessions framed charges under Sections 302/34 and 201 of I.P.C. against both the

accused persons. They both denied the charges and claimed to be tried.

5. In order to prove its case, the prosecution examined the following witnesses:-

(i) P.W.1- Mihi Lal, the complainant;

(ii) P.W.2- Jokhawati, sister-in-law of the complainant (Bhabhi);

(iii) P.W.3- Moti Lal, witness of inquest (Panch);

(iv) P.W.4- Dr. Vipin Kumar, who conducted the autopsy of the deceased;

(v) P.W.5- Mr. Vijay Bahadur Singh, Sub-Inspector, who investigated the case;

(vi) C.W.1- Sub-Inspector Vijay Bahadur Singh, who proved the carbon copy of General Diary.

6. Apart from the above oral evidences, relevant documents have also been proved by the prosecution which are as under:-

(i) Exhibit Ka-1 - Written report;

(ii) Exhibit Ka-2- Inquest report;

(iii) Exhibit Ka-3 - Post mortem examination report;

(iv) Exhibit Ka-4 - Recovery memo;

(v) Exhibit Ka-5 - Police form No.13;

(vi) Exhibit Ka-6 - Specimen Seal;

(vii) Exhibit Ka-7 - Police form No.379;

(viii) Exhibit Ka-8 - Letter to Reserve Inspector of Police for post mortem;

(ix) Exhibit Ka-9 - Letter to C.M.O. for conducting post mortem;

(x) Exhibit Ka-9A - (As Exhibit Ka-9 has been marked at 2 pages so this is referred as Exhibit Ka-9A) Entry in relevant General Diary;

(xi) Exhibit Ka-10 - Site plan of the place of recovery of dead body;

(xii) Exhibit Ka-11 - Site plan of the place where accused persons killed the deceased;

(xiii) Exhibit Ka-12 - Charge sheet;

(xiv) Exhibit Ka-13 - General Diary related to entry about the missing report of the deceased given by complainant;

(xv) Exhibit Ka-14 - Carbon copy of the General Diary having entry regarding alteration after recovery of the dead body and

(xvi) Exhibit Ka-15 - Carbon copy of the General Diary regarding the articles recovered related to the crime.

7. After close of the prosecution evidence, the statements of the

convicts/appellants were recorded under Section 313 of the Code of Criminal Procedure, 1973 (in short Cr.P.C.). Both the convicts/appellants denied the crime and related proceedings and stated that all the Exhibits have been prepared falsely at the concerned police station. The witnesses have deposed falsely due to enmity. The convict/appellant Arvind Kumar Maurya has further stated that the complainant and Moti Lal who lost the election of Pradhan are from the same family and the convict/appellant belongs to the family of Village Pradhan Sudama. He has been implicated due to enmity of election. The convicts/appellants did not produce any evidence in defence though opportunity was provided by the learned trial court.

8. The learned trial court after hearing the arguments of both the sides and analyzing the evidence on record, found the evidence of P.W.1, P.W.2, P.W.3 and P.W.5 trustworthy and concluded that the prosecution has proved that the deceased left the house on 02.11.2013 and when after all attempts, the whereabouts of the deceased could not be known, the missing report was recorded. On the basis of this information, the Investigating Officer went to the Village of Shesh Kumari but her house was found locked. Thereafter accused Deepak Kumar Yadav was arrested on account of this information. He disclosed that Arvind Kumar Maurya was also with him while committing the crime and they killed the deceased and threw the dead body in a well. The learned trial court has further noted that the dead body of deceased Anil Kumar was recovered from one well and the bicycle by which the deceased went, from another, at the pointing out of accused Deepak Kumar Yadav. The post mortem examination report proved that the deceased died due to ante-mortem throttling. The learned trial court came to the conclusion that all these circumstances indicate that the convicts/ appellants Deepak Kumar Yadav and Arvind Kumar Maurya killed the deceased Anil Kumar and threw his dead body in a well. The learned trial court has also held that there is nothing on the record to show that the complainant has falsely implicated the convicts/appellants. The learned trial court held that the prosecution has proved the charges framed against the convicts/appellants beyond reasonable doubt and held them guilty under Sections 302/34 and 201 of I.P.C. The convicts/appellants were sentenced under Section 302 read with Section 34 of I.P.C. with life imprisonment coupled with a fine of Rs.10,000/- each and in default of payment of fine further imprisonment of 5 months each. Both the convicts/appellants have further been sentenced under Section 201 I.P.C. with imprisonment of 7 years coupled with a fine of Rs.3,000/- each and in default of payment of fine further imprisonment of 2 months each. Being aggrieved of this conviction and sentence, the convict/appellant Deepak Kumar Yadav filed Criminal Appeal No.435 of 2016 and convict/appellant Arvind Kumar Maurya filed Criminal Appeal No.407 of 2016.

9. Heard Shri Rajesh Kumar Dwivedi, learned counsel for the appellant Deepak Kumar Yadav and Shri Amit Chaudhary, learned counsel for the appellant Arvind Kumar Maurya and Shri Umesh Chandra Verma, learned Additional Government Advocate for the State-respondent. Shri Firoz Ahmad Khan, learned counsel for the complainant did not appear to argue the appeals.

10. Learned counsel for the appellant Deepak Kumar Yadav argued that there is

inordinate delay in lodging the F.I.R. The F.I.R. is ante-dated and ante-timed. The scribe of F.I.R., Ram Pyare Lal Head Constable of Police has not been produced by the prosecution in the witness box. No motive has been established by the prosecution against the convict/appellant to commit the crime. The convict/appellant Deepak Kumar Yadav was allegedly arrested on 12.11.2013 at 02:00 P.M. but no arrest memo is on record. The place of arrest of convict/appellant Deepak Kumar Yadav is doubtful. There is no public witness of the arrest of convict/appellant Deepak Kumar Yadav. The alleged recovery of the dead body of the deceased and his bicycle on the pointing out of the convict/appellant Deepak Kumar Yadav is not covered within the ambit of Section 27 of the Indian Evidence Act. The recovery is a false recovery. No disclosure statement of the convict/appellant is there on the record. The alleged recovery of the dead body of the deceased and his bicycle on the pointing out of the convict/appellant Deepak Kumar Maurya is from two wells situated at a distance of half kilometer in two different villages, hence, both the recovery memos cannot be prepared simultaneously on the spot by the same person. The recovered bicycle was not got identified by Hanuman to whom the bicycle belongs as stated by the complainant. The presence of Mihi Lal P.W.1 at the time of recovery of the dead body of the deceased and his bicycle and at the time of conduction of inquest is not established. It is belied by the testimony of P.W.1 himself. There is no mention of case crime number and sections on the inquest report which indicates that the F.I.R. was not in existence at the time of preparation of inquest report. Inquest proceedings were not done on the spot and those were done at the Police Station Rudauli and inquest report was ante-timed. No test identification parade was conducted as the convict/appellant Deepak Kumar Yadav was not previously known to P.W.1 Mihi Lal. Further convict/appellant Deepak Kumar Yadav was not kept (Baparda) by the police and he was got identified to P.W.1 Mihi Lal. No D.N.A. test of the bones of the deceased was got conducted by the prosecution to establish the identity of the deceased. No recovery of mobile phone of the deceased was made by the Investigating Officer. No explanation was given by the prosecution about the cutting made in General Diary and after cutting the name of accused Dileep, the name of accused Deepak Kumar Yadav was added. Medical evidence does not corroborate the prosecution version. The cause of death has been opined by the autopsy surgeon, only on the basis of surmises and conjectures as the dead body was completely decomposed and turned into skeleton and the soft tissue over the neck was missing. Only bones were present on the neck. Hence the strangulation could be ascertained. There are variations, inconsistencies and major contradictions in the testimony of the prosecution witnesses. No Jeans/Pants and cloth around the neck of the deceased was found at the time of alleged recovery of the dead body. The case of prosecution is based on circumstantial evidence and the chain of circumstances is not complete to bring home the guilt of the convict/appellant. No circumstance under Section 302 I.P.C. was put to the convict/appellant to explain his innocence. Hence no conviction can be awarded to him under Section 302 I.P.C. He further submitted that P.W.1 Mihi Lal is not a reliable witness and conviction cannot be based on his evidence. He further submitted that it is a settled position of law that suspicion howsoever grave cannot take place of the proof. The prosecution has

miserably failed to prove its case beyond reasonable doubt against the convict/appellant. Hence, the accused/appellant Deepak Kumar Yadav deserves to be acquitted.

11. Learned counsel for the convict/appellant Deepak Kumar Yadav relied upon the following case laws :-

(i) Sharad Birdhichand Sarda vs. State of Maharashtra AIR 1984 SC 1622: 1984 SCC (Cri) 487;

(ii) Ganpat Singh vs. State of Madhya Pradesh (2018) 2 SCC (Cri) 159: (2017) 16 SCC 353;

(iii) Anil Kumar Singh vs. State of Bihar 2004 SCC (Cri) 1167;

(iv) Padala Veera Reddy vs. State of Andhra Pradesh AIR 1990 SC 79: 1990 ACC 32 (SC);

(v) Gargi vs. State of Haryana (2019) 9 SCC 738;

(vi) Hanumant Govind Nargundkar vs. State of M.P. AIR 1952 SC 343;

(vii) Shivaji Shahabrao Bobade vs. State of Maharashtra (1973) 2 SCC 793;

(viii) Anjan Kumar Sarma vs. State of Assam (2017) 14 SCC 359;

(ix) Joydeb Patra & Ors. vs. State of West Bengal 2013 (3) JIC 548 (SC);

(x) Pulukuri Kottaya and Others vs. Emperor AIR (34) 1947 Privy Council 67;

(xi) Bahadul vs. State of Orrisa AIR 1979 SC 1262;

(xii) Sonu Sharma vs. State of U.P. 2011 (1) JIC 381 (All D.B.);

(xiii) Anter Singh vs. State of Rajasthan (2004) 10 SCC 657;

(xiv) Navaneethakrishnan vs. State by Inspector of Police AIR 2018 SC 2027;

(xv) Kusal Toppo and Another vs. State of Jharkhand 2019 (106) ACC 964;

(xvi) Ram Chander vs. State of Haryana (1981) 3 SCC 191 and

(xvii) Samsul Haque vs. State of Assam 2019 (3) JIC 432 (SC).

12. Learned counsel for the convict/appellant Arvind Kumar Maurya argued that there was no motive to commit the crime by the convict/appellant Arvind Kumar Maurya. He has been implicated in the crime due to political enmity and that too on the basis of the statement of co-convict/appellant Deepak Kumar Yadav. He has no concern with the crime. No incriminating article has been recovered either from his person or on his pointing out. There is no evidence on the record to connect Arvind Kumar Maurya with the crime. The evidence of P.W.2 Jokhawati is not reliable and he (convict/appellant Arvind Kumar Maurya) never told Jokhawati that the deceased used to talk with one Shesh Kumari on telephone. The statements of witnesses are contradictory. P.W.1 and P.W.2 are related witnesses. The dead body of the deceased was not identifiable as it was found fully

decomposed as has been stated in the post mortem examination report, hence, there is no evidence on record to prove that the convict/appellant Arvind Kumar Maurya killed the deceased. Hence, the accused/appellant Arvind Kumar Maurya should be acquitted.

13. To the contrary learned A.G.A. argued that the chain of circumstantial evidence is complete and has very well been proved by the prosecution. The P.W.1 Mihi Lal has proved that his son Anil Kumar left the house on 02.11.2013 at about 8 O'Clock in the night and did not return and his mobile phone was also switched off. He informed the police about the missing of his son. He did not name anybody in the report so it cannot be believed that later on he implicated the convicts/appellants due to enmity. He further submitted that P.W.2, Jokhawati has proved that convict/appellant Arvind Kumar Maurya has told her that the deceased Anil Kumar used to talk on telephone with one Shesh Kumari resident of village Gulzar Ka Purwa and the deceased went there. When this information was given to the Investigating Officer, he went to the place of Shesh Kumari but the house was found locked. The Investigating Officer, on the information given by the informant, arrested accused/appellant Deepak Kumar Yadav and he confessed that he killed the deceased Anil Kumar and convict/appellant Arvind Kumar Maurya was also with him while committing the crime. He further submitted that the prosecution has also proved the recovery of dead body of the deceased from a well at the pointing out of the convict/appellant Deepak Kumar Yadav. The prosecution has also proved the recovery of the bicycle on which the deceased left the house, at the pointing out of the convict/appellant Deepak Kumar Yadav. The statement given to the Investigating Officer by the convict/appellant Deepak Kumar Yadav, supported by recovery of dead body and bicycle, is admissible under Section 27 of The Indian Evidence Act. The dead body has been identified by the father of the deceased by his clothes and also from the soles which were not decomposed. He further submitted that the near relative of the deceased can identify the body by clothes of deceased. He further submitted that the learned trial court has rightly relied upon the testimony of witnesses of facts and held the convicts/appellants guilty and sentenced them accordingly. He prayed that both the appeals should be dismissed.

14. Considered the rival submissions and perused the original record of the trial court as well as the record of the appeals and also gone through the case laws cited by the learned counsel for the convict/appellant Deepak Kumar Yadav.

15. Admittedly, it is a case of circumstantial evidence as there was no eye witness. In case of circumstantial evidence, to hold a person guilty of offence alleged the chain of circumstantial evidence must be complete. All the circumstances must point out towards the guilt of the person who is accused, no other possibility should be there. No hypothesis of accused being innocent should be there. Further, suspicion however strong can not take place of proof beyond reasonable doubt.

16. The Hon'ble Apex Court in Plethora of cases have explained the principles relating to circumstantial evidence. In **Ram Niwas vs. State of Haryana (2022) SCC OnLine SC 1007**, the Hon'ble Apex Court in this regard has observed as under:-

"25. The prosecution case rests on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has very well been crystalized in the judgment of this Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra , wherein this Court held thus:

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]. This case has been uniformly followed and applied by this Court in a large number of later decisions upto-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]:

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

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

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

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

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

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

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

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

26. This Court has held that there has to be a chain of evidence so complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. It has been held that the circumstances should be of a conclusive nature and tendency. This Court has held that the circumstances should exclude every possible hypothesis except the one to be proved. It has been held that the accused "must be' and not merely "may be' guilty before a Court can convict.

27. It is settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt."

17. The **Hon'ble Apex Court** in the case of **Sujit Biswas vs. State of Assam (2013) 12 SCC 406** has held as under:-

"14. In Kali Ram v. State of H.P. [(1973) 2 SCC 808 : 1973 SCC (Cri) 1048 : AIR 1973 SC 2773] this Court observed as under: (SCC p. 820, para 25)

"25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.""

18. Now we have to examine the matter in the light of evidence available on the record keeping in mind the above principles of law laid down by the Hon'ble Apex Court. In the present case, the son of the complainant left the house on 02.11.2013 at about 08:00 P.M. The complainant searched for him at the places of his relatives but he could not be found at any place. The mobile phone carried by the son of the complainant was switched off. The missing report was submitted by the complainant at the police station on 09.11.2013 i.e. after 7 days when his son left the house. This missing report was entered in General Diary at Police Station Kotwali Rudauli, District Faizabad at No.19 at 12:40 hours as missing information. Since the missing boy could not be traced so entry in General Diary regarding alteration was made at No.25 at 12:50 hours (Exhibit Ka-13) on 10.11.2013 and a case was registered as Case Crime No.338 of 2013, under Section 363 of I.P.C. The carbon copy of relevant General Diary is Exhibit Ka-14.

19. The investigation was handed over to Sub-Inspector Vijay Bahadur Singh examined as P.W.5. The Investigating Officer after taking over the investigation recorded the statement of complainant Mihi Lal and Jokhawati (sister-in-law of the

complainant). Thereafter, he received information about the appellant/convict Deepak Kumar Yadav through an informant. He (Investigating Officer) arrested Deepak Kumar and on his arrest, Deepak Kumar allegedly confessed the crime and told that appellant/convict Arvind Maurya was also with him at the time of committing the crime. The dead body of the deceased was recovered from a well on the pointing out of Deepak Kumar Yadav and a bicylce from another well. At the time of recovery of dead body and bicycle appellant/convict Deepak Kumar Yadav told that he and Arvind Maurya committed murder of the deceased and threw the dead body in a well in his village and the bicycle in another well. The Investigating Officer along with appellant/convict Deepak Kumar reached at the place where well was situated. The dead body was taken out from the well. At the distance of 400 metres the bicycle was recovered from another well. The inquest report was prepared of the body of deceased. Dead body was sent for postmortem examination along with relevant papers. Recovery memo of bicycle was also prepared.

20. In the post-mortem examination report following condition of the cadaver was noted:-

"A decomposed body. Soft tissue missing over Face, Neck and Subaro Anterior Scalp. Lt. hand and Lt. Radius Bone missing. No opinion regarding nose, mouth, tongue, nail and anus.

1. Head/neck skin and soft tissue not present at head. Contusion prest over posterior part of scalp- 8x6 cm which was hanging posteriorly brain because liquified- changing into skeletal;

2. Magot present, more over skull in notched, cloth present around neck;

3. A knotted cloth present around neck;

4. Contusion over (Rt) side chest- 18x14 cm;

5. Contusion over (Lt) side chest- 20x14 cm plus two ribs fractured 5th and 6th;

6. Contusion (Rt) inguinal region- 18x16 cm extending to thigh;

7. Contusion (Lt) thigh above knee joint- 25x10 cm;

8. Contusion at scrotal region- 8x6 cm and

9. Bone and tissue of Lt hand missing and (Lt) radius bond also missing.

It has further been noted in the post-mortem examination report that only skeletal present on orbital/nasal and aural cavities findings.

Immediate cause of death has been noted as "Asphyxia as a result of most probably due to Ante-mortem strangulation.""

21. Doctor who conducted the post-mortem examination of the deceased preserved the D.N.A. sample. It has also been noted in the report that on the dead body, a t-shirt, underwear, a cloth in the throat and 'Kalava' over palm were found which were kept in sealed bundle. Dr. Vipin Kumar who conducted the post-mortem has been examined as P.W.-4 and he has stated

before the trial court that no rigor mortis was present in the dead body. The dead body was rotten, a flesh of face, neck and head was missing. Palm and radius bone of left hand missing. Eyes and tongue were also missing. He has further stated that the skin and flesh of neck and head were missing and there were contusions present on the posterior part of head- 8x6 cm. Head/Brain was rotten and magots were present there. In the neck one handkerchief was there. In the Rt side of chest there was a contusion of size 18x4 cm. On the Lt side of chest there was contusion of size 20x14 cm and 5-6 ribs were broken. On the right hand at inguinal region a contusion 18x16 cm was present which was going up to the thigh. He has further stated that in the left thigh above the knee joint a contusion of size 25x10 cm was present and in the genital region a contusion of 8x6 cm was present. This witness has proved the post-mortem report as Exhibit Ka-3 and has stated that cause of death was Asphyxia probably due to ante-mortem throttling. This witness has further stated that femur bone was preserved and sent in a sealed state along with the clothes found on the body and 'Kalava' were also handed over to the concerned constable. In the cross-examination this witness has stated regarding the injury found on the neck of deceased that nothing was possible to say about the injury found on neck because only bone was there. No estimation can be done of pressing the neck on the basis of a bone. He has further stated that remaining injuries found on the remaining parts of the body, which have been noted by him, were on the rotten parts. Both the soles of the feet were left. There were injuries on the legs above the knees and over both the thighs but below knees and soles, there were no marks. He has further submitted that Investigating Officer did not record his statement in this regard. This witness has further stated in his cross-examination that dead body which came before him for post-mortem examination was not identifiable. The dead body which was brought before him was rotten from neck to head. There was only one bone in the neck and there was one handkerchief tied over neck. He has further stated that he has written in the post-mortem report that cause of death is strangulation only on the basis of probability.

22. None of the appellants/convicts were named in the F.I.R. as there was no clue with the complainant to name them. The F.I.R. was registered as a missing report. No motive has been disclosed in the missing report nor any possibility of murder of the missing boy. On the basis of missing report, the Investigating Officer started investigation. P.W.1- Mihi Lal (the complainant) in his statement before the trial court has stated that after the missing report, the Investigating Officer came to his house on 10.11.2013 and inquired from him whether he found any clue about his son then he told the Investigating Officer that Arvind (accused/appellant) told him that the deceased used to talk on mobile phone with a girl resident of Gulzar Ka Purwa and her name was Shesh Kumari. The deceased received a phone call and probably he went there. He also stated that whatever was to be done, done. This witness has further stated that this was heard by his sister-in-law (Jokhawati) who was present at the time. This witness has identified Arvind Kumar Maurya, who was present in the court, as the person who told all this to him. This witness has further stated that he told all this to the Investigating Officer and remained indulged in search of his son. Thereafter on 12.11.2013 Investigating Officer called him at about 02:30 P.M. and

asked him to come at the 'Chak road' of Gulzar Ka Purwa. He reached there. Thereafter the Investigating Officer reached there, after some time in a jeep. The accused Deepak and police personnel came down from jeep and Deepak moved forward and pointed out the well from where the dead body of his (complainant) son was recovered. Deepak also told that Arvind was with him in committing the murder. Thereafter, the dead body was taken out of well and inquest was done. This witness was present at the time of inquest and he signed over that as a Panch. He has further stated that from well the bicycle was recovered on the pointing out of the accused Deepak Kumar Yadav.

23. P.W.2- Jokhawati has also stated that after 7 days of the incident at about 3 P.M. Arvind came in front of his home and asked whether Anil came back when she told him that he did not come back then Arvind stated that whatever was to happen, happened and he also told that the deceased was talking on mobile phone with a girl resident of Gulzar Ka Purwa. This fact had come into the knowledge of the brothers of girl and they asked the deceased not to talk with the girl but the deceased did not pay heed. He further stated that Anil, while going told him that he was going to get the mobile recharged. This witness has further stated that at the time his brother-in-law (the complainant) was also present at the home. She has further stated that she has prior knowledge of the love affair between Anil Kumar (deceased) and the girl Shesh Kumari.

According to this witness (P.W.2) she was aware of the love affair between the Shesh Kumari and the deceased but there is nothing in the missing report about the same. On the record there is no evidence showing any connection between the deceased and the girl. It has been alleged that the deceased used to talk with a girl on mobile phone but no call details record were presented and proved by the prosecution to prove the motive of crime. Though it is not always necessary to prove motive because no one can peep into the mind of a miscreant, yet in the case based on the circumstantial evidence, the motive acts as a link in the chain of circumstantial evidence. Existence of motive gives support to the prosecution case based on circumstantial evidence. In this case the prosecution did not prove the motive of the case. There is no evidence to prove the motive of the crime.

24. The case of the prosecution is that during investigation, the Investigating Officer got the information that accused Deepak Kumar Yadav has committed murder of the deceased Anil Kumar and arrested him and he confessed that dead body was thrown by him in a well after committing the murder and Arvind Kumar Muarya was also present at the time of committing the crime. The dead body was recovered on the pointing out of the appellant Deepak Kumar Yadav from a well and the bicycle by which he went from the house was also recovered from another well situated at a distance of 400 metres, from the well from which dead-body was recovered.

25. The dead body was recovered after ten days when the deceased left his house and according to the doctor, who conducted the post-mortem of the dead body, the dead body was found in a rotten state. No flesh and tissue was present over face, neck and other parts of body except soles. The doctor has clearly stated in his statement before the trial court that the dead body was not identifiable.

The complainant (father of the deceased) stated that he recognized the dead body of his son by his clothes. He has stated in the cross-examination that when the dead body was recovered there were t-shirt and jeans on the dead body, which the boy was wearing when he left the house. He has further stated that there was a mark on the neck of his son. P.W.3 - Moti Lal has been examined as a witness, he was present at the time of 'Panchayatnama' and he was one of the Panch. He has stated in his examination-in-chief that he saw the dead body which was mostly rotten. In the cross-examination this witness has also stated that the dead body was completely rotten. In his cross-examination this witness has also stated that when the dead body was taken out of the well, the deceased was wearing 'baniyan', 'kachchha', t-shirt and pants. The pants were of black colour. As far as the identity of the dead body is concerned, the doctor who conducted the autopsy has stated that the body has completely rotten except soles and he found on the body a t-shirt, 'banyan', 'kalava' and underwear. There was no mention of any pants/jeans while the father of the deceased examined as P.W.1 has stated that at the time of recovery of dead body a jeans were there and witness P.W.3- Moti Lal has stated that on the dead body a black colour pants were there.

Admittedly the body was rotten and was not identifiable with face or other parts. Only soles were left/remained. In such circumstances, the identity of the body is not proved beyond reasonable doubt. The doctor in his statement has already stated that he has written the cause of death as a probability because he has found a cloth tied on the bones of neck.

26. In the light of above analysis the case of prosecution cannot be deemed to be proved beyond reasonable doubt. Further more the D.N.A. sample was preserved but no D.N.A. test was conducted to ascertain the identity of the dead body.

27. All the above facts and circumstances show that chain of circumstances is not complete. Missing report was lodged after seven days of leaving the house by the deceased. There is no mention in the report that anything was told by Arvind Kumar Maurya to Jokhawati. There is no evidence on record to establish the love affair between the deceased and the girl Shesh Kumari, hence, it cannot be said that the prosecution has proved the case against the accused/appellants beyond reasonable doubt. Both the accused/appellants deserve the benefit of doubt to be given.

28. Accordingly, both the appeals i.e. CRIMINAL APPEAL No. - 435 of 2016 and CRIMINAL APPEAL No. - 407 of 2016 are **allowed**. The impugned judgment and order dated 29.02.2016 is hereby **set-aside.**

29. The accused/appellant Arvind Kumar Maurya is already on bail, his bail bonds are cancelled and sureties discharged. The accused/appellant Deepak Kumar Yadav is in jail. The accused/appellant Deepak Kumar Yadav shall be released from jail forthwith if not required in any other criminal case.

30. The convicts/appellants Deepak Kumar Yadav and Arvind Kumar Maurya are directed to file personal bonds and two sureties each in the like amount to the satisfaction of the court concerned in compliance with Section 437-A of Cr.P.C.

31 . Office is directed to send a copy of this order along with lower court record

to the trial court concerned for necessary information and compliance forthwith.

(2022) 9 ILRA 1463
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.08.2022

BEFORE

THE HON'BLE SHAMIM AHMED , J.

Criminal Appeal No. 677 of 2011

Babu Lal & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Mr. Brijesh Yadav Vijay, Mata Prasad Yadav

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Criminal Procedure Code, 1973 - Sections 313 & 374(2) - Indian Penal Code, 1860 - Sections 32, 34, 308, 323, 325 & 504: - Appeal – against conviction & sentence - quantum of sentence - crime was committed in year 2000 and the trial court passed conviction order in year 2011 and now they are on Bail - further, appellants have already undergone sufficient period in jail during trial - court uphold the impugned judgment and order being found not suffer from any illegality, perversity or jurisdictional error - however, their rest of sentence is converted into a fine - accordingly, appeal partly allowed - directions issued for released, subject to they are not wanted in any other case.(Para 7, 9, 10)

(B) Criminal Law - Criminal Procedure Code,1973 - Sections 313 & 374(2) - Indian Penal Code, 1860 - Sections 32, 34, 308, 323, 325 & 504 - Appeal – against conviction & sentence - quantum of sentence - by converting rest of the sentence into fine, Court directed to the appellants to pay & deposit Rs. 20,000/- as a fine - out of which Rs. 15,000/- shall be paid to the informant and rest of Rs. 5000/- shall go to the St. Government to use in health programme. (Para 10)

Appeal partly allowed. (E-11)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard learned counsel for the appellants as well as Shri Aniruddha Kumar Singh, the learned A.G.A.-I for the State and perused the record.

2. Learned counsel for the appellants submits that appellant No. 1, Babu Lal and appellant No. 4, Smt. Ram Kali, have died.

3. In view of above statement made by the learned counsel for the appellants, the present appeal stands abated in respect to the appellant No. 1, Babu Lal and appellant No. 4, Smt. Ram Kali.

4. The present criminal revision under Section 374(2) Cr.P.C. was preferred in the year, 2011 by the accused-appellants, namely, Babu Lal (since deceased), Babban, Lal Ji and Smt. Ram Kali (since deceased), against the judgment and order dated 31.03.2011 passed by learned Additional Sessions Judge/ Special Judge, S.C./S.T. Act, Court No. 8, Sultanpur in Session Trial No. 497 of 2004, State Vs. Babu Lal and others, arising out of Case Crime No. 470-A of 2000, under Sections 32, 325, 504, 308 I.P.C., Police Station Kudwar, District Sultanpur, convicting and sentencing each of the appellants under Section 323/34 I.P.C. for six months rigorous imprisonment, under Section 325/34 I.P.C. for two years rigorous imprisonment with a fine of Rs. 2500/- each, and under Section 504 I.P.C. for a period of one year rigorous imprisonment, with default stipulation.

5. After passing of the impugned judgment and order of conviction, the appellants were granted interim bail by the learned trial court and at the time of admission of the present appeal they have been released on bail vide order dated 06.04.2011 passed by this Court.

6. With the consent of learned counsel for the parties, the present criminal appeal is being decided on the question of sentence only.

7. Learned counsel for the appellants submits that maximum sentence provided to each of the appellants is two years rigorous imprisonment for offence punishable under Section 325/34 I.P.C. and they have already undergone a substantial period of incarceration. The crime was committed in the year, 2000 and the appellants were convicted by the trial court in the year 2011, and now they are on bail. A sufficient time has passed, therefore, their rest of sentence be converted into fine and the same shall not be treated as enhancement of sentence.

8. Learned A.G.A. opposed the prayer for quashing of the impugned judgment and order passed by the court below and has submitted that the learned trial court has rightly convicted and sentenced the appellants by the impugned judgment and order after considering the evidence on record before it, hence no interference is called for by this Court and the appeal is liable to be dismissed.

9. I have perused the impugned judgment and order passed by the court below and have gone through the entire record. In my opinion the impugned judgment and order does not suffer from any illegality, perversity or jurisdictional error which may call for any interference by this Court, hence the conviction and sentence of present appellants is hereby upheld. But taking in account of the fact that appellants have already undergone sufficient period in jail as under trial and after conviction by the trial court, their rest of sentence is converted into a fine.

10. Accordingly, surviving appellants are directed to pay and deposit a fine of total Rs. 20,000/- in the court of C.J.M. concerned, out of which Rs. 15,000/- shall be paid to the informant and 5,000/- shall go to the State, which shall be used by the State Government in some health programme. If appellants deposit the aforesaid amount of fine, they shall be released forthwith, if not already released, and further if not wanted in any other case.

11. In default of the fine as directed above, the appellants shall serve out the sentence as awarded by the trial court.

12. In view of the above, the present criminal appeal is partly allowed.

13. Office is directed to send a certified copy of this order to C.J.M., concerned for its compliance.

14. Let the lower court record, if any, be sent back to the court below forthwith.

(2022) 9 ILRA 1464
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2022

BEFORE

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

Criminal Appeal No. 879 of 2018

Mohan & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:

Sri Akhilesh Kumar Mishra, Ms. Abida Syed (AC), Sri Kamlesh Kumar Tiwari, Sri Surendra Kumar Chaubey

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 313 - Indian Penal Code, 1860 - Sections 34 & 302 - Appeal - against conviction - complaint - FIR - offence of murder - informant alleged that when his brother was sleeping with his son he heard a noise of firing and when he went to the place, he saw that one of the accused was shooting at his brother who was died - evaluation of evidence - it is an admitted position of fact that no one had seen the firing - the role assigned to each accused persons has not been spelled out in testimony of any of witnesses - no injuries of lathi rather stick on body of deceased - nobody has seen the role of Mohan - neither fire arm was recovered nor Forensic Science Lab report was produced and nor any injuries were caused to Child who was sleeping with deceased even though there were alleged to be 93 pellets are found as well as no blood stain was found on the cot where alleged firing was said to have been taken place - all these proves that there is political rivalry - Court have no other option but to upturn the impugned judgment - appeal is accordingly allowed. (Para 15, 16, 17, 2322, 24)

Appeal allowed. (E-11)

List of Cases cited:

St. of M.P. Vs Gharkole (AIR 2005 SC 44).

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

1. Heard Shri Surendra Kumar Chaubey, learned counsel for the appellant-Mohan; Ms. Abida Syed, learned Amicus Curie for unrepresented litigants; and Shri N.K. Srivastava, learned counsel for the respondents. Perused the record.

2. During trial the main assailant, accused-Kedar has breathed last and the other three accused Mohan and two others faced the trial, all the accused have been convicted for commission of offence under Section 302 of Indian Penal Code and sentenced to life imprisonment. The accused were punished sentenced to life imprisonment with the aid of Section 34 of the IPC and fine of Rs.50,000/- each and default sentence of 6 months if they did not deposit the amount of fine.

3. The first Information report given on 13.10.1993 is to this effect that brother of the informant namely Ram Sevak son of Rupai was done to death on 12.10.1993 at about 11 p.m by firing. The brother of the informant was sleeping on his bed with his son and the informant was sleeping in his hut and suddenly on the noise of firing the informant woke up and went in the direction from where the noise had come. The informant and others went in the direction from where the noise had come and saw that Kedar was shooting at the brother of the informant who died and Kedar was shouting that, Mohan run, Ram Sevak is dead, till then Jangi son of Sajjan and Hansraj son of Ram Ratan came there and after hearing the shouting they had tried to catch the accused, but all four accused persons Kedar son of Gauri, Mohan son of Ram Shree, Budhiram son of Vanshraj and Daroga son of Ramdhani ran away from the place of occurrence.

4. According to the informant, accused Mohan and Kedar were carrying country-made pistol (Katta) and Budhiram and Daroga were carrying lathi in their

hands. The informant taking some other people with him and the Chowkidar went to house of Kedar and Mohan as they believed that after committing the said act they might have reached home but they were not at home, they went again at the place of occurrence to take the injured to hospital.

5. The informant further informed that before 20 days there was auction in their village in which brother of the informant (namely deceased) and Kedar both had taken part but as the auction money was more, Kedar could not deposit the money or get the bid in his favour because of non depositing of money which bid was allotted to the brother of informant (deceased). From the said day Kedar and Mohan had grudge against the deceased. It is further alleged that accused Mohan had by force encroached on the land known as Kali Mata Temple and so the village people along with deceased had objected to this act of Mohan and, therefore, both the accused Kedar and Mohan in connivance with the other two accused had committed the act causing the death of brother of informant by firing gunshot from close range.

6. The information culminated into FIR and investigation was kept in motion. The statements of witnesses were recorded by investigating officer and after completing the investigation, the police filed the charge sheet which culminated into case being committed to the court of session as it was sessions triable case.

7. The accused on being summoned appeared before the learned Sessions Judge. The learned Judge framed the charge on 27.2.2000. The accused pleaded not guilty and wanted to be tried. During trial Kedar died and trial abated qua him.

8. The prosecution examined 10 witnesses who are as follows:

1	Rama Shanker	PW1
2	Jangi	PW2
3	Dheera	PW3
4	Ram Asrey	PW4
5	Rukmuddin @ Samsuddin	PW5
6	Tirath Ram	PW6
7	Ramakant	PW7
8	Chandrabhan Singh	PW8
9	Harihar Prasad	PW9
10	Dr. V.K. Dubey	PW10

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

1	First Information Report	Ex.Ka.2
2	Written Report	Ex.Ka.1
3	Recovery Memo of blood-stained cloth pellets and Tickli	Ex.Ka.7
4	Recovery Memo of blood stained and plain earth	Ex.Ka.8
5	Postmortem Report	Ex.Ka.14
6	Panchayatnama	Ex.Ka.6
7	Charge-sheet Mool	Ex.Ka.5

8	Site Plan with Index	Ex.Ka.4

10. On the witnesses being examined and the prosecution having concluded its evidence, the accused were put to questions under Section 313 Cr.P.C.

11. It is submitted by the counsel for appellants that the FIR did not mention that Mohan was the person who had fired gunshot. The FIR was proved the evidence of PW-1 and corroborated by PW-2 that it was Kedar who had fired gunshot injuries which caused death of the deceased instantaneously. On the basis of First Information Report and deposition of doctor who performed the post mortem, it is submitted by learned counsel for appellants that Mohan accused is entitled to benefit of doubt.

12. Shri Chaubey, learned counsel for the accused has vehemently submitted that it is not the case of prosecution that Mohan had caused the firearm injuries. According to counsel for appellants, during the investigation 93 pellets were found and 5 dead cartridges were recovered. According to learned counsel for appellant, there is only one injury despite the fact that two injuries are mentioned to have been caused, but the post mortem report shows that there was one injury which reads as follows:

"(i) A fire arm wound of entrance measuring 2 cm x 2 cm x chest cavity-deep on the left side chest upper part just above Clavicular region, margins of wound inverted. Blood & scorching round the wound seen. Wound directed downward."

13. The learned trial Judge has convicted the accused on the basis of the evidence which according to the learned court below pointed out the figures towards the present accused. PW-3 has not witnessed the incident. PW-6 and PW-7 have given a different version, then that which were given in the statement under Section 161 of Cr.P.C. The witnesses were put to questions about dacoity in the said village which the witnesses have categorically denied. The witness has categorically mentioned that Kedar and Mohan had enmity with the deceased that is why he was done to death by accused. PW-2 has deposed that he came after hearing of the gun-fire and when he was going towards the residence of Ram Sevak, he heard the second fire and he run and went towards the residence of Ram Sevak, it is deposed that by PW-2 that the other people who had seen the accused with Kedar going away told him about this fact. PW-5 has corroborated to certain extent that the death occurred at 11 pm. He was sleeping on roof top, when came down he saw the deceased and he breathed last.

14. The prosecution before the trial judge had contended that minor contradictions should not be considered to grant acquittal. It is submitted that on minor contradictions, benefit of doubt cannot be granted to the accused who have committed the offence.

15. While considering the factual scenario, there are certain aspects which require to be noted, namely, the fire arm injuries were alleged to be fired by Kedar and not by Mohan; no firearm was recovered from Mohan; and there is no Forensic Science Lab report. The ocular versions of PW-1 and PW-2 does not see that it was Mohan who had fired any gunshot neither the evidence case to show that it was Kedar who had shot and convey to Mohan to flee from the seen of offence.

16. It is an admitted position of fact that no one had seen the firing. The role assigned to Daroga and Buddhiram is not spelled out in testimony of any of the witnesses and there are no injuries of lathi rather the stick on the body of the deceased.

17. While going through the evidence and the findings of fact, we fail to understand that there are no reasoning given by the learned Judge so as to come to the conclusion that accused were the perpetrators of the crime, the fact that no injuries were caused to child who was sleeping with deceased Ram Sevak though there were 93 pellets found also does not find any mention in the judgment. The evidence of PW-1 and PW-2 also does not inspire confidence. No blood was found on the cot where alleged firing was said to have taken place as is deposed by PW-1. The evidence also proves that there is political rivalry.

18. The evidence of witnesses is reproduced in Hindi in our ready reference so that this becomes crystal clear for us to decide whether the accused have been involved in the commission of offence or not:-

"विस्तर पर कोई खून नहीं गिरा था । मै झोपडी के अंदर नहीं सोया हुआ था । झोपड़ी के बाहर दो कदम की दुरी पैर सोया था । यही बात मैंने अपने तहरीर में भी लिखवाया था । और यही बात मैंने दरोगा जी को भी बताया था की झोपडी के बाहर दरवाजे पर सोया हुआ था । अगर मेरे तहरीर में यह बाद की "हम उसी से चार कदम उत्तर अपनी झोपडी में सोये थे" लिखा हो तो मैं इसकी वजह नहीं बता सकता । अगर दरोगा जी ने मेरे बयान में झोपडी से सोने वाली बात लिखा हो तो मैं उसकी वजह नहीं बता सकता । गोली की पहली आवाज सुनकर मैं चारपाई से उठकर गुमटी की आड़ में चला गयाविस्तर पर कोई खून नहीं गिरा था । मै झोपडी के अंदर नहीं सोया हुआ था । झोपड़ी के बाहर दो कदम की दुरी पैर सोया था । यही बात मैंने अपने तहरीर में भी लिखवाया था । और यही बात मैंने दरोगा जी को भी बताया था की झोपडी के बाहर दरवाजे पर सोया हुआ था । अगर मेरे तहरीर में यह बाद की "हम उसी से चार कदम उत्तर अपनी झोपडी में सोये थे" लिखा हो तो मैं इसकी वजह नहीं बता सकता । अगर दरोगा जी ने मेरे बयान में झोपडी से सोने वाली बात लिखा हो तो मैं उसकी वजह नहीं बता सकता । गोली की पहली आवाज सुनकर मैं चारपाई से उठकर गुमटी की आड़ में चला गया. दूसरा फायर करने के बाद जब जाने लगे तब मैंने शोर किया. उसके बाद तुरंत हंसराज व् जंगी आ गए तब हम तीनो लोक मुल्जिमान का पीछा करने लगे. उसके बाद चकरोड पक्काडकर के भाग गए. दौड़ते समय मुल्जिमान ने हम लोगो को जान से मरने की धमकी दीया था. कटे के पीछे मत पद्दो नहीं तो तुमको भी मर देंगे. तब हम लोग जान गए की मोहन केदार बुधिराम और दरोगा हैं. उसके बाद हम लोग थोड़ा पीछे हट गए तब मुल्जिम वह से भाग गए । दूसरा फायर करने के बाद जब जाने लगे तब मैंने शोर कियाविस्तर पर कोई खून नहीं गिरा था । मै झोपडी के अंदर नहीं सोया हुआ था । झोपड़ी के बाहर दो कदम की दुरी पैर सोया था । यही बात मैंने अपने तहरीर में भी लिखवाया था । और यही बात मैंने दरोगा जी को भी बताया था की झोपडी के बाहर दरवाजे पर सोया हुआ था । अगर मेरे तहरीर में यह बाद की "हम उसी से चार कदम उत्तर अपनी झोपडी में सोये थे" लिखा हो तो मैं इसकी वजह नहीं बता सकता । अगर दरोगा जी ने मेरे बयान में झोपडी से सोने वाली बात लिखा हो तो मैं उसकी वजह नहीं बता सकता । गोली की पहली आवाज सुनकर मैं चारपाई से उठकर गुमटी की आड़ में चला गया. दूसरा फायर करने के बाद जब जाने लगे तब मैंने शोर किया. उसके बाद तुरंत हंसराज व्

जंगी आ गए तब हम तीनो लोक मुल्जिमान का पीछा करने लगे. उसके बाद चकरोड पक्काडकर के भाग गए. दौड़ते समय मुल्जिमान ने हम लोगो को जान से मरने की धमकी दीया था. कटे के पीछे मत पद्दो नहीं तो तुमको भी मर देंगे. तब हम लोग जान गए की मोहन केदार बुधिराम और दरोगा हैं. उसके बाद हम लोग थोड़ा पीछे हट गए तब मुल्जिम वह से भाग गए । उसके बाद तुरंत हंसराज व जंगी आ गए तब हम तीनो लोग मुल्जिमान का पीछा करने लगे। उसके बाद चकरोड पकड़कर के भाग गए। दौड़ते समय मुल्जिमान ने हम लोगो को जान से मरने की धमकी दीया था। कट्टे के पीछे मत पडो नहीं तो तुमको भी मर देंगे। तब हम लोग जान गए की मोहन केदार बबुद्धिराम और दरोगा हैं। उसके बाद हम लोग थोड़ा पीछे हट गए तब मुल्जिम वहां से भाग गये ।

जब मैं रत में शोर सुनकर राम सेवक के घर गया तो वहां मोहन नहीं था मेरे सामने बदमाशो को कोई खोजने भी नहीं गया था"

19. The provisions of Section 34 of the IPC are also not made out. Nobody has seen the role of Mohan. Only Rama Shanker and Hansraj who had given the name of Buddhiram and Daroga as held above, no incriminating instruments were found from their possession.

20. In our case the judgment of the Apex Court in **State of Madhya Pradesh v. Gharkole, AIR 2005 SC 44** will not be applicable to the facts of this case as the judgment will also not help the prosecution and the learned trial Judge has brushed aside the judgment cited by counsel for the accused. Just because the informant was sleeping at four steps from the coat of the deceased, it is very doubtful as to he came after the second shot was heard by him. It was Kadar who had fired and nobody had seen Mohan at the time of the incident.

21. While discussing the parameters on which the accused can be convicted, the evidence and the decision of the court below has to be also evaluated .

22. We now come to the role of each of the accused-appellants. All the three accused-appellants were convicted for the offence punishable under Section 302 read with Section 34 of IPC. Section 34 of I.P.C. reads as under :

***"34. Acts done by several persons in furtherance of common intention.**--When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."*

23. In that view of the matter, we have no other option but to upturn the judgment of the learned Judge below and appeal is allowed accordingly.

24. The accused if not wanted in any other offence, we set free giving benefit of doubt to the accused.

25. This court is thankful to counsels for the parties for getting matter disposed of .

26. Rs.12,500/- as honorarium be paid to Ms. Abida Syed, who is appointed as Amicus Curie by the High Court Legal Services Committee.

27. Record and proceedings be sent back to the Court below forthwith, if any

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(2022) 9 ILRA 1470
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2022

BEFORE

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

Criminal Appeal No. 1102 of 1987

Siri Harijan & Anr. ...Appellants
Versus
State ...Opposite Party

Counsel for the Appellants:
Sri S.N. Srivastava, Sri Anirudh Pratap Singh Rathor, Ms. Jigyasa Singh, Ms. Rajeshwari Singh

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

(A) Criminal Law – Criminal Procedure Code, 1973 - Sections 161 - Indian Penal Code,1860 - Sections 34, 299, 300, 302, 304(1), 304(2), 323 & 504: - Appeal - against conviction and Sentence - FIR was lodged on the St.ment of deceased - offence of murder - it is alleged that incident has occurred in a fit of anger and two sons had assault their father in desperation to get their shares in the landed property which was denied to them by their father - Appreciation of evidence - from the injury report as well as from the testimony of eye-witness, it is evident that both the appellants had not aimed/intent to cause their father's death - deceased was conscious and speaking till he had succumbed, he died due to he could not get proper treatment - four elements of section 300 of IPC was not proved - thus, offence would fall under section 304 of IPC - held, surviving appellants is not guilty of 'murder' (u/s 302 of IPC) but his is guilty of 'culpable homicide not amounting to murder' punishable in the first part of section 304 of IPC - thus, appeal is allowed in part - judgment under appeal is modified accordingly. (Para 35, 36, 38, 40, 41, 42)

Appeal dismissed. (E-11)

List of Cases cited:

1. Virsa Singh Vs St. of Punj., AIR 1958 SC 465,

2. Rampal Singh Vs St. of U.P., (2012) 8 SCC 289,

3. Vineet Kumar Chauhan Vs St. of U.P., (2007) 14 SCC 660,

4. St. of Andhra Pradesh Vs Rayavarapu Punnayya& anr., (1976) 4 SCC 382,

5. Rajwant Singh Vs St. of Kerala, AIR 1966 SC 1874,

6. St. of U.P. Vs Indrajeet, (2000) 7 SCC 249,

7. Satish Narayan Sawant Vs St. of Goa, (2009) 17 SCC 724,

8. Arun Raj Vs U.O.I., (2010) 6 SCC 457,

9. Phulia Tudu Vs St. of Bihar, (2007) 14 SCC 588,

10. Mohinder Pal Jolly Vs St. of Punj., (1979) 3 SCC 30 : 1979 AIR SC 577,

11. Aradadi Ramudu @ Aggiramudu Vs St. through Inspector of Police, Yanam, (2012) 5 SCC 134.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Ms. Jigyasa Singh and Ms. Rajeshwari Singh learned Advocates for the appellants and Sri Rupak Chaubey learned AGA for the State-respondents.

2. This appeal is directed against the judgment and order dated 16.12.1986 passed by the 2nd Additional Sessions Judge, Ghazipur in Sessions Trial No. 68 of 1986 (State vs. Siri Harijan and Sripat Harijan) whereby appellants Siri Harijan and Sripat Harijan have been held to be guilty for the offence punishable under

Section 302 readwith Section 34 IPC and have been convicted and sentenced to undergo life imprisonment.

3. The prosecution case starts with the first information report lodged on a report scribed by Head Moharrir Sri Shyam Narain Yadav on the statement of deceased Dhorha Harijan. The said report which was lodged on 7.1.1986 at about 10:10 AM for the incident which occurred on the said date at about 7:00 AM, was a Non-cognizable report registered as NCR No. 3/86 under Sections 323/504 IPC. The report was scribed on the statement of the injured Dhorha (later deceased) stating that the assailants/accused were his own sons who were living separately from him. The deceased was residing with his brother Pati Ram at the time of the incident, the accused assaulted him with Lathis while saying that if their shares were not given, they would kill him. On hue and cry raised by the informant (injured himself), many people came to save him.

4. The written report scribed by the Head Moharrir is signed by him and had been proved in his deposition as PW-4. The scribe of the report namely Head Moharrir as PW-4 stated that he was posted as Head Moharrir on 7.1.1986 in the police station Mardah/concerned. At about 10:10 AM, the report was lodged on the oral information given by the injured Dhorha Harijan son of Jiut Harijan, who had later died. It was stated by PW-4 that whatever was told to him was scribed and the injured was conscious and was speaking clearly. PW-4 further stated that the said report was registered as NCR No. 3 in his handwriting and signature and the copy of Check FIR was in his handwriting and signature proved as Exhibit Ka-4. He further stated that whatever was written in the report was transcribed as Check FIR and it was read over to the informant who put his thumb impression thereafter. He stated that the thumb impression of the deceased was existing on the FIR and the copy thereof had been proved by him. The case was entered in GD at Rapat No. 11 at about 10:10 AM on the said date. The original GD was brought in the Court and the copy thereof was filed on record proved as Exhibit Ka-5 being in handwriting and signature of Constable Moharrir Ramlala Yadav. It was stated by PW-4 that the injuries found on the person of the deceased were entered in the GD. After making entries, the injured was sent for medical examination to the Government Hospital, Mardah. On 7.1.1986 at about 16:10 hours, a memo was received from the doctor about the death of the injured which was entered in GD at Rapat No. 25 at about 16:10 hours in his handwriting and signature. The original GD was brought in the Court and the copy thereof was filed and proved as Exhibit Ka-6.

PW-4 stated that on the basis of information of the death, the case was converted into an offence under Section 304 IPC from Section 323 IPC and the entry in this regard could be found in the GD. The original FIR which was dictated by deceased Dhorha was proved as Exhibit Ka-7 being in the handwriting and signature of PW-4. PW-4 was further confronted as to how the injured could reach at the police station. He stated that the injured Dhorha came alongwith Pati Ram, his brother on his own and the S.O. of the police station was present at that time. He was confronted about the entries in the GD and the inspection of GD by the Circle Officer. He was further confronted about the contents of the written report and PW-4 asserted that whatever was dictated

by Dhorha (deceased) was written by him. Constable Shiv Mani Yadav took the injured for medial examination and his return entry was recorded on the same day at about 12:25 PM. At the time of entry of his return to the police station, the said Constable had filed the injury report of injured Dhorha which fact was entered in the GD, however, injury report was not copied in the GD. PW-4 was further confronted on this statement and he stated after going through the GD, that the injury report was not filed rather the Constable told that the doctor would provide injury report later.

5. The Investigating Officer S.I. Shyam Sundar Mishra examined as PW-5 stated that he was posted in the police station Mardah on 7.1.1986 as Sub-Inspector. On a memo of the doctor R.S. Prasad, Medical Officer, P.H.C., Mardah received at about 16:10 hours, the investigation was handed over to him after conversion of the case. He started investigation on 7.1.1986 itself and went to P.H.C. Mardah; found the dead body of deceased Dhorha and took it in his possession; the inquest was conducted and the inquest report was proved as Exhibit Ka-8 in the handwriting and signature of PW-5. Other related papers were proved as Exhibits Ka-9 to Ka-13 by PW-5 being in his handwriting and signature. The dead body was sealed and sent for postmortem. PW-5 stated that brother of the deceased namely Pati Ram was present in the hospital and his statement was recorded in the hospital itself. The statement of one more person named as Deena was also recorded and PW-5 left to the place of the incident and conducted raid for arrest of the accused who had run away. The spot inspection of the site in question was made on the next date, i.e. on 8.1.1986 at about 6:30 AM and the site plan was prepared which was proved as Exhibit Ka-14 being in the handwriting and signature of PW-5. Both the accused were arrested on the said date itself on the report of the informer and their statements were recorded and they were lodged in the lockup. After completion of the investigation, the charge sheet was submitted as Exhibit Ka-15 on 9.1.1986. PW-5 was confronted about the injury report in cross and he stated that the injury report was received at the police station before he proceeded to the hospital and it was given to the Head Constable Shyam Narain Yadav (PW-4) and its entry was made in the GD. He further stated that he reached at the hospital on 7.1.986 at about 16:30 hours and conducted inquest. PW-5 was further confronted about the statement of Pati Ram (PW-1) recorded under Section 161 Cr.P.C. and the topography of the place of the incident. The suggestion that the place of the incident indicated by him in the spot memo was his own creation was categorically denied by PW-5. Further suggestion that he made investigation in order to cover up the case and examined only the interested witnesses was also denied.

6. PW-6 is the doctor who had conducted the postmortem. As per his deposition, body was brought by two constables C.P. No. 508 Iqbal Ahmad and C.P. No. 57 Sambhu Nath in sealed state, they identified the body and then postmortem was conducted. As per the external condition, the age of deceased was estimated as 55 years and the time of death about one day. It was an average built body, rigor mortis was present in all four limbs.

Ante-mortem injuries found on the person of the deceased are:-

"(1) Abrasion on tip of vertex.

(2) Contusion on the left side of the chest.

(3) Contusion on the left upper arm.

(4) Contusion on the left thigh.

(5) Abrasion on the left leg.

(6) Fracture of left humerus shaft and neck of left femur and left ribs."

On internal examination, contusion was found at the left side of the chest, third to eighth ribs were found broken and lacerated. Left lung was lacerated, half litre blood was present in the chest cavity. Contusion was found on the front wall of the stomach and one litre blood was present in its cavity. The gall bladder and liver were lacerated, Urinary bladder was empty, white liquid material was present in the stomach.

The cause of death, mentioned in the postmortem report, was shock & Hemorrhage as a result of ante-mortem injuries.

PW-6 proved that the postmortem report was prepared by him in his own handwriting and signature and it was proved as Exhibit Ka-16. The clothes of deceased which were sealed and given to the Constable were marked as Material Exhibits "I', "II' and "III'. PW-6 stated that there was a possibility of death of the deceased at about 3:45 PM on 7.1.1986 and the ante-mortem injuries were sufficient to cause death. He further stated that ante-mortem injuries could have been caused by Lathi.

7. In cross, PW-6 stated that the injury no. 2 (ante-mortem injury) was at the front of the chest and could be seen from the naked eyes. The injuries were sufficient to cause death. There was a pasty liquid in the stomach like flour and milk, which was undigested and could be on account of consumption of milk about 1 & ½ hours of death. The suggestion that the death was caused due to wrong treatment given to the deceased was categorically denied by PW-6.

8. PW-3 Dr. R.S. Prasad is the doctor who had examined the injured when he was brought to P.H.C. Mardah by the Constable CP No. 314 Shiv Nath Yadav. He stated that he was present in P.H.C. Mardah, posted as a Medical Officer and deceased Dhorha was brought by the aforesaid Constable at about 11:00 AM. His injuries were examined and the injuries found on the person of deceased have been described as under:-

"(1) Lacerated wound 4 cms x .5 cm on the right side of head scalp deep 13 cms above the right ear.

(2) Contused wound 9 cms x 2 cms with marked swelling 10 cms x 7 cms on the left upper Arm with fracture left upper arm bone.

(3) Multiple contusion on the back left side chest five in number (a) 19 cm x 2 cm (b) 10 cm x 21 cm (c) 16 cm x 2 cm (d) 23 cm x 2 cm (e) 11 cm x 2 cm suspected fracture left Rib.

(4) Multiple contusion on the left hip and buttock, six in number (a) 13 cm x 2 cm (b) 7 cm x 2 cm (c) 9 cm x 2 cm (d) 12 cm x 2 cm (e) 11 cm x 1 cm (f) cm x 2 cm. Reddish with mark tenderness.

(5) Abrasion 1 cm x 1 cm on the front of left leg.

(6) Lacerated wound 1 cm x 0.5 cm x 0.5 cm on the front of left leg 1 cm below the left knee.

(7) Abrasion 11.5 cm x 0.5 cm on the left leg. 2.5 cm below the injury no. (c)."

He stated that the injuries were fresh and looking to the nature of injuries, the injured was referred to the District Hospital, Ghazipur. All the injuries seem to have been caused by hard blunt object like Lathi and Danda. The injury report was proved as Exhibit Ka-1 being in his handwriting and signature and the thumb impression of deceased (injured) was also proved by PW-3. PW-3 stated that he also recorded the identification marks of the injured. As per his statement, the injuries could have been caused at around 7:00 to 8:00 AM on 7.1.1986. PW-3 stated that he treated the injured when he was in the hospital and the injured died at around 3:45 PM on 7.1.1986 in his hospital itself. The information of death was then given to the Station House Officer. The memo sent to the Police Station shown to PW-3 was proved as Exhibit Ka-2 being in his handwriting and signature. PW-3 stated that after preparation of the injury report, X-ray was advised and a separate memo was prepared for referring the injured to the District Hospital. The said memo was also proved as Exhibit Ka-3 being in his handwriting and signature by PW-3 who stated that thumb impression and identification marks of the deceased were noted therein. PW-3 stated that when injured was brought to the hospital, his condition was serious but he was conscious, his dying declaration was not recorded as the injured was referred to Ghazipur. After preparation of the injury report and referring the injured to Ghazipur, the first aid was given while the injured was admitted in P.H.C. Mardah. PW-3 was confronted about the treatment given to the injured and he stated that the injured remained in his hospital despite referring to the district hospital, Ghazipur as he was not in a condition to transport. He was further confronted that he did not give adequate treatment to the injured and there was no arrangement for blood transfusion. The District Hospital was about 25 kms. and he did not make any effort to take any help from the District Hospital. The suggestion that the injured had died because of lack of proper treatment and the injury report was prepared to cover up his fault was denied by PW-3.

9. PW-2 is the Constable Iqbal Ahmad who took the dead body for the postmortem. He stated that the body was handed over to the doctor at the Mortuary in sealed state and no one had touched it when it was in his custody.

10. The only witness of fact, i.e. the incident in question is PW-1 Pati Ram brother of deceased Dhorha. PW-1 stated that he was residing in Harijan Basti in the village and described the topography of the said colony. He stated that the people of Harijan Basti used to go to defecate on Puliya and Canal which was located near the Basti. His father had two sons, one of them was deceased Dhorha and the second one he himself. PW-1 was living separately for the last 15 years and before his death, Dhorha (deceased) separated from his sons. The accused (sons of the deceased) separated alongwith their family (wife and children) and Dhorha was left alone as he became old. The wife of Dhorha had

predeceased him. When the accused persons had left Dhorha, being brother PW-1 had kept him and they were residing together. Dhorha was having 10 biswas of agriculture field and after he was separated, Dhorha was ploughing his field on his own. The accused persons were demanding the agricultural field of Dhorha and Dhorha used to say that since the accused were not paying money to him and hence they would get the field only when he was dead. The accused persons were, therefore, angry with their father Dhorha. A day prior to when Dhorha was murdered, in the evening, a scuffle took place between the accused persons and deceased Dhorha. The villagers intervened and ended the fight.

PW-1 then stated that on the fateful day in the early morning, after the Sun rise, Dhorha (deceased) went to defecate towards the Canal. After ten minutes, he (PW-1) also went towards Puliya to defecate. When he reached at the Puliya, he saw Dhorha on the Southern side of Puliya at the West corner of the Canal while he was washing his hands. PW-1 sat near Puliya after crossing it to defecate and within a short time, he heard cries of Dhorha "save, life is in danger". PW-1 stated that on hearing cries of Dhorha, he immediately washed his hands at the Puliya and went towards him. He saw accused Siri and Sripat assaulting their father Dhorha by Lathis and he started shouting. Hearing the noise, the people of Harijan Basti namely Deena, Ramvat Janu and the wife of PW-1 ran towards the place of the incident. The accused persons had run away towards South of the Canal at the Patri after injuring Dhorha. They arranged a cot, kept Dhorha in it and took him to the police station Mardah. Dhorha (later deceased) was conscious and was speaking when he was brought to the police station. The report was dictated by Dhorha and the Head Moharrir read it over to him and got thumb impression of Dhorha. The injuries of deceased were examined by the Head Moharrir and he was sent to the Government Hospital along with the Constable where doctors had treated him. Dhorha died on the same day in the hospital at about 4:00 PM. The statement of PW-1 was recorded by the Investigating Officer in the hospital at about 7:00-8:00 PM.

11. In cross, PW-1 stated that deceased Dhorha was elder to him and they were living separately for about 10-12 years with their families. The wife of deceased Dhorha had predeceased him (died about two years prior to their separation). PW-1 then goes on to say that he himself was not doing any work and was in his home at the time of the incident otherwise he was doing the work of "Harwahi'. He then stated that at the time of the incident the work of irrigation of field had started but it was being done during day time. PW-1 further stated that Dhorha was physically fit and was earning on his own. He was also doing labour work. PW-1 stated that he did not remember as to whether Dhorha was working at someone else's place a day prior to the incident.

PW-1 then stated that the houses of accused Siri and Sripat was nearby and in between their houses, there were fields of both the brothers. The house in which the accused persons were living was of deceased Dhorha in which he was residing prior to their separation. The houses of accused persons was in the same Chak which belonged to the deceased. The said house was constructed about 6-7 years prior to the incident. In the house in which PW-1 was living was constructed about 2-3

years prior to his deposition. PW-1 then stated that the Abadi was from the time of their ancestors and they were all residing in the same Abadi. At the time of the incident, wheat crop sown by the deceased was standing in the field which was irrgated about 2-4 days prior from the tube well of one Kalpnath Singh. A fight between the deceased and his sons (accused) occurred one day prior to the incident in his presence and other villagers were also present, the time was around 5:00 PM. PW-1 stated that the incident of fight occurred in the field where wheat was sown and it was lasted for around half an hour. The crop was damaged near the Medh for about one Laththa. Before the fight started, Dhorha was at the door of his house and the accused Siri was at his door. They all moved towards each other carrying Lathi and started pushing each other in the field. On the intervention of villagers no untoward incident had occurred. No report of the said incident, however, was lodged.

12. On a suggestion given to PW-1, he stated that he and deceased Dhorha were having good relation and deceased was residing with him after his sons had thrown him out of his house. It was admitted by PW-1 that the wheat crop was harvested by him after the death of Dhorha as his sons were lodged in the jail. He then stated that he had no concern with the field of Dhorha and he never had any concern with it during the lifetime of Dhorha. He always intended that after death of Dhorha, his field would go to his family and the said fact was also told by the deceased to his daughter.

PW-1 then stated that the Investigating Officer came on the spot on the second day of the incident and the place where the previous incident had occurred in the evening was also shown to him. PW-1 stated that people in the village normally would wake up around 4:00 AM and everyone would go to their field after being freshen up. However, in winters, they go to the field to work at around 8:00 AM. He then described the place of the incident and stated that he saw deceased washing his hands when he reached at the place of the incident. PW-1 was further confronted about the presence of other persons at the pumping set and the place where he stated that he went to defecate. He stated that as soon as he heard the cries of deceased, he rushed towards him as he had identified the voice of his brother. He saw the accused persons hitting the deceased and he started shouting while standing at Puliya. The accused were hitting the deceased at a short distance from Puliya and other persons had reached within minutes of his cries. PW-1 further described that deceased was hit for about 7-8 times from all sides by Lathi by both the accused and he fell down. When villagers reached, the accused persons ran away. On further confrontation PW-1 stated that he was shouting while standing at Puliya and did not make any effort to save the deceased as he was empty hand. He and deceased both went to defecate and no one else was there.

About the injuries, PW-1 stated that the deceased got injuries on his chest, back, hands, skull and legs. He did not remember as to whether blood oozed out from the wounds fell on the ground. PW-1 then stated that they were at the place of the incident for about half an hour and then went to the police station, Dhorha was conscious. The police station was about two kms. from his house and he could not remember as to how much time was taken to reach there. Other villagers namely Deena, Saheb were accompanying him.

When they reached at the police station, the Investigating Officer was not present. The report was scribed by the Head Moharrir and after taking thumb impression of the injured, the injuries were examined. They remained at the police station for about half an hour and then were sent to the hospital. The hospital was around 1 km. from the police station and they reached there at around 10:45 AM. The doctor treated the deceased from 11:00 AM to 4:00 PM and PW-1 could not explain as to what treatment was given but stated that he and Deena were present in the hospital. PW-1 stated that the deceased was conscious from 11:00 AM till 3:30 PM and was speaking but about 3:30 PM he stopped speaking and then doctors made a lot of efforts to save him. The deceased could not be taken to the District Hospital as he had died.

13. On further confrontation, PW-1 admitted that apart from two accused persons there was no other heir of deceased Dhorha and stated that he had no idea as to whether deceased would get the property after conviction. He further stated that he was doing pairvi of the case and engaged a counsel and he was not aware as to whether the accused would be convicted. The suggestion that he had falsely implicated the accused persons in order to grab the field of Dhorha or to get his name mutated on the record was categorically denied by PW-1. The suggestion that he had sown the field of Dhorha was also denied and it was categorically stated that the field was now Parti (barren). The suggestion that he had planned murder of his brother Dhorha in the night in order to grab his landed property and house and falsely implicated the accused persons (both his sons) for that reason, was categorically denied by PW-1. The suggestion that he ensured the death of Dhorha by managing wrong treatment in the hospital was also denied. The suggestion that the injury reports were fabricated at his instance in order to cover up the wrong treatment given by the doctor was further denied by PW-1. PW-1 had denied the suggestion that he had given wrong statement and that he did not witness the incident.

14. Before proceeding further, we may record that appellant Siri Harijan had died and the appeal on his behalf has been abated. Only appellant Sripat Harijan is before us who has been lodged in jail on 2.12.2021 in execution of the non-bailable warrant issued by this Court.

15. It is argued by the learned counsel for the appellant that it was a case of false implication of the accused persons/appellants herein and the first informant was instrumental in it. The submission is that the deceased was residing with the first informant who was his brother as he had separated from his two sons was admitted by the first informant in his deposition. The agricultural field of the deceased was in his possession and he was ploughing the field after the incident. The dispute between the accused (sons) and deceased (father) was about agricultural field which would have gone to the share of two sons after the death of the deceased. However, in order to grab the landed property of the deceased not only the agricultural field but the house occupied by the appellants, the first informant, brother of the deceased, hatched the conspiracy in which he got the deceased murdered and managed to put his sons behind the jail. It was argued that it was admitted by the informant that the agricultural field of the deceased was in his possession after the incident and the Wheat

crop sown by the deceased was harvested by the informant.

16. It was further argued that in any case, the injuries found on the person of the deceased were mostly simple in nature and there were suspected fractures on injury nos. 2, 3 and 4 which was never ascertained as no X-ray was done. The doctor at P.H.C. namely PW-3 admitted that he though had referred the deceased to the District Hospital, Ghazipur which was about 25 kms. from P.H.C., Mardah but the deceased was never taken to the District Hospital. It is, thus, clear that the deceased had died because he could not get proper and timely medical intervention. The act of the informant in taking the deceased to the police station rather than taking him straight to the hospital also added to the worsening condition of the deceased. It is admitted by the informant that it took about one hour to take the deceased to the hospital to get even first aid and in the intervening period, the deceased himself narrated the incident to the Head Moharrir at the police station.

17. The submission is that from the statement of the informant and the doctor (PW-3), it is evident that the deceased was conscious and speaking throughout, till he had died at about 3:45 PM. Looking to the nature of the injuries and turn of events after the injuries were caused to the deceased, it is evident that the injuries were not fatal in nature. The deceased had succumbed to the injuries only on account of the delay in getting the first aid and lack of proper treatment at the P.H.C. Mardah. It was then submitted that even in the report dictated by the deceased, he only mentioned it to be a case of assault by Lathi and the Non-cognizable report was lodged under Section 323/504 IPC, accordingly.

It was, thus, argued by the learned counsel for the appellant that the conviction of the surviving appellant Sripat Harijan for the offence under Section 302 IPC with the aid of Section 34 IPC is too harsh. From any angle, the offence committed by the appellant Sripat Harijan does not fall beyond the scope of the offence under Section 304 Part II, i.e. of causing injury with the knowledge that it was likely to cause death but without any intention to cause death.

The contention is that the conviction of the appellant under Section 302 IPC is a result of misappreciation of the evidence on record. The appellant had suffered incarceration of more than two years as he also remained in jail for some time during the course of trial. It was contended that the appellants is entitled to be released from jail by condoning his period of sentence to the period undergone by converting the conviction from Section 302 IPC to Section 304 Part II IPC.

18. Learned A.G.A., on the other hand, vehemently argued that the facts of the present case would bring it under Section 300 "thirdly' as it is proved from the record that the accused persons attacked the deceased with an intention to inflict such bodily injury which in the ordinary course of nature would cause death. As all four elements of Section 300, i.e. the presence of a bodily injury, the nature of the injury being fatal, the intention of the accused to inflict that particular bodily injury and further that the injuries were of the type which were sufficient to cause death in the ordinary course of nature, were present and established by the prosecution, the offence is "murder' under Section 300 "thirdly'. It does not matter that there was no intention to cause death. It does not

matter that there was no intention even to cause an injury of a kind that was sufficient to cause death in the ordinary course of nature. It does not even matter that there is no knowledge that the act of that kind will be likely to cause death. It is argued that once the intention to cause bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question remains whether the injury was sufficient in the ordinary course of nature to cause death.

Reliance is placed on the decision of the Apex Court in the case of **Virsa Singh vs. State of Punjab1** to argue that looking to the nature of injuries and the turn of events thereafter, the conviction of appellant Sripat Harijan for the offence under Section 302 with the aid of Section 34 IPC is perfectly justified. No interference may be made in the decision of the trial court in this regard.

19. As regards, the submission of the learned counsel for the appellant that it was a case of false implication of the appellant, it was argued by the learned A.G.A. that there is an eye-witness account and the presence of eye-witness on the spot was natural. The place of the incident was proved by the eye-witness as also in the enquiry made by the Investigating Officer. No contrary suggestion could be given to any of the witnesses of making a false investigation.

It was further argued that the contention of the learned counsel for the appellant of false implication at the hands of the informant is hypothetical, inasmuch as, even after death and conviction of two sons of the deceased, his landed property and house of the accused could not have gone in the hands of the informant. As both the sons of the deceased were alive, by mere implication of them in the murder of their father, they would not be denuded of the landed property of their father. It has come on record that apart from two sons, there was no other heir of the deceased and in any case, the landed property and the house would remain in the name of the accused persons, being sons of the deceased. In any case, the informant could not have derived any benefit from the death of his brother. Even otherwise, the deceased was living with his brother, the informant for a period of more than two years before the date of the incident. No evidence could be brought by the accused person for drawing any adverse inference against the informant of planning murder of his brother and false implication of the accused persons.

20. Having heard learned counsels for the parties and perused the record, as regards the place of the occurrence and the manner in which the incident had occurred, they stood proved with the statement of the informant, formal witnesses and material circumstances brought on record. The presence of eye-witness (PW-1) on the spot cannot be doubted as the deceased was residing with the informant/eye-witness. The time of the incident and the reason for presence of the informant at the place of the incident presents a natural picture. The informant had categorically stated that both sons of the deceased were annoyed with him and thrown the deceased out of his house. The deceased, thereafter, was living with the informant (PW-1) and the agricultural property was in the possession of the deceased. It was being sown by the deceased who was physically fit to look after his field. Both the sons were fighting for the agricultural field and the deceased had denied to give it to his sons. When the

sons were fighting with him, the deceased told them that they would get the field only after his death. A day prior to the incident, both the sons fought with their father (the deceased) but the said incident did not aggravate on account of the intervention of villagers. As it was an incident of fight between father and sons, no report was lodged. It is proved from the record that the information of the incident in question was given by the deceased himself who was injured and conscious at the time when the non-cognizable report was lodged under Section 323/504 IPC. The Head Moharrir (PW-4) had proved that he himself scribed the report on the oral statement of the deceased (injured). The deceased had named his two sons Siri Harijan and Sripat Harijan being the assailants and categorically stated that he was hit by Lathi and the reason for assault was the demand of share in the land by his sons. The report dictated by the injured/deceased itself shows that his sons were saying at the time of assaulting him that they would beat him more if he would not give them their shares. The deceased could be saved as many people reached at the spot. No contrary suggestion could be given to the Head Moharrir and the report lodged by the injured/deceased was proved.

21. In the above facts and circumstances of the case, the contention of the learned counsel for the appellant that it was a case of false implication of the appellants at the hands of the informant, brother of the deceased, is liable to be turned down. Once it is proved that the report was dictated by the injured himself and scribed by the Head Moharrir in the same language as was dictated to him, it cannot be said to be a false implication of the accused persons at the instance of the informant, by any stretch of imagination. There is no answer to the question as to why father would falsely implicate his two sons if he was injured by some stranger allegedly hired by his brother. It is not the case of the defence that the informant had himself attacked the deceased or injured him.

22. As regards the second submission with regard to the conviction of the appellant Sripat Harijan under Section 302 readwith Section 34 IPC, we are required to examine as to whether the act of the appellant in causing death of the deceased (his father) would amount to "murder' within the meaning of Section 300 IPC or it is a case of "culpable homicide which will not amount to murder' attracting punishment under Section 304 IPC. Further question is as to in which part of Section 304 IPC, the offence in question would be punishable, in case, the Court reaches at the conclusion that it was a case of 'culpable homicide not amounting to murder' and not 'murder'.

23. In order to ascertain the same, we are required to go through the legal principles governing the distinction between the provisions under Sections 300 and 302 of the Code on the one hand and Section 304 Part I and Part II of the Code on the other. Section 299 of the Code which deals with the definition of culpable homicide is also to be taken note of.

Sections 299 and 300 of the Indian Penal Code deal with the definitions of 'culpable homicide' and 'murder'; respectively. In terms of Section 299, 'culpable homicide' is described as an act of causing death:- (i) with the intention of causing death, or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge

that such an act is likely to cause death. As is clear from the reading of this provision, the first part of it emphasises on the expression "intention' while the latter upon "knowledge'. As has been noted in a catena of decisions, both these words denote positive mental attitudes of different degrees. The mental element in "culpable homicide', i.e. the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the above three stated manners, it would be "culpable homicide'.

Section 300, however, deals with "murder'. Though there is no clear definition of "murder' in Section 300 of the Code but as has been held by the Apex Court and reiterated in Rampal Singh vs. State of Uttar Pradesh2, "culpable homicide' is the genus and "murder' is its species and all "murders' are "culpable homicides' but all "culpable homicides' are not "murders'.

24. Another classification that emerges from the Code is "culpable homicide not amounting to murder", punishable under Section 304 of the Code. There are decisions which also deal with the fine line of distinction between the cases falling under Section 304, Part I and Part II.

25. Dealing with a matter, wherein the question for consideration was whether the offence established by the prosecution against the appellant therein was "murder" or "culpable homicide not amounting to murder", the Apex Court in **Vineet Kumar Chauhan vs. State of Uttar Pradesh3** considered its earlier decision in the **State of Andhra Pradesh Vs. Rayavarapu Punnayya and Another4,** wherein the then Justice R.S. Sarkaria brought out the points of distinction between the two offences under Sections 299 and 300 IPC, reiterating the law laid down in **Virsa Singh Vs. State of Punjab5 and Rajwant Singh Vs. State of Kerala6**. It was held therein that whenever a Court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder"; on the facts of a case, it will be convenient for it to approach the problem in three stages:- (i) the question to be considered, at the first stage, would be whether the accused has done an act by doing which he has caused the death of another; (ii) proof of such connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 IPC is reached; (iii) the third stage is to determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable.

Further, if this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304 IPC. It was, however, clarified therein that these were only the broad guidelines to facilitate the task of the Court and not cast iron imperative.

26. In **Aradadi Ramudu alias Aggiramudu vs. State through Inspector of Police, Yanam7,** the question was for modification of sentence from Section 302 to Section 304 Part II. While answering the same, the Apex Court had considered the above noted decisions in **Virsa Singh** (supra) as also other decisions in line namely **State of U.P. v. Indrajeet8; Satish Narayan Sawant vs. State of Goa9 and Arun Raj vs. Union of India10** to note that for modification of sentence from Section 302 to Section 304 Part II, not only should there be an absence of the intention to cause death, but also an absence of intention to cause such bodily injury that in the ordinary course of things was likely to cause death. [Reference **Paragraph 16**]

Noticing the above noted decisions, in **Rampal Singh** (supra) the Apex Court had considered the distinction between the terms "murder" and "culpable homicide not amounting to murder". The observation in **State of Andhra Pradesh Vs. Rayavarapu Punnayya** (supra) was noted in paragraph '13' of **Rampal Singh** (supra) as under:-

"13. In the case of State of A.P. v. Rayavarapu Punnayya, this Court while clarifying the distinction between these two terms and their consequences, held as under: -

"12. In the scheme of the Penal Code, "culpable homicide' is genus and "murder' its species. All "murder' is "culpable homicide' but not vice versa. Speaking generally, ..."culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called "culpable homicide of the first degree'. This is the greatest form of culpable homicide, which is defined in Section 300 as "murder'. The second may be termed as "culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304."

The guidelines laid down in its earlier decision in **Phulia Tudu vs. State of Bihar11** had been noted therein to reiterate that the safest way of approach to the interpretation and application of these provisions (Sections 299 and 300) is to keep in focus the key words used in the various clauses of these sections. In paragraph '17', it was noted that :-

"17. Section 300 of the Code states what kind of acts, when done with the intention of causing death or bodily injury as the offender knows to be likely to cause death or causing bodily injury to any person, which is sufficient in the ordinary course of nature to cause death or the person causing injury knows that it is so imminently dangerous that it must in all probability cause death, would amount to "murder". It is also "murder" when such an act is committed, without any excuse for incurring the risk of causing death or such bodily injury. The Section also prescribes the exceptions to "culpable homicide amounting to murder". The Explanations spell out the elements which need to be satisfied for application of such exceptions, like an act done in the heat of passion and without pre- mediation. Where the offender whilst being deprived of the power of self-

control by grave and sudden provocation causes the death of the person who has caused the provocation or causes the death of any other person by mistake or accident, provided such provocation was not at the behest of the offender himself, "culpable homicide would not amount to murder". This Exception itself has three limitations. All these are questions of facts and would have to be determined in the facts and circumstances of a given case."

It was observed in paragraph '21' in **Rampal Singh** (supra) that Sections 302 and 304 of the Code are primarily the punitive provisions. An analysis of these two Sections must be done having regard to what is common to the offences and what is special to each one of them. The offence of culpable homicide is, thus, an offence which may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 of the Code. Section 304 deals with cases not covered by Section 302 and it divides the offence into two distinct classes, i.e. (a) those in which the death is intentionally caused; and (b) those in which the death is caused unintentionally but knowingly. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional and the maximum sentence only extends to imprisonment for 10 years. The first clause of Section 304 includes only those cases in which offence is really "murder", but mitigated by the presence of circumstances recognized in the Exceptions to Section 300 of the Code, the second clause deals only with the cases in which the accused has no intention of injuring anyone in particular.

In paragraph '22' **Rampal Singh** (supra), it was observed that where the act is done with the clear intention to kill the other person, it will be a murder within the meaning of Section 300 of the Code and punishable under Section 302 of the Code but where the act is done on grave and sudden provocation which is not sought or voluntarily provoked by the offender himself, the offence would fall under the Exceptions to Section 300 of the Code and is punishable under Section 304 of the Code. Another fine tool which would help in determining such matters is the extent of brutality or cruelty with which such an offence is committed. (emphasis added)

It was, thus, held therein that the distinction between two parts of Section 304 (Part I and Part II) is evident from the very language of this Section. While Part I is founded on the intention of causing the act by which the death is caused, the other is attracted when the act is done without any intention but with the knowledge that the act is likely to cause death.

It was further observed therein that it is neither advisable nor possible to state any straight-jacket formula that would be universally applicable to all cases for such determination. Every case essentially must be decided on its own merit. The Court has to perform the very delicate function of applying the provisions of the Code to the facts of the case with the clear demarcation as to under what category of cases, the case at hand falls and accordingly, punish the accused.

27. Referring to an earlier decision in **Mohinder Pal Jolly vs. State of Punjab12,** it was noted in **Rampal Singh** (supra) that the distinction between two parts of Section 304 has been stated with some clarity therein which reads as under:-

"24. A Bench of this Court in the case of Mohinder Pal Jolly v. State of Punjab [1979 AIR SC 577], stating this distinction with some clarity, held as under :

"11. A question arises whether the appellant was guilty under Part I of Section 304 or Part II. If the accused commits an act while exceeding the right of private defence by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death then he would be guilty under Part I. On the other hand if before the application of any of the Exceptions of Section 300 it is found that he was guilty of murder within the meaning of clause "fourthly", then no question of such intention arises and only the knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injuries as was likely to cause death. There does not seem to be any escape from the position, therefore, that the appellant could be convicted only under Part II of Section 304 and not Part I."

As a guideline as to how the classification of an offence into either Part of Section 304 would be made, it was held in paragraph '25' as under:-

"25. .....xxxxxxxxxxx.....This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of pre-meditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished. This can also be decided from another point of view, i.e., by applying the "principle of exclusion'. This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminary finding if the accused had committed an offence punishable under the substantive provisions of Section 302 of the Code, that is, "culpable homicide amounting to murder'. Then secondly, it may proceed to examine if the case fell in any of the exceptions detailed in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law.....xxxxx....."

The following observations in paragraph '16' of the decision in **Aradadi Ramudu alias Aggiramudu** (supra) have been quoted in para '34' to state that while answering the question for modification of sentence from Section 302 of the Code to Part II of Section 304 of the Code, it has to be kept in mind that:-

"not only should there be an absence of the intention to cause death, but also an absence of intention to cause such bodily injury that in the ordinary course of things is likely to cause death."

28. Keeping in mind the guidelines laid down by the Apex Court, in the facts of the present case, the first step in analysis, would be to examine as to whether the appellant had committed an offence punishable under the substantive provisions of Section 302 of the Code, i.e. "culpable homicide amounting to murder".

29. To return a finding on the issue, we have to determine as to whether the act by which the death is caused would fall in any of the four Clauses detailed in Section 300 of the Code.

30. Proceeding in this way in the facts of the instant case, it may be noted that both the accused and the deceased were sons and father. Their relationship were sour as the deceased was evicted from his own house by his two sons. The house in which two sons were living was in the Chak (agricultural field) which was in the possession of the deceased. It has come on record that the house in which two sons were living was in the Abadi which was ancestral and after eviction from his own house, the deceased was living with his brother, the informant herein. The deceased was fit enough to look after his field and he was managing his field without the assistance of his brother. It has further come on record that both the sons were annoyed and demanding their shares in the field which also seem to be an ancestral property. It has come in the evidence of PW-1 (brother of the deceased) that both the sons were living in one house and the fields of two brothers namely the deceased and the informant were adjacent. The house which was in occupation of the informant and in which the deceased was living, was in the possession of the informant since the time of his grandfather. It was stated by PW-1 that in the Abadi in which they were living, their ancestors were also living and after death of their ancestors, it came in their occupation. It has come in the evidence of PW-1 that he was having three houses in the village and both the accused persons were living in one house belonging to the deceased which was built about 6-7 years prior to the incident. From the statement of PW-1, it seems that the landed property and the Abadi wherein the houses were built by two brothers belonged to their ancestors. The accused persons were demanding their shares in the agricultural property which was denied by their father namely the deceased and that was the reason for their annoyance.

31. A day before the incident, a fight broke between two warring parties (father and sons) but with the intervention of villagers, no untoward incident could occur. However, in the early morning on the next day both the brothers (sons of the deceased) went together to the place where the deceased used to go to defecate and hit him by Lathis while saying that they would beat him more if he would not give their shares in the landed property.

32. The injuries found on the person of the deceased as indicated in the injury report prepared by PW-3 (doctor) show that the deceased was beaten by Lathis all over his body. PW-1 has stated that both the sons namely the accused persons were beating the deceased from all four sides and injuries were caused to the deceased on his chest, back, hands, legs and a portion of skull was also lacerated. The injury no. 1, found on the right side of the head of the deceased seem to be a simple injury. The injury no. 2 on the upper arm of the deceased was also found to be simple. However, the injury no. 3 on the back side of chest, five in number, proved fatal. The remaining injuries on the leg, hip, and buttock were also simple in nature having been caused by Lathis. It was stated by PW-3 (doctor) that five injuries on the chest of the deceased, multiple contusions as indicated in injury no. 3, could be seen from the naked eyes and the same situation was about injury no. 3. As per the doctor's report, all injury nos. 1, 5, 6 and 7 were

simple and injury nos. 2, 3 and 4 were suspected fractures.

33. The doctor (PW-3) who himself treated the deceased stated that the deceased was brought to the hospital at about 11:00 AM and looking to the nature of injuries, he had suspected fractures and suggested X-ray and referred the deceased to the District Hospital, Ghazipur. However, no reason could be assigned by PW-3, the doctor who had treated the deceased as to why after reference the deceased was treated in the Primary Health Centre itself where there was no facility even of X-ray. No explanation could be offered as to why the deceased was not taken to the District Hospital, Ghazipur. PW-1, the informant also could not give any reply when confronted on this aspect. PW-3, the doctor who had treated the deceased at the hospital stated that the deceased was in a serious condition but was conscious and admitted in the P.H.C. even after reference to the District Hospital, Ghazipur, and his treatment continued there till the evening.

The explanation offered by the doctor (PW-3) on confrontation that the deceased was not in a condition to be transported to the District Hospital, Ghazipur does not seem to be convincing for the reason that the deceased himself went to the police station to lodge the report and then was taken to the hospital. PW-1 stated that the deceased was speaking till the evening while he was being treated in the P.H.C., Mardah. The postmortem report indicated that the deceased had consumed Milk sometime before he had died. The condition of the deceased could not be said to be such as is clear from the record that he could not have been transported to the District Hospital, Ghazipur. Further from the statement of the informant (PW-1), it is evident that the deceased was put on a Cot and was taken to the police station instead of a hospital. It took about one hour to them to reach at the hospital that too at a place where the deceased could not get proper treatment. It was admitted by PW-3 that emergency blood was not available in the P.H.C. From the turn of events, the manner in which, the deceased was treated after he had suffered injuries and died on the same day at about 4:00 PM, it is evident that the adequate medical treatment could not be provided to the deceased. The reason for the same could not be known to us nor can be discerned from the record but it seems to us that had the deceased got the proper treatment on admission in the District Hospital, Ghazipur, his life could have been saved.

34. Further from the nature of the injuries and the manner in which the deceased was assaulted by his two sons, it seems that both the sons were assaulting their father not with an intention to cause his death but to injure him being furious by the fact that the deceased was not giving them shares in the agricultural land. Both the sons were arguing and fighting with the deceased for their shares in the landed property which was an ancestral property. It is established that a fight had also broke between the father and his two sons and both sides were carrying Lathis when fighting in the field on the previous day, as per statement of PW-1. It is though proved by the prosecution that both the sons were carrying Lathis and they had assaulted their father at the place where he went to defecate and that the deceased who had no weapon in his hand was beaten mercilessly but merely from the nature of the injuries and the manner in which the assault took

place, it could not be proved by the prosecution that the sons had an intention to cause death or such bodily injury which they knew would cause the death of their father being sufficient in the ordinary course of nature to cause death. The treating doctor PW-3 had categorically stated that the deceased was though serious but conscious and as such he did not record his dying declaration. The deceased was referred to the District Hospital to get a better treatment. From the postmortem report, it seems that the internal organs of the deceased got damaged because of breaking of six ribs due to injuries on his chest and as per the postmortem doctor's report, the said injury was sufficient to cause death.

35. However, on a careful analysis of the above circumstances, it is proved that the intention of the appellant was though to cause bodily injury to their father but there was no intention to cause his death or such bodily injury as they knew would cause the death of their father being sufficient in the ordinary course of nature to cause his death. Had the accused intended to cause murder of their father, they could have assaulted him with Lathis on the head and barely two blows of lathi on head would have been sufficient to cause the death of the deceased on the spot.

36. The Court, thus, reaches at the answer to the first question that the appellant had not committed an offence within the meaning of Section 300 IPC, i.e. "culpable homicide amounting to murder" which is punishable under Section 302 IPC. The four elements of Section 300 IPC are not proved from the circumstances discussed above. The incident had occurred in a fit of anger and two sons had assaulted their father in desperation to get their share in the landed property which was denied to them by their father. The record further indicates that the only agricultural land of the family was in possession of the father, the deceased himself. The offence committed by the appellant, thus, would fall within the meaning of "culpable homicide not amounting to murder" under Section 304 of the Code.

37. A further question then would be whether the surviving appellant is guilty under Part I or Part II of Section 304.

38. As is evident from the statement of the injured in the written report, his two sons while giving blows of Lathi were saying that they would beat him more if their shares were not given by the deceased. From the injury report and the statement of PW-1, who was the eye-witness, it is evident that both the sons were freely assaulting their father by Lathis together but they had not aimed to cause his death. Out of seven injuries, barring one namely injury no. 3 all others were simple injuries. The injuries sustained by the deceased on his head were also simple. The deceased was conscious and speaking till he had succumbed to his injuries as he could not get proper treatment in the P.H.C., Mardah which was not equipped to deal with such injuries.

39. Considering the weapon used, the place and time of the incident and the nature of the injuries, it is found that the surviving appellant had committed the offence with his brother in a premeditated plan to cause injuries to his father and the act of the appellant cannot be said to have been done by mistake or accident but with the clear intent to cause bodily injury, which was likely to cause the death of the deceased. It is a case where there may be

an absence of the intention to cause death or such bodily injury which was sufficient in the ordinary course of nature to cause death, but it is not a case where there was also an absence of intention to cause such bodily injury as was likely to cause death in the ordinary course of thing.

40. In view of the above discussion, though we find that the surviving appellant Sripat Harijan is not guilty of "murder' under Section 302 IPC but he is guilty of committing an offence under Section 304 Part I of the Code "culpable homicide not amounting to murder" punishable in the First Part (Part I) of Section 304 of the Code.

41. We, therefore, do not accept the contentions of the learned counsel for the surviving appellant that the offence committed by the surviving appellant would fall in the Second Part (Part II) of Section 304 IPC.

42. Having held that the surviving appellant Sripat Harijan is guilty of the offence under Section 304 Part I, we partially accept this appeal and alter the offence from that of Section 302 of the Code to one under Section 304 Part-I of the Indian Penal code.

Further giving due consideration to the facts and circumstances of the present case, we find that the sentence of ten years rigorous imprisonment would be adequate for the offence of which the appellant has been held guilty.

We, therefore, award a sentence of ten years rigorous imprisonment to the appellant.

The judgment under appeal is modified in the above terms.

The appellant Sripal Harijan is in jail.

According to the counsel for the appellant, the period of incarceration of the appellant is about more than two years as he remained in jail during the course of trial and further has been lodged in jail on 2.12.2021 in execution of the non-bailable warrant issued by this Court.

Be that as it may, the appellant Sripat Harijan shall serve out the sentence awarded above.

The appeal is **allowed in part.**

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

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

(2022) 9 ILRA 1488
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Appeal No. 1935 of 1992

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

Counsel for the Appellant:
Sri S.R. Verma, Ms. Aarushi Khare (A.C.)

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

Criminal Law - Criminal Procedure Code, 1973 - Sections 222, 313 & 374(2) - Indian Penal Code, 1860 - Sections - 324, 354, 376 & 511 - Evidence Act, 1872 - Sections – 134 & 145 - Appeal – against conviction and sentence – FIR - informant alleged that accused had committed the diabolic offence of severely cutting the private parts of his minor daughter - in defence, plea has been taken about some discrepancies and contradictions are in the St.ment of witnesses - - Appreciation of evidence - it is settled law that in the evidence of untutored witnesses such contradictions are bound to creep in - since, since witnesses has not be examined in court immediately after the offence and this case witnesses were examined after about two years therefore some trivial and minor contradiction are natural - further, St.ment of witnesses including medical evidence proved the case beyond any reasonable doubt that, offence committed by the appellant by mutilating the private part of the minor girl cannot be termed as an act of a person of normal virtues since said offence has been committed out of severe sexual lust and sadistic approach - hence, appellant does not deserve any kind of leniency - lower court rightly convicted and sentenced - impugned judgment is confirmed - appeal is dismissed. (Para 30, 35, 37, 38)

Appeal dismissed. (E-11)

List of Cases cited:

1. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj., (1983) 3 SCC 217

2. Balu Sonba Shinde Vs St. of Mah. [(2002) 7 SCC 543 : 2003 SCC (Cri) 112]

3. Chacko @ Aniyan Kunju & ors. Vs St. of Kerala, (2004) 12 SCC 269

4. C. Muniappan Vs St. of T.N., (2010) 9 SCC 567

5. Gagan Kanojia Vs St. of Punj. [(2006) 13 SCC 516 : (2008) 1 SCC (Cri) 109]

6. Radha Mohan Singh Vs St. of U.P. [(2006) 2 SCC 450 : (2006) 1 SCC (Cri) 661]

7. Rameshwar Vs St. of Raj., AIR 1952 SC 54

8. St. of U.P. Vs Ramesh Prasad Misra [(1996) 10 SCC 360 : 1996 SCC (Cri) 1278]

9. Sarvesh Narain Shukla Vs Daroga Singh [(2007) 13 SCC 360 : (2009) 1 SCC (Cri) 188]

10. Subbu Singh Vs St. [(2009) 6 SCC 462 : (2009) 2 SCC (Cri) 1106]

11. St. Vs Ishrat, Sessions Trial No.175 of 1990

12. Shiv Ram& anr. Vs St. of U.P., (1998) 1 SCC 149

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Ms. Aarushi Khare, learned Amicus Curiae for the appellant and Sri Vinod Kumar Singh Parmar, learned AGA for the State.

2. Present Criminal Appeal under Section 374(2) of the Cr.P.C. has been preferred by accused-appellant Ishrat against the judgment and order dated 20.10.1992 passed by Sri S.C. Nigam, Seventh Additional District and Sessions Judge, Kanpur Nagar in Sessions Trial No.175 of 1990 (State Vs. Ishrat), Police Station- Chamanganj, District- Kanpur Nagar, whereby accused-appellant was convicted u/s 324 IPC and sentenced to three years rigorous imprisonment. He was also convicted u/s 354 IPC and sentenced to two years rigorous imprisonment. Both sentences were to run separately.

PROSECUTION STORY:

3. Prosecution story, in nutshell, as unfolded from written report dated 29.11.1988 (Ex.Ka-1) is that informant Shaukat Ali (PW-1) filed written report (Ex.Ka-1) transcribed by Mohd. Aslam, mentioning therein that on 29.11.1988

between 01:00 PM to 03:00 PM, his minor daughter aged about 4-5 years had gone to the house of one of the neighbours to play. On the same day at about 03:00 PM, some people of the locality were stated to have brought his minor daughter in a blood soaked condition from the field and informed that some unknown person had assaulted her private parts by a blade. The victim was taken to the hospital for treatment. It has also been stated in the FIR that blood stained blade is still lying in the field.

4. On the basis of written report (Ex.Ka-1), Chik FIR (Ex.Ka-5) was registered on 29.11.1988 at 09:15 PM as Case Crime No.274 of 1988, under Section 324 IPC against unknown person. Thereafter investigation was initiated.

5. The investigation was taken up by the Investigating Officer Mehfooz Ali, Sub-Inspector who after recording the statement of the witnesses, preparing site plan, taking in possession the blood stained blade and other materials, arrested the appellant and prepared the arrest memo dated 1.12.1988, thereafter submitted the charge-sheet against him on 16.12.1988.

TRIAL PROCEEDINGS:

6. Charge against the appellant was framed by the Trial Court on 22.6.1990 u/s 324, 376/511 IPC. The appellant had claimed himself to be juvenile at the time of offence but after the radiological examination, he was found to be major. The trial was proceeded as such.

7. In order to prove its case, the prosecution has examined ten witnesses i.e. PW-1 Shaukat Ali (Informant), PW-2 Victim, PW-3 Dr. Sushma Singh, PW-4 Ram Kishore, PW-5 Dr. H.N. Bahadur, PW-6 Dr. Ashok Upadhyay, PW-7 Mohd. Javed, PW-8 Gulshan, PW-9 Shakeela and PW-10 Mahfooj Ali. The Court was pleased to examine Dr. Ram Babu as CW-1 to prove the ossification test report of the appellant wherein the age of the appellant was found above 18 years.

8. PW-1 informant is the father of the victim and has corroborated the prosecution story. He has stated that the appellant had committed the diabolic offence of severely cutting the private parts of his minor daughter after having attempted to rape her. The witness was cross-examined by the counsel for the appellant wherein he has stated that after lodging of the FIR, he was informed by the victim that it was the appellant who had committed the said crime to her as by the time of lodging of the FIR, she was not in a condition to speak. He has proved his written report as Ex.Ka-1.

9. PW-2 is the victim who has stated that the appellant had taken her behind the bushes in the field by luring her to give her a toffee where she was disrobed and her private part was cut by him with a blade. She has also stated in the examination-in-chief that she had told about the name of the appellant at the hospital. She had identified the appellant in the dock. Nothing material could be extracted from her in cross-examination by the defence counsel.

10. PW-3 is Dr. Sushma Singh who has stated that the victim was in a state of shock at the time of her medical examination and was not even able to speak. Her blood pressure was found 180-50 mm Hg. Her internal examination was conducted under general anesthesia. She had observed that her private

part was badly damaged and tear were present of size 06mm x 5mm and 08mm x .5mm. No spermatozoa were found by the pathologist in the vaginal smear. Dr. Singh has further opined that there is a possibility of sexual intercourse having been committed with the victim. She has proved the medical examination report as Ex.Ka-2. As per the Ossification test, the age of the victim was found to be four years. She has even confirmed the time of the offence. Dr. Sushma Singh has further stated that due to the serious condition of the victim, she had consulted Senior Dr. Negi and Surgeon Dr. Bahadur and the medical examination of the victim was conducted by her in their presence.

11. PW-4 Ram Kishore is the formal witness. He has proved the FIR as Ex.Ka-5 and the GD of the institution of the FIR as Ex.Ka-6.

12. PW-5 Dr. H.N. Bahadur, Senior Consultant who has proved the bed head ticket of the victim as Ex.Ka-7. The victim had undergone treatment from 29.11.1988 to 23.12.1988.

13. PW-6 Dr. Ashok Upadhyay who was the first person to examine the victim on 29.11.1988 at about 03:45 PM and found following injuries on her body.

"1. Horizontal incised wound 6cm x 1cm x muscle deep present on the pubic region 6cm below the umbilicus fresh bleeding present.

2. Horizontal incised wound 8cm x 1cm x muscle deep present half cm below injury no. One. Fresh bleeding present.

3. Horizontal incised wound 10cm x 2cm x muscle deep present One & half cm below injury no. Two.

4. Multiple incised wounds over right labia majora region on its upper surface & by the side ranging in size from 4cm x ¼cm to 1cm x ¼cm in size depth not probed. Fresh bleeding present.

5. Multiple incised wounds over left labia region on its upper surface & by its side ranging in size from 2cm x ¼cm to ½cm x ¼cm depth not probed. Fresh bleeding present.

6. Multiple small incised wounds present all along the margin of right labia ranging in size from ¼cm x ¼cm to ½cm x ¼cm x depth not probed. Fresh bleeding present.

7. Multiple small incised wounds present all along the margin of left labia ranging in size from ¼cm x ¼cm to ½cm x ¼cm x depth not probed. Fresh bleeding present.

<u>Opinion</u>

All injuries are fresh caused by sharp edged object for ascertaining the nature. All injuries kept under observation. Patient admitted & referred to E.M.O. Dufferin Hospital for internal examination of private parts and necessary action."

14. He opined that the said injuries could have been sustained by the victim on 29.11.1988 between 1 to 2 PM.

15. PW-7 Mohd. Javed is the independent witness. He has stated in his examination-in-chief that he has not seen the occurrence but had heard of it on 29.11.1988 at about 05:00 PM. He has not supported the prosecution story and thus, was declared hostile by the public prosecutor and cross-examined.

16. PW-8 Gulshan is another independent witness who had also resiled from his statement recorded by the Investigating Officer and has not supported the prosecution version.

17. PW-9 is the mother of the victim and has stated that about 15 days before the occurrence, an altercation with the appellant had occurred over watching television in her house. She has also corroborated the statement of the victim.

18. PW-10 Mehfooj Ali is the Investigating Officer who has proved recovery memo of blood stained blade recovered from the place of occurrence as Ex.Ka-8. He has proved the memo blood stained sand and simple sand as Ex.Ka-9. Ex.Ka-10 is the letter for medical examination of victim wherein Doctor has opined that the victim was found in an unconscious state. He has further stated that the victim was not able to speak at the time of her admission on 29.11.1988. Site plan has been proved as Ex.Ka-11. Ex.Ka-12 is the memo of blood stained frock of the victim. He has also proved the recovery memo of blood stained frock of the victim as Ex.Ka-13. The charge-sheet has been proved as Ex.Ka-14.

19. Thereafter, the statement of accused-appellant under Section 313 Cr.P.C. was recorded. He has stated that the prosecution story is false. Appellant-accused Ishrat claimed that he has been falsely implicated in the case to get the house vacated.

20. On appreciation of evidence available before Trial Court and after hearing parties, learned Sessions Judge convicted and sentenced accused-appellant, Ishrat, as stated above, by judgment and order impugned in this appeal.

POINTS OF DETERMINATION:

i) Whether the appellant had committed the said offence of assault causing grievous hurt by dangerous weapon to the victim on 29.11.1988 between 1 PM to 3 PM?

ii) Whether the appellant had caused any assault or criminal force to the victim with an intent to outrage her modesty?

RIVAL CONTENTIONS:

21. Ms. Aarushi Khare, learned Amicus Curiae appearing for the appellant has argued that the appellant has been falsely implicated in the present case. The FIR is delayed by about six hours and there is no explanation of the said delay caused. The appellant is not named in the FIR. During investigation, his name has come up in the statement of the victim, informant and other witnesses. Learned Amicus Curiae has further stated that there are several contradictions in the statements of the witnesses. She has also stated that as per the statement of the mother of the victim PW-9, the victim had come to the house of the appellant walking although she has denied the said fact later on during further cross-examination. She has referred to several contradictions in the said statement of the prosecution witnesses, namely, PW-1, PW-2 & PW-9. She has further stated that the blood stained blade and the blood stained frock of the victim has not been seen for chemical examination by the Investigating Officer. This is the serious lacuna in the prosecution story. She has also stated at Bar that the offence is of the year 1988 and much water has flown down the Thames, thus, the appellant is entitled to acquittal. The witnesses are interested witnesses and the said fact stands supported by the statements of appellant

recorded u/s 313 Cr.P.C. The independent witnesses PW-7 and PW-8 have turned hostile. The prosecution story is falsified on account of absence of corroboration. She has also stated that if the court is not inclined in allowing the appeal, the appellant may be released to the period of sentence already undergone.

22. Per contra, Sri Vinod Kumar Singh Parmar, learned AGA has vehemently opposed the criminal appeal on the ground that the victim is a child of tender age of four years. The offence of cutting her private parts with a blade and also attempting to commit rape and outraging the modesty of the victim has categorically been proved by the statement of the PW-1 and PW-2 and has also been corroborated by PW-9 who happens to be the mother of the victim. There are no material contradictions in their statements. The treating Doctors have also categorically corroborated the prosecution story and have even been asked about the alleged time of offence regarding the injuries sustained by the victim which further substantiate the prosecution allegations.

23. Learned AGA has further stated that the FIR was naturally lodged by the appellant as it was his priority to get the victim medically examined as her private part was found mutilated and she was not in a conscious state. The said delay stands explained by the statement of the PW-1. The said fact has also been corroborated by the statement of PW-2 victim and PW-10 Sub-Inspector Mehfooj Ali, the Investigating Officer.

24. Learned AGA has further stated that in the present scenario, no independent witness is ready to depose against another person to face ire of the accused later on in life. To buttress his argument, he has placed much reliance on the judgement of Supreme Court in the case of ***Shiv Ram and Another vs. State of U.P.1,*** and the operative part of para-16 reads as under:-

"16. ..... The witnesses further admitted that many persons had gathered at the place of occurrence, if this be so it was very much necessary for the prosecution to examine some independent witnesses to lend assurance to the credibility of the evidence of these two eyewitnesses. These submissions do not impress us at all. Nowadays it is a common tendency that no outsider would like to get involved in a criminal case much less in the crime of present magnitude and, therefore, it was quite natural that no independent witness would come forward to assist the prosecution. It is well settled that the evidence of witnesses cannot be discredited only on the ground that they are close relatives of the deceased persons. All that is required in such a situation is that the court must scrutinize the evidence of such witnesses with utmost care and caution. The magnitude of the present crime and nature of prosecution evidence has put us on guard to appreciate the evidence of these two eye witnesses with utmost care and caution. We have done this exercise and we are unable to be persuaded to discard the evidence of these two witnesses on the grounds urged before us. The evidence of both these witnesses in our considered view is absolutely straightforward, unblemished and without any infirmity. The first information report which was lodged within four hours, naming all the accused also lends asurance to our conviction that the evidence of these two witnesses is trustworthy and cannot be discarded. The contentions of the learned

counsel for the accused, therefore, stand rejected."

25. Learned AGA has also stated that the prosecution story is itself proved by the statements of PWs-1, 2 and 9 and they cannot be considered as interested witnesses as there is nothing on record to suggest that the appellant has been falsely implicated by the informant.

CONCLUSION:

26. This is one of the most serious and diabolic offence committed against a minor girl of tender age of four years.

27. Coming to the first point for determination, it is proved beyond reasonable doubt by the statements of prosecution witnesses i.e. PW-1 informant, PW-2 victim, PW-3 Dr. Sushma Singh, PW-5 Dr. H.N. Bahadur, PW-6 Dr. Ashok Upadhyay and PW-9 Shakeel, mother of the victim that the appellant has committed the aforesaid heinous offence with the victim of tender age. In the statements of prosecution witnesses, the date, time and motive of offence also stands corroborated. The identification of the appellant in the dock has been done by the PW-2 victim. The witnesses have not been cross-examined on this point by the counsel for the appellant. Even the minor contradictions that had crept up in the statement of the victim, have not been put to the Investigating Officer as per the provision of Section 145 of the Indian Evidence Act, 1872, thus, it also stands proved and unrebutted.

28. Now, I proceed to consider second point for determination which is in regard to commission of any assault or criminal force by the appellant with the victim with an intent to outrage her modesty. The said point has also been proved beyond reasonable doubt by the statements of the victim and the doctors referred above.

29. The learned Trial Court has rightly taken recourse of Section 222 of Cr.P.C. wherein the allegations of commission of rape by the appellant with the victim were not found. Although the internal examination report of the victim supports it. However, the evidence regarding the commission of offence punishable under Section 354 IPC was established by the statement of the victim PW-2 and, therefore, on this count, learned Trial Court has rightly convicted the appellant u/s 354 IPC, although, the charge was framed u/s 376/511 IPC. The accused-appellant deserved harsh punishment for the diabolic offence committed by him which depicts his depraved mental status.

30. Learned Amicus Curiae appearing for the appellant has pointed out certain discrepancies in the statements of the prosecution witnesses. On this count, this Court is of the considered view that it is but natural that minor discrepancies and contradictions may appear in the statement of witnesses. It is a settled law that in the evidence of untutored witnesses such contradictions are bound to creep in. The witnesses have not been examined in Court immediately after the offence. They have been examined after about two years of the occurrence and some trivial and minor contradictions are natural to come up in their statements as they are not bound to possess a photographic memory.

31. The said view has been vented by the Apex Court in ***Bharwada Bhoginbhai***

Hirjibhai Vs. State of Gujarat2, and the relevant paragraphs no.5, 6 & 10 are as under:-

"5. ..... We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Over much importance cannot be attached to minor discrepancies. The reasons are obvious:

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

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

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

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

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.

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

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him- Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

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

....

....

10. Without the fear of making too wide a statements or of overstating the case, it can be said that rarely will a girl or

a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because: (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (S) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

32. It has also been settled by the Apex Court in ***Rameshwar v. State of Rajasthan3***, that corroboration is not the sine qua non for a conviction in a rape case.

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge .....

The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

33. Section 134 of Indian Evidence Act, 1872 provides that it is the quality and not quantity that matters with respect to proving of fact. The provision clearly states that no particular number of witnesses are required to establish a case. In the case herein, the statement of the victim stands corroborated by the medical evidence. In the case of ***Chacko alias Aniyan Kunju***

and Others Vs. State of Kerala4, the Apex Court has discussed in para-7 the parameters of Section 134 of the Indian Evidence Act, 1872 and the same is reproduced hereunder:-

"7. Coming to the question whether on the basis of a solitary evidence conviction can be maintained, a bare reference to Section 134 of the Evidence Act, 1872 (in short "the Evidence Act") would suffice. The provision clearly states that no particular number of witnesses is required to establish the case. Conviction can be based on the testimony of a single witness if he is wholly reliable. Corroboration may be necessary when he is only partially reliable. If the evidence is unblemished and beyond all possible criticism and the court is satisfied that the witness was speaking the truth then on his evidence alone conviction can be maintained. Undisputedly, there were injuries found on the body of the accused persons on medical evidence. That per se cannot be a ground to totally discard the prosecution version. This is a factor which has to be weighed along with other materials to see whether the prosecution version is reliable, cogent and trustworthy. When the case of the prosecution is supported by an eyewitness who is found to be truthful as well, mere non-explanation of the injuries on the accused persons cannot be a foundation for discarding the prosecution version. Additionally, the dying declaration was found to be acceptable."

34. Regarding the argument tendered by the learned Amicus Curiae pertaining to the hostility of the two witnesses i.e. PW-7 and PW-8 in the present case, the statement of hostile witnesses can be discarded and only the part which corroborates the prosecution story has to be considered. The two witnesses have not denied the commissioning of offence, but have only denied having seen it. The Apex Court in the case of C. Muniappan v. State of Tamil Nadu5, has opined as under:-

"81. It is settled legal proposition that:

"6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

82. In State of U.P. v. Ramesh Prasad Misra [(1996) 10 SCC 360 : 1996 SCC (Cri) 1278] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra [(2002) 7 SCC 543 : 2003 SCC (Cri) 112] , Gagan Kanojia v. State of Punjab [(2006) 13 SCC 516 : (2008) 1 SCC (Cri) 109] , Radha Mohan Singh v. State of U.P. [(2006) 2 SCC 450 : (2006) 1 SCC (Cri) 661] , Sarvesh Narain Shukla v. Daroga Singh [(2007) 13 SCC 360 : (2009) 1 SCC (Cri) 188] and Subbu Singh v. State [(2009) 6 SCC 462 : (2009) 2 SCC (Cri) 1106] .

83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as

a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."

35. Considering the overall facts and circumstances of the case, statement of the witnesses, relevant case laws and the fact that the offence committed by the appellant by mutilating the private part of the minor girl cannot be termed as an act of a person of normal virtues. The said offence has been committed out of severe sexual lust and sadistic approach. The appellant does not deserve any kind of leniency as the said case stands proved beyond any reasonable doubt by the statement of the prosecution witnesses and the medical evidence adduced.

36. It is a very sorry state of affairs that the State has not preferred any appeal against the leniency observed by the learned Trial Court in sentencing the appellant to such a short term. The lethargy of the public prosecutor is highly deplorable.

37. From the evidence available on record, it is proved beyond reasonable doubt that the accused-appellant Ishrat had committed grave offence and the learned lower court had rightly convicted and sentenced him as mentioned above.

38. In above circumstance, I do not find any merit in the appeal. The appeal is **dismissed,** accordingly. The judgement and order dated 20.10.1992 passed by Sri S.C. Nigam, Seventh Additional District and Sessions Judge, Kanpur Nagar in Sessions Trial No.175 of 1990 (State Vs. Ishrat), Police Station- Chamanganj, District- Kanpur Nagar, is hereby affirmed. Bail bonds of accused-appellant are hereby cancelled and sureties are discharged from their liability. He is directed to surrender before the court below forthwith to serve out remaining sentence and if he fails to do so, concerned Chief Judicial Magistrate shall take appropriate action in this regard.

39. Let a copy of this judgement along with Lower Court Record be returned to the court concerned forthwith for compliance. A compliance report be also sent to this Court.

(2022) 9 ILRA 1498
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 221 of 2011
(U/S 372 Cr.P. C.)

Shakti Singh ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Birandra Singh Khokher, Sri Daya Ram Yadav, Sri Shyam Lal
Counsel for the Opposite Parties:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 372 - Appeal against acquittal in case u/s 498A, 304B IPC r/w s 113B of the Evidence Act and 3/4 of the Dowry Prohibition Act - An appellate court has the full power to review, re-appreciate, and reconsider the evidence upon which an order of acquittal is founded - However, an appellate court should not ordinarily set aside a judgment of acquittal, as there is a double presumption in favor of the accused in case of acquittal - appellate court may interfere if the views of the trial court

were perverse or otherwise unsustainable, if in arriving at a finding of fact, the trial court failed to take into consideration relevant admissible evidence and/or had taken into consideration the evidence brought on record contrary to law - If the finding so outrageously defies logic as to suffer from the vice of irrationality, it may interfere - wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court (Para 14)

B. Criminal law - Indian Penal Code, 1860 - Section 304 - Dowry death - Section 304 IPC - where the death of a woman is caused by any burn or bodily injury or occurs otherwise than under normal circumstances within seven years of the marriage and *it is shown* that *soon before* her death, she was subjected to cruelty or harassment by her husband or any relative of her husband then the same shall be termed to be dowry death - *"soon before"* - Meaning - term *"soon before"* is a relative term and does not mean "immediately before" - interval between the time of the cruelty or harassment and the death should not be too long - It contemplates a reasonable time - Prosecution must show that there was a "proximate and live link" between the cruelty or harassment suffered by the woman and her subsequent death in order to prove that the death was a dowry death - This means that the cruelty or harassment must have been a significant contributing factor to her death - demand for dowry, cruelty, or harassment should not be stale but should be the continuing cause for the death of the married woman under Section 304-B (Para 38)

As per complain, deceased was staying at her brother's house since 28.06.2008 - On 04.08.2008 she left for village Hastinapur for some work at 2pm, but did not reach her destination - PW3 & PW5 lastly saw her with her husband on a motorcycle - thereafter she went missing, later her body was found in an agricultural field - prosecution alleged that the accused had demanded a dowry of one lakh rupees and a four-wheeler, and that the deceased was killed because the demand was not met - *Held* - Prosecution made bald allegations of a demand for dowry of one lakh rupees and a four-wheeler but not provided any details about when or where the demand was made - prosecution did not provide any details about when or where the demand was made, and there is no record of any complaint or legal proceedings being filed - death occurred at the deceased's maternal home, and the father-in-law had assured that he would take the deceased after the Teej ceremony - There were also inconsistencies in the testimony of the witnesses regarding the timing of the deceased's departure from the house, and the last seen theory was not supported by the evidence - recovery of the body was not supported by independent witnesses - Prosecution could not prove the ingredients u/s 498A, 304B r/w s 113B of the Indian Evidence Act and 3/4 of the Dowry Prohibition Act - view taken by the trial court in acquitting the accused was a possible view - judgment and order of acquittal is not perverse, and there is no error in the trial court's conclusion that the accused is entitled to acquittal (Para 49, 50, 52)

Dismissed. (E-5)

List of Cases cited:

1. Guru Dutt Pathak Vs St. of U.P. (2021) 6 Supreme Court Cases 116

2. Kans Raj Vs St. of Punj. & ors. (2000) 5 SCC 207
3. Rajinder Singh Vs St. of Pun. (2015) 6 SCC 477

4. Satbir Singh & anr. Vs St. of Har. (2021) 6 SCC 1

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Witnessing exasperation the appellant/complainant is before this Court in the proceedings purported to be under Section 372 of the Criminal Procedure Code, 1973 (Cr.P.C.) challenging the judgment and order of acquittal passed in favour of the accused herein by Additional Sessions Judge, Court No.6 Meerut on

16.12.2010 in Sessions Trial No.1572 of 2008, State Vs. Sonu and two others, under Section 498A/304B IPC read with Section 3/4 of the Dowry Prohibition Act, Police Station Hastinapur, District Meerut.

2. The present appeal was presented before this Court on 13.1.2011 and on 18.1.2011 this Court passed the following orders:

"Summon the record and list thereafter."

3. Thereafter, the present case was listed on various dates. However, for the sake of brevity the order passed on 2.1.2017, 8.11.2017, 13.1.2021, 8.11.2021 and 19.11.2021 are being quoted as under:-

On 2.1.2017

List has been revised. None appears on behalf of the appellant.

Two week's time is granted for filing an application seeking leave to appeal.

List thereafter.

On 8.11.2017

"This case has been taken up in the revised call, no one has appeared on behalf of the appellant to argue the case. On the last occasion also, the case was adjourned on account of non-appearance of the learned counsel for the appellant.

Office is directed to issue notices to the appellant, Shakti Singh at his address returnable within six weeks who shall engage another counsel by the next date of listing.

Let the matter be listed in the week commencing 18th December, 2017."

On 13.1.2021

"None for the appellant even when the case is called in the revised list.

The case is adjourned."

On 8.11.2021

"As prayed, list on 09.11.2021, to enable the learned counsel for the appellant to prepare the case."

On 9.11.2021

Case called out, none appears for the appellant.

List this matter again on 16.11.2021.

However, it is made clear that, in case, on the next date, learned counsel for the appellant does not appear, we shall proceed with the appeal on hearing the State counsel.

4. Despite existence of the above mentioned orders in the order sheet of this case, nobody appears today also to press the appeal and thus in the light of the observations so made in the previous order dated 9.11.2021, the present appeal is being decided with the aid and assistance of learned AGA.

5 . Noticing the prosecution version it transpires that the complainant being Shakti Singh son of Ram Bhajan, resident of Village Pali, Police Station Hastinapur, District Meerut, who claims himself to be real brother of the deceased Seema had submitted a written complaint on 6.8.2008 at 10.10 am with an allegation that his sister since deceased got married with the

accused Sonu son of Ramesh. Various gifts and offerings were tendered to the in-laws of her sister however the same was not commensurate to their expectation and even in fact prior to the lodging of the FIR in question for a dowry demand was made referable to rupees one lakh and a four wheeler and as the same was not provided to them, the same became instrumental in commission of crime while disposing of his sister.

6. As per the written complaint the deceased was in the house of her brother being the complainant and she had at 2.00 in the noon on the fateful day 4.8.2008 proceeded from the village in question to Hastinapur, however, she did not reach the destination and in between the husband being one of the accused took her while allowing her to sit in the motorcycle and thereafter, she went missing and subsequently the dead body of the deceased was found in an agricultural field which belong to Deepak. On the basis of the written complaint so sought to be lodged appellant complainant FIR got registered under Sections 498A/304B read with Section 3/4 of the Dowry Prohibition Act in Police Station Hastinapur against the accused herein.

7. One S.I. Prabhakar Dixit was nominated as the Investigating Officer, who happens to be PW10. He as per the prosecution version conducted the investigation prepared the site plan took statement of the witnesses and even in fact also assisted in the preparation of Panchnama. Body of the deceased was also sent for postmortem and eventually submitted charge sheet against the accused herein in the above noted sections.

8. The case was committed to sessions. Charges were read over to the accused herein, who happend to be the husband Sonu son of Ramesh, Smt. Munni mother-in-law and one Pradeep son of Chandrapal. The accused, who are three in number pleaded innocence.

9. Ultimately charge sheet was submitted in Case Crime No.211 of 2008, under Sections 498A, 304B IPC and 3/4 Dowry Prohibition Act.

10. The prosecution in order to substantiate their version produced following ocular testimony namely (a) PW1 Shakti Singh (b) PW2 Shravan Kumar (c) PW3 Mekchand (d) PW4 Sudhir Kumar, (e) PW5 Vijai Pal (f) PW6 Constable Ram Pal Singh (g) PW7 C.O. Digambar Kushwaha (h) PW8 Dr. N.K. Gupta (I) PW9 Manju Gupta (j) PW10 S.I. Prabhakar Canbura (k) PW11 S.I. Sushil Kumar Sharma (l) PW12 S.I. Chandra Pal (j) PW13 Anil Kumar.

11. Besides the ocular testimony various documentary evidence were also produced by the prosecution which would be discussed in the latter part of the judgment.

12. Notably the present proceedings emanates under the appellate jurisdiction so encompasses under Section 372 of the Cr.P.C. at the instance of the complainant against the judgment of acquittal.

13. The appellate court as mandated by the Hon'ble Apex Court have to bear in mind that interference in the judgment of the acquittal is not to be resorted is not routine and cyclostyle manner as this Court can only interfere while granting its indulgence when the judgment of the acquittal is palpable erroneous, proceeds on misreading of evidence, perverse and takes

into its ambit, the vice of miscarriage of justice.

14. To put it otherwise, there should be compelling and substantive reasons for interference. In a recent judgment of the Hon'ble Apex Court in the case of ***Guru Dutt Pathak Vs. State of U.P. (2021) 6*** Supreme Court Cases 116, the Hon'ble Apex Court in paragraphs 14, 15, 16 have observed as under:-

14. We are conscious of the fact that this is a case of reversal of acquittal by the High Court. Therefore, the first and foremost thing which is required to be considered is, whether in the facts and circumstances of the case, the High Court is justified in interfering with the order of acquittal passed by the learned C trial court?

15. In Babu v. State of Kerala³, this Court has reiterated the principles to be followed in an appeal against acquittal under Section 378 CrPC. In paras 12 to 19, it is observed and held as under: (SCC pp. 196-199)

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/ or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court.

13. In Sheo Swarup v. King Emperor¹4, the Privy Council observed as under: (SCC OnLine PC : IA p. 404)

".... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

14. The aforesaid principle of law has consistently been followed by this Court. (See Tulsiram Kanu v. State ¹5, Balbir Singh v. State of Punjab¹6, M.G. Agarwal v. State of Maharashtra¹7, Khedu Mohton v. State of Bihar¹8, Sambasivan v. State of Kerala ¹9, Bhagwan Singh v. State of M.P.20 and State of Goa v. Sanjay Thakran²1.) C

15. In Chandrappa v. State of Karnataka22, this Court reiterated the legal position as under: (SCC p. 432, para 42)

'42.... (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate e court on the evidence before it may

reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.'

16. In Ghurey Lal v. State of U.P.23, this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh24, the Court again examined the earlier judgments of this Court and laid down that: (SCC p. 374, para 20)

'20. ... An order of acquittal should not be lightly interfered with even if the Court believes that there is some evidence pointing out the finger towards the accused."

18. In State of U.P. v. Banne25, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with judgment of acquittal by the High Court. The circumstances include: Banne case 25, SCC p. 286, para 28)

i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case; a

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.'

A similar view has been reiterated by this Court in Dhanapal v. State26. 19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference." (emphasis supplied) C

16. When the findings of fact recorded by a court can be held to be perverse has been dealt with and considered in para 20 of the aforesaid decision, which reads as under: (Babu case³, SCC p. 199) d

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. 27, Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons 28, Triveni Rubber & Plastics v. CCE2⁹, Gaya Din v. Hanuman Prasad³ 0Arulvelu v. Statell and Gamini Bala Koteswara Rao v. State of A.P.31)"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police32, that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with."

15. Heard the present case is to be viewed in the light of the proposition of law so mandated by the Hon'ble Apex Court as reproduced herein above.

16. We have heard Ms. Nand Prabha Shukla, learned AGA, who appears for the State of U.P. and with her able assistance, the present appeal is being proceeded to be decided.

17. First and foremost this Court finds it proper to analyse the ocular testimony of the prosecution witness in brief.

18. As per PW1, who happens to be Shakti Singh, the real brother of the deceased, the first information report was lodged by him consequent to filing of written complaint wherein allegations under Section 498A read with Section 304B IPC and 3/4 of the Dowry Prohibition Act were sought to be inflicted upon the accused herein while alleging that marriage of her sister along with the accused respondent no.2 was solemenised three years ago, though enough gifts and offerings were extended but demand of a four wheeler and one lakh rupees were

made and even in fact more than couple of times harassment was meted to his his sister and she had come back to his place and with the help and the aid of well wisher, she was deported to her in-laws place. He has further stated that his sister had lastly come on 28.6.2008 and she was residing with him in her maternal place. However, on 4.8.2008, she from her maternal house at 2.00 in the noon had proceeded to village Hastinapur in connection with some work but she did not return. PW3 being Mekchand and PW5 being Vaiji Pal saw the deceased on the motorcycle of her accused husband and along with him on the second motorcycle, the accused opposite party no.3 was also present and traveling while riding his bike. According to PW1 the deceased was lastly seen with the accused opposite party nos.2 and 3.

19. It has been further deposed by the PW1 that due to non-payment of monetary amount and gift of four wheeler, the same became instrumental in disposing of the deceased and rather the deceased was also found in the field of one Deepak wherein whereat recovery of incriminating articles were made which belonged to the accused husband.

20. As PW2 one Shravan Kumar got himself examined who claims himself to be one of the close relative (Sadhu) and he in his cross-examination has stated that he was the mediator in the marriage of the sister of the complainant with the accused husband. He has further stated that a demand of rupees one lakh and a four-wheeler was made by the accused. In his deposition, he has further stated that on 5.8.2008, he received a call from the complainant regarding missing status of the deceased. He has further stated that he saw the accused opposite party no.3 being Mekchand son of Chandra Pal along with 2-4 persons.

21. As PW3 Mekchand appeared as a prosecution witness, according to him the accused used to demand dowry and he along with PW5 Vijai Pal on 4.8.2008 had gone to purchase buffalo from a place at Khatauli and he on 4.8.2008 at about 1-1.30 at noon while proceedings from Saidpur village Ganeshpur on the road found the accused husband along with the deceased and the said bike was being ridden by the accused husband and in the another motorcycle Ravindra and Pradeep were sitting and he came back at 8 in the night to his house then he was informed that the deceased went missing. PW3 Pradeep claims himself to be a family uncle of the informant.

22. As PW4 one Sudhir Kumar appeared as a prosecution witness who proved Panchnama and so far as PW6 being Rampal is concerned, he proved lodging of the chik FIR.

23. As PW5 Vijaipal appeared as a prosecution witness and he also supported the prosecution case while coming with a stand that he along with PW3 Meghchand had gone to purchase buffalo and he saw the deceased with the accused husband in one motorcycle and Pradeep and Ravindra in another motorcycle at 1.30 in the noon.

24. So far as PW7 is concerned he entered the witness box while identifying him as Digamber Kushwaha, who had conducted investigation while taking evidences and submission of the charge sheet.

25. PW8 as one Dr. K.N. Gupta got himself examined as PW8 and according to him he conducted postmortem of the

deceased on 6.8.2008 wherein as many as five injuries were sought to be sustained by the deceased being on stomach and upper portion of the left side of the head. According to PW8 the body of the deceased was in decomposed situation and it was witnessing worms. He has further stated that the death of the deceased occasioned one and half to two days and there can be variation of 12-14 hours. He has further admitted that the time of the death of the deceased though written in the FIR is 2-3 days however, the same can be four days also and so far as injury nos. 1 to 3 are concerned, the same has been sustained by a pointed weapon and so far as 4-5 are concerned, the same is through hard and blunt object.

26. As PW9 Smt. Manju, who happens to be the wife of the complainant entered the witness box and according to her statement the deceased proceeded from her house at 9.00 in the morning.

27. As PW10 S.I. Prabhakar Dixit appeared and he proved the recovery of mobile and motorcycle which is being stated to be owned by the accused husband.

28. As PW11 one S.I. Sushil Kumar got himself examined, who proved the recovery of knife.

29. PW12 happens to be the witness who is the scriber of the Chik Fir, who proved the recovery of knife and incriminating articles.

30. PW13 happens to be Anil Kumar who is the owner of the mobile phone number 997527279 and the said mobile phone is being used to link the accused while committing crime.

31. We have carefully gone through the memo of appeal and the lower court records so summoned by the court.

32. Undisputedly the entire genesis revolves around the commission of crime by the accused with relation to demand of dowry and murder of the deceased while seeking to attract the provisions contained under Sections 498A read with Section 304B as well as Section 3/4 of the Dowry Prohibition Act of the IPC.

33. Section 498A of the IPC itself provides that who ever being the husband or the relative of the husband of a woman subjects such woman to cruelty shall be punished with imprisonment for a term which may extent to three years and also liable to find and further cruelty itself has been defined according to which there should be a conduct of such a nature which is likely to drive the woman to commit suicide or to cause grave injury or danger to live or health whether mental or physical and harassment in that regard.

34. Similarly, so far as 304 IPC is concerned the same relates to the contingency where the death of a woman is caused by any burn or bodily injury or occurs otherwise than under normal circumstances within 7 years of the marriage and it is shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband then the same shall be termed to be dowry death exposing attraction of penal consequences.

35. Though Section 113B of the Indian Evidence Act creates a presumption of the dowry death but the prosecution herein has to prove that the death occurred due to dowry demand.

36. Record reveals that the deceased was living in a maternal place since 26.8.2008 and the entire allegations centers around the events which occurred on 4.8.2008 meaning thereby that for approximately 35 days, the deceased was living in a maternal place and not in-laws place. It has further come on record in the cross-examination of PW1 Shakti Singh that the father-in-law of the deceased had come to the complainant's house in connection with death ceremony of Rohtash and he had assured that after the Teej (religious ceremony), he was taken away daughter.

37. The word soon before so employment in Section 304B of the IPC has been a matter of interpretation by the Hon'ble Supreme Court in various decisions wherein it has been mandated that the cruelty or harassment regarding dowry demand and death of the wife should not be strictly be soon before the death. However, it should be interpreted in such a manner that there should be consistent demand for dowry entailing even before the death of the wife.

38. The Hon'ble Apex Court in the case o**f Kans Raj Vs. State of Punjab and others (2000) 5 SCC 207** the Hon'ble Apex Court in paragraph 15 has observed as under:-

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

and in the case of **Rajinder Singh Vs. State of Punjab (2015) 6 SCC 477** the Hon'ble Apex Court in paragraphs 24 and 25 have observed as under:-

24. We endorse what has been said by these two decisions. Days or months are not what is to be seen. What

must be borne in mind is that the a word "soon" does not mean "immediate". A fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of Section 304-B would make it clear that the expression is a relative expression. Time-lags may differ from case to case. All that is necessary is that the demand for dowry should not be stale but should be the continuing cause for the death of the married woman under Section 304-B.

b 25. At this stage, it is important to notice a recent judgment of this Court in Dinesh v. State of Haryana²7, in which the law was stated thus: (SCC p. 537, para 15)

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

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

and yet in the case of **Satbir Singh and another Vs. State of Haryana (2021) 6 SCC 1** in paragraph 38.3 has observed as under:-

"The phrase "soon before" as appearing in Section 304-B IPC cannot be construed to mean "immediately before". The prosecution must establish existence of "proximate and live link" between the dowry death and cruelty or harassment for dowry demand by the husband or his relatives."

39. Here in the present case the trial court has analysed the entire aspect of the matter while coming to the conclusion that the father-in-law of the deceased being Bhanvar Singh even in fact had visited the house of the complainant whereat the deceased was residing since 28.6.2006 till her death 4.8.2008 and he had assured to take the deceased to his own house after religious ceremony of Teej. The said circumstances even in fact coupled with the admitted fact that the deceased was staying in her maternal place since 28.6.2008 itself makes it clear that the present case is not a dowry death case. The position might have been different when the deceased was in her in-laws place from where she would have died.

40. Barring making bald allegations of demand of dowry of rupees one lakh and a four wheeler, no details have been given by the prosecution as to when and on which day the same was being sought to be demanded and further there is nothing on record to suggest that any complaint or proceedings drawn under any provision of law. The said aspect assumes significance and importance when the death occurred in a maternal place and there are surrounding factors which do not support the case of the prosecution while linking the accused herein beyond doubt.

41. Now another question arises which is with relation to the lase seen theory. As per the deposition of the PW1 being the informant brother of the

deceased, the deceased had departed from the house in question on 4.8.2008 at 2.00 in the noon.

42. PW9 being Smt. Manju, who happens to be the wife of PW1 first informant has deposed that the deceased proceeded from the house at 9.00 in the morning. It has further come on record that even in fact if the deceased had gone walking then to the distance was 3 kms. then she would have reached by 10/10.30 at Hastinapur.

43. So much so according to the statement of PW3 being Mekchand and PW5 Vijai Pal, who supported the prosecution version of last seen theory as according to them the deceased was in the motorcycle of her husband and the second motorcycle Pradeep son of Chandrapal was there and further according to them in the cross-examination they had seen the deceased along with the accused husband at 1 or 1/30 at noon. It is highly improbable and that in case the deceased had gone walking and she started a journey at 2.00 in the noon than how PW3 and PW5 could have seen along with the accused.

44. To put the nail on the coffin of the prosecution theory the PW9 being Smt. Manju, who happens to be the wife of the first informant has come up with a stand that the deceased proceeded at 9.00 in the morning and in case the distance is calculated from the point last seen theory then the deceased could have easily reached by 11 and thus the entire prosecution theory stands demolished.

45. More so, so far as connecting the commission of crime by the accused through last seen theory also stands exploded from the fact that though PW13 Anil Kumar is supposed to have been made a witness in order to collect call details linking the accused with respect to commission of crime but it has come on record from the statement of the Investigating Officer as well as PW13 Anil Kumar that the mobile phone in question bearing number 9719724650 did not belong to the accused husband but it was in the name of Suresh Pal resident of Haridwar.

46. The learned trial court had taken pains of scrutinizing the said aspect of the matter while recording a categorical finding that the place from where the mobile was being used is also different from one place to other as it did not even link the presence of the accused at the sight of occurrence.

47. More so it has also come on record that though it is being stated by the prosecution that the recovery of a motorcycle and mobile phone has been recovered on the pointing out of the accused but there is no independent witness so as to connect the accused with respect to commission of crime.

48. Even otherwise though PW8 Dr. N.K. Gupta proved the postmortem report however according to him the death might have taken place 2-3 days and even 4 days prior to date of postmortem dated 6.8.2008.

49. Analysing the present case from the four corners of law, this Court finds that the prosecution has miserably failed to connect the applicant with respect to commission of crime particularly in view of the fact that the prosecution could not prove the ingredients so contained under Sections 498A, 304B read with Section 113B of the Indian Evidence Act and 3/4 of the Dowry Prohibition Act as firstly the death took place in the house of the informant being maternal house and the

deceased from 28.6.2008 to 4.8.2008 was staying in her maternal house and further the fact that as per the deposition of PW1 the father-in-law Bhanwar Singh himself had come to informant place and assured to take the deceased after religious ceremony of Teej and so far as the timing of departing from the house by the deceased is concerned, there is a enormous variation vis-a-vis the testimony of PW9 Smt. Manju, who happens to be wife. Secondly, the fact that the last seen theory also stands exploded as it is highly improbable that the deceased would have been found in the company of the husband as there are inconsistency and variation and vast contradiction in the testimony of PW1 and PW9 and lastly the recovery which is being sought to be shown on the pointing of the accused is not supported by the independent witnesses.

50. Cumulatively marshaling the entire facts of the case including the ocular testimony and documents so adduced by the prosecution, this Court finds that the view so taken by the learned trial court while acquitting the accused is a possible view and judgment and order of acquittal is neither perverse nor there is any error committed by the learned trial court while arriving to the conclusion that the accused herein is entitled for acquittal.

51. Nonetheless presumption of double innocence is already attached to the accused herein and thus this Court finds the order of acquittal is liable to be affirmed.

52. In view of foregoing discussion, the present appeal is liable to be dismissed and is accordingly **dismissed.**

53 The records be sent back to the court-below.

(2022) 9 ILRA 1510
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.09.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SHAMIM AHMED, J.

Crl. Appeal No. 366 of 2013

Anil Kashyap ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Prashant Gupta, Anil Kumar Sharma, Dinesh Kr. Sharma, Farida Jalal, M B Tiwari, Sunil Kumar Singh

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Evidence Act, 1872 - Section 3 - Material Contradiction in the St.ment of witness - effect - mere marginal variations in the St.ments cannot be dubbed as improvements but where material improvements and embellishments are found, evidence of such witness becomes unreliable and doubtful - discrepancies in the evidence of eye witnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence - the omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially, affect the trial, render the testimony of the witness liable to be discredited - if a witnesses evidence is found to be in conflict and contradiction with other evidence or with the St.ment already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt - Benefit of doubt - When on the evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt - The

principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence (Para 57, 58, 59)

Criminal Law - Indian Penal Code, 1860 - Sections 302 & 376 - Victim "x' aged about 10 years had gone to mango orchard for collecting mango - Accused appellant, caught hold the victim "x' and committed rape upon her & slitted (cut) her neck with knife thereafter the accused appellant ran away leaving the victim "x', who died at the spot - Trial court convicted him u/s 376 & 302 IPC & u/s 4/25 Arms Act - Held - The informant/father (P.W.1) was not an eyewitness nor a witness to any relevant circumstances of the alleged incident - Prosecution did not examine Chhotakke, who is claimed to be an eyewitness to the incident, and no reasonable explanation was provided for withholding his testimony - Radhey Shyam (P.W.3), another alleged eyewitness, was declared hostile - Material contradictions were found in the testimonies of prosecution witnesses regarding the location of the victim's body, the timing of the incident, and the information received by the police - post-mortem report of the victim revealed no signs of injuries on the hands and legs, and there was no evidence of semen in the vaginal smear, which was confirmed by the F.S.L. report - Additionally, no blood was discovered on the plain earth, contradicting the claims made by prosecution witnesses regarding blood on the victim's neck and private parts - Prosecution failed to establish the guilt of the appellant beyond a reasonable doubt - Conviction in the impugned judgment was found unsustainable, leading to the acquittal of the appellant based on the benefit of doubt. (Para 60, 65)

Allowed. (E-5)

List of Cases cited:

1. Bhupinder Sharma Vs St. of H. P. : (2003) 8 SCC 551

2. Nipun Saxena & anr. Vs U.O.I. & ors.: 2018 SCC Online 2772

3. M.G. Agarwal Vs St. of Mah. AIR 1963 SC 200: (1963) 1 Cri LJ 235

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

5. B.N. Mutto & anr. Vs Dr. T.K. Nandi (1979) 1 SCC 361

(Delivered by Hon'ble Shamim Ahmed, J.)

INTRODUCTION

1. Accused, Anil Kashyap, was tried by the Additional Sessions Judge, Court No.16, Lucknow, in Sessions Trial No. 809 of 2007, State Vs. Anil Kumar Kashyap, arising out of Case Crime No. 241 of 2007, under Sections 376 and 302 Indian Penal Code (IPC) Police Station Kakori, District Lucknow. The appellant was also tried in Sessions Trial No. 810 of 2007, State Vs. Anil Kumar Kashyap, arising out of case crime no. 242 of 2007 under section 4/25 Arms Act, Police Station-Kakori, District Lucknow. Both these Sessions Trials were clubbed together and decided by a common judgment and order dated 11.01.2013 passed by the Additional Sessions Judge, Court No.16, Lucknow.

2. Vide judgment and order dated 11.01.2013, the Additional Sessions Judge, Court No.16, Lucknow, convicted and sentenced the accused-appellant in the manner as stated hereinbelow :-

i. Under section 376 (2) (cha) IPC to undergo 14 years rigorous imprisonment with fine of Rs. 25,000/- In default of fine to undergo additional one year rigorous imprisonment.

ii. Under section 302 IPC to undergo life imprisonment.

iii. Under section 4 read with section 25 of Arms Act to undergo three months rigorous imprisonment with fine of 1000/-. In default of fine to undergo additional fifteen days rigorous imprisonment;

All the sentences were directed to run concurrently.

3. In view of the judgments of the Apex Court in **Bhupinder Sharma vs. State of Himachal Pradesh : (2003) 8 SCC 551 and Nipun Saxena and another vs. Union of India and others : 2018 SCC Online 2772**, the name of the victim is not being disclosed. She is transcribed as victim 'x' in the judgment hereinafter.

FACTUAL MATRIX

Shortly stated, the prosecution case runs as under :-

Informant P.W.1-Nand Lal son of Lalaram resident of Hata Raheem Vasit Town Kakori, Police Station Kakori, District Lucknow (father of the victim "X'/deceased) got the written scribed from one Sushil Kumar, who after scribing it read it over to him. Thereafter, the informant submitted a written report (Ext.Ka-1) to Station House officer, Police Station Kakori, District Lucknow stating therein that on 3.7.2007 at about 6.00 A.M. victim "x' aged about 10 years had gone to mango orchard alongwith her elder brother Rajesh for collecting mango. Rajesh after eating some mango came back to his house leaving the victim "x' there. In the meantime, accused appellant, who is his neighbour caught hold the victim "x' and committed rape upon her in the mango orchard. She raised alarm but for stopping her voice, the accused-appellant slitted (cut) her neck with knife which Chhotakke son of Buddhilal, Sajiwan Lal son of Bhagwandeen and Radhey Shyam son of Kalika, residents of town Kakori who were working near mango orchard exhorting reached there then the accused appellant ran away leaving the victim "x', who died at the spot. The blood was oozing from her neck and private part. The news of the said incident spread in Kakori town and the people started raising slogan for arresting the accused, as a result thereof, a panic was created in the general public, which jammed the traffic. However, after hectic efforts, the situation was controlled.

4. On the basis of written report (Ext.Ka-1) Chick FIR (Ext. Ka-3), was registered against the convict/appellant Anil Kashyap on 3.7.2007 at 10.05 O'clock as Case Crime No. 241 of 2007, under Sections 376 and 302 I.P.C. at Police Station Kakori, District Lucknow and Chick FIR (Ext. Ka-6) was registered against the convict/appellant Anil Kashyap as case crime no. 242 of 2007 under section 4/25 of Arms Act, at Police Station Kakori, District Lucknow. The distance of Police Station Kakori from the place of incident is three Kms. After the registration of the FIR, the entry in the General Diary (Ext Ka-5) was made.

5. After lodging of the FIR, the investigation of the case was conducted by Investigating Officer, Mahendra Pal Singh (P.W.5) who prepared inquest report of the dead body of the deceased (Ext. Ka-2) and sent the corpse of the deceased after sealing it for autopsy to KGMC, Lucknow on 3.7.2007 by Constable No. 3198 Anand Chaubey and Constable No. 297 Jang Bahadur.

6. The postmortem examination report (Ext. Ka-13) of deceased was

conducted by Dr. Ram Kishore Gupta (P.W.6) on 3.7.2007 at 10.00 P.M. in KGMU, Lucknow, who found the following injuries on the person of victim "x':-

Ante mortem Injuries:-

1. Multiple abrasion in area 8.0 cm x 5.0 cm present around the mouth and chin size varying from 0.5 cm x 0.2 cm to 1.0 cm x 0.5 cm.

2. Incised wound 2.0 cm x 1.0 cm x muscle deep present in outer aspect of left side neck 9.0 cm below lobule of left ear.

3 Incised wound 10.0 cm x 6.0 cm x vertebrae deep present on front and both side neck 4.0 cm above sternal notch.

4 Multiple incised wound of area 7.0 cm x 3.0 cm present on front and Rt side neck 2.0 cm below injury no. (3) size varying front 3.0 cm x 0.5 x skin deep to 5.0 cm x 0.5 cm x skin deep.

On opening injury:-

Ecchymosis present underneath all the injuries mentioned above margin of all injuries except injury no (1) are sharped, clear cut and well defined.

Minor and major vessel of both side of neck found cut through and through. Trachea Oesophagus and Larynx found cut through and through at the throat.

7. The Doctor has opined that the deceased died due to shock and hemorrhage as a result of ante mortem injury as noted above. Further, the doctor after conducting the postmortem handed over the clothes of deceased, two vaginal smear slide two vaginal swab, two test tube and postmortem report (in original) in sealed cover to the police. The police sent the same to the Forensic Science Laboratory, U.P. Lucknow (Ext.Ka-17) through Chief Judicial Magistrate, Lucknow.

8. Here, it would be relevant to point out that investigation of the case relating to case crime no. 241 of 2007 under sections 376 and 302 IPC was entrusted to Sub Inspector Indrajeet Singh (P.W.7) on 3.7.2007 whereas the investigation of case crime no. 242 of 2007 under section 4/25 Arms Act was started by Station House Officer Indrajeet Singh on 4.7.2007.

9. The investigating officer also prepared documents viz written report (Ext.Ka-1), inquest report of deadbody of deceased (Ext. Ka-2), Chick FIR relating to case crime no. 241 of 2007 (Ext.Ka-3), Nakal Roznamcha kayami case rapat No.14 dated 3.7.2007 (Ext.Ka-4), Nakal Roznamcha rapt no.4 dated 4.7.2007 (Ext.Ka-5), Chick FIR relating to case crime no. 242 of 2007 under section 4/25 Arms Act (Ext.Ka-6), Chalan lash (Ext. Ka-7), photolash of corpse of deceased (Ext. Ka-8), sample seal of deadbody (Ext. Ka-9), a letter to Medical Officer, KGMU, Lucknow (Ext. Ka-10), recovery memo of blood stained of plain earth (Ext. Ka-11), recovery memo of accused and recovered knife (Ext. Ka-12), Post mortem report of corpse of deceased (Ext. Ka-13), site plan of place of alleged incident relating to case crime no. 241 of 2007 under sections 376,302 IPC (Ext.Ka-14), site plan of recovery of weapon (knife) on the pointing of the accused (Ext.Ka- 15), chargesheet under section 4/25 Arms Act (Ext. Ka-15/2), chargesheet under sections 376 and 302 IPC (Ext. Ka-16) and report dated 25.9.2007 of Forensic Science Laboratory, U.P. Lucknow (Ext. Ka-17).

10. After completion of investigation, chargesheets (Ext. Ka-15/2 and 16) were submitted against the accused appellant in both the cases i.e. for the offence

punishable under sections 302,376 IPC and section 4/25 Arms Act.

11. After the receipt of the chargesheets, cognizance of the offence was taken by the Chief Judicial Magistrate, Lucknow, and the case was committed to the court of sessions for trial. The trial court framed the charges against the accused appellant for the offence under sections 302,376 (2) (cha) IPC and section 4/25 Arms Act to which he pleaded not guilty and claimed to be tried.

PROSECUTION EVIDENCE

12. To bring home the guilt of the accused appellant, the prosecution examined as many as eight witnesses, namely, Nand Lal (PW-1), informant (father of deceased), who supported the prosecution story. Sajiwan Lal (PW-2), eye-witness of alleged incident, also supported the prosecution story and Radhey Shyam (PW-3), was **declared hostile** during trial. S.I. Kamlesh Kumar (PW-4); proved the FIR (Ext. Ka-3) Mahendra Pal Singh Sub-Inspector (Retd,) (PW-5) proved written report (Ext. Ka-1), FIR (Ext. Ka-6) and Panchnama (Ext. Ka-2) and Dr. Ram Kishore Gupta (PW-6) who proved postmortem examination report (Ext. Ka-13)

13. The defence in order to prove its versions produced three witnesses, namely, Sunil, brother of accused appellant, (D.W.1), Vishram Prasad, father of the accused appellant (D.W.2) and Susmita, sister of accused appellant (D.W.3) .

14. After completion of the prosecution evidence, the statement of the accused appellant was recorded under section 313 Cr.P.C. He was confronted with the incriminating evidence adduced against him during the course of the trial , which he denied and pleaded innocence and stated that he has been falsely implicated. He specifically stated that to save the main culprit P.W.2 Sajiwan Lal gave false statement before the trial court.

15. The trial court after examining the evidence available on record believed the evidence of prosecution witnesses trustworthy and reliable, hence by means of the impugned judgment convicted and sentenced the accused appellant for the offence as stated hereinabove.

16. Hence this appeal at the instance of the convicted appellant.

17. For the sake of convenience, the testimonies which have been relied upon by the trial court are being referred hereinafter:-

18. Nandlal (P.W.1), who is informant and father of victim "x' supported the version of FIR but in cross- examination he deposed that he did not witness the alleged incident. At the time of alleged incident, he was in his house. This witness stated that he was given the information about the incident by Sajiwan Lal (P.W.2) and Radhey Shyam (P.W.3). He further deposed that he got the report lodged on the basis of saying by some persons. It is incorrect to say that he had got the false report lodged due to enmity.

19. Sajiwan Lal (P.W.2) in his testimony has deposed that the incident occurred at about 7.30 AM on 3.7.2007. At that time Radhey Shyam and Chhotakke were working with him in another mango orchard near the place of alleged incident. Chhotakke son of Putti Lal and Radhey

Shyam son of Chandrika and Pachcha were sitting at some little distance from him. This witness further deposed that they heard the voice of screaming, upon which they saw here and there, and saw the accused-appellant in other mango orchard i.e. the place of alleged incident. They witnessed him that he was cutting the neck of victim "x' with knife and she was screaming. When they exhorted the accused appellant, he fled away brandishing the knife. Thereafter they reached near victim "x'. and saw that she was sobbing and blood was oozing from her neck and legs.

20. Sajiwan Lal (P.W.2) further deposed that he himself intimated to the family members of the victim "x' and also at the Chowki (Police out post) and thereafter to police station. Thereafter police personnel went with him to alleged place of incident where around two-three thousands people had assembled. This witness further deposed that he knew the accused appellant Anil Kashyap, who committed rape and murdered victim "x' (aged about 10 years). Blood was oozing from her private part. The police prepared panchnama (Ext.ka-2) in his presence and at that time S/Sri Shiv Kumar, Saleem, Rampal and Rajjanlal were also present. He also proved that he put signature on the Panchnama.

21. In the cross-examination this witness deposed that the accused appellant was arrested on the day of incident from the village. He further deposed that the police had recorded his statement at police station/place of incident. He further deposed that the distance from the place of occurrence to place of mango orchard where he was working would be about **100-150 Mtr.** He further deposed that he had seen the deceased, who was wearing brown colour underwear, white colour innerwear and red colour frock. During the course of cross-examination, this witness further deposed that he was working 10-12 days prior to alleged incident in the mango orchard but he could not tell the names of the persons of orchard adjacent to the mango orchard where incident took place.

22. P.W.3 Radhey Shyam deposed in his testimony that Informant Nandlal is his cousin brother (Maternal brother). He had not seen the accused appellant committing murder of victim 'x' and was not looking after the mango orchard at the time of alleged incident. Thus he was **declared hostile**. However, during the course of cross examination, this witness had deposed that it is true that when he had gone to place of occurrence, the process of sealing of the corpse was completed but denied that he had recorded his statement under section 161 Cr.P.C before the police. He further deposed that he knew the father of the accused appellant, namely, Vishram. It is incorrect to say that due to acquaintance with the father of the accused he is adducing false evidence to save the accused.

23. P.W. 4 S.I. Kamlesh Kumar has deposed in his testimony that on 3.7.2007 he was posted as Head Moharrir at Police Station Kakori. He scribed the FIR under sections 376 and 302 IPC (Ext Ka-3) and registered in nakal rapat no. 14 time 10.5 dated 3.7.2007 and prepared carbon copy thereof (Ext. Ka-4). He proved Exts. Ka-5 and Ext. Ka-6).

24. P.W.5 Mahendra Pal Singh, (since retired.) no. 442/58 deposed in his testimony before trial court that on 3.7.2007, he was posted as Inspector at Police Station Kakori Lucknow and in his presence, the case was registered. The

investigation of the case was conducted by Station Officer-Indrajeet Singh. On the information, he alongwith S.O. Indrajeet and Senior Constable Satyadev and police-force of station reached the place of occurrence where they found the dead body of the victim. On spot family members of the deceased and people of adjacent area had assembled. S/Shri Shiv Kumar, Rampal, Saleem, Rajjanlal and Sajiwan Lal were made witnesses of Panchnama (Ext. Ka-2) and signatures of Panchs were also obtained. Thereafter the body of the deceased was sealed and sent to KGMU for postmortem examination. This witness proved the Papers relating to Panchayatnama as Chalan lash Photolash, Sample seal, report of C.M.O which are shown as Exts. K-8, Ka-9,Ka-10 respectively. He also proved collected blood stained earth and plain earth taken in the presence of witnesses and recovery memo (Ext. Ka-11).

25. Mahendra Pal Singh (P.W.5) further deposed in his testimony that on 4.7.2007 he alongwith Head Constable Satyadev Singh Constable Harilal and Constable Raj Kumar Pandey and S.O. Shri Indrajeet Singh proceeded on Jeep to arrest the accused appellant. On the information given by the Informer, the accused appellant was arrested from road at 00.45 AM which is 50 yard away from Chilauli village. On the interrogation made by Investigating Officer, the accused appellant accepted his guilt and said to give the knife used in the commission of crime. The knife which is alleged to be used in the commission of crime was recovered on his pointing out with the source of torch light from inside standing bushes behind the western side of Bones Store situate in Bag Samiti. The knife was sealed and a recovery memo was prepared, which was signed by S.O. Indrajeet Singh, witnesses Harilal, Raj Kumar and accused Anil Kumar. Thereafter the material as above and accused were brought to police station. This recovery memo (Ext. Ka-12) was also proved by this witness.

26. P.W. 6 Dr. Ram Kishore Gupta in his testimony deposed that on 3.7.2007 he was posted as Medical Officer in KGMC,Lucknow. The deadbody of the deceased in sealed cover alongwith ten papers was sent by the police of Police Station Kakori which was received in KGMC Mortuary, Lucknow, on the same day i.e. 3.7.2007 around 4.30 P.M. The deceased was identified by CP No. 3198 Anand Chaubey and CP 297 Jang Bahadur. This witness proved the post-mortem report and stated that the deceased died due to shock and hemorrhage as a result of ante mortem injury as noted above. He further deposed that the deceased died half day prior to alleged incident i.e. 3.7.2007. The injury in the vagina may be caused due to committing rape. The injury on the neck may be caused due to sharp knife. In cross-examination this witness deposed that there is no sign of injury found on the hands, feet, back and head. He further deposed that in the postmortem report there is no mention of earth. However, he was unable to tell that rape was committed by one person or more.

27. P.W.7 Indrajeet Singh (Investigating Officer) has deposed in his testimony that on 3.7.2007 he was posted as Station Officer at Police Station Kakori. He conducted investigation of case relating to crime no. 241 of 2007 under sections 376 and 302 IPC. He recorded the statement of Nandlal (informant),on his pointing out and inspected the place of occurrence and prepared site plan. He

recorded the statements of witnesses of Krishna Pal and Suresh Kumar. He found the deceased naked on the place of incident . He collected blood stained earth and plain earth and thereafter sealed them. He prepared recovery memo thereof. He recorded the statements of the witnesses of recovery memo, namely, Shatrohan Pal and Sunil Kumar. He prepared site plan (Ext.Ka-14). The recovery memo of blood stained earth and plain earth (Ext. Ka-11) was got written by S.I. Mahendra Pal Singh. After reading it over he made signature thereon and obtained the signature of the witnesses. During trial, he proved the aforesaid documents.

28. This witness (P.W.7) further deposed that on 4.7.2007, he arrested the accused appellant and on his pointing out, blood stained knife from the western side of Bones Store in the standing bushes was recovered. He prepared recovery memo (Ext. Ka-12) regarding discovery of blood stained knife site plan (Ext. Ka-15) but in the site plan he has not mentioned that near Bones Store bushes were standing and proved it. He also proved the filing of the charge-sheet (Ext. Ka-16). However, in the cross examination he deposed that he did not show any bushes around Bones Store in the site plan from where alleged knife was recovered.

29. Prabhakar Tiwari (P.W.8) deposed in his testimony that on the date of incident i.e. 3.7.2007 he was posted as Head Constable. On 4.7.2007, he was entrusted the investigation of the case relating to case crime no. 242 of 2007 under section 4/25 Arms Act, on the direction of Station Officer. On the pointing out of accused he alongwith Station Officer-Indrajeet Singh inspected the place of occurrence on 7.7.2007 and prepared site plan (Ext Ka-14) and proved it. He shown in the site plan that near Bones Store bushes were standing. He submitted chargesheet no. 165 of 2007 in case crime no. 242 of 2007 under section 4/25 Arms Act (Ext.Ka-15) and proved it. In the cross examination, this witness deposed that there was no public witness to the recovery memo of discovered knife.

30. As averred the accused-appellant, in order to prove its defence he had examined Sunil, Vishram Prasad and Susmita as defence witnesses, which are being referred hereinafter.

31. Sunil (D.W.1), who is younger brother of accused- appellant deposed that on 3.7.2007 around 8.00 A.M., he had gone with his elder brother to work in the factory of Jardozi [Embroidery work] belonging to one Dilshad. He received information at about 8/1-2 A.M. in the factory that animal has scratched victim 'x' who was living behind his house. Due to pressure of work both could not have gone to the place of occurrence. On the same day at about 10.00 A.M., his younger sister came to the factory alongwith police. The police asked the names of both and brought accused Anil to police station for interrogation and implicated him in a false case.

32. In the cross examination, this defence witness deposed that his house was sabotaged by the family members of victim 'x' and some members of her family were demonstrating keeping the corpse of victim 'x' on Durgaganj crossing , due to which he could not go to his house from this path. Later on, he was taken into custody by the police and was kept at the police out-post for 2-3 nights and could not be permitted to meet his brother. He informed the police about robbing in his house and setting his

house on fire and requested to prevent. One constable went to his house but returned without action.

33. Vishram Prasad (D.W.2) who is father of accused deposed in his testimony that on 2.7.2007, he had gone to the house of his daughter. On 3.7.2007 at about 11.00 AM when he came to his village, Kakori, he saw that there is crowd around his house and Sajiwan Lal, Chhotakke, Rampal and Dileep and some other persons are present there. His house was set on fire for which he had lodged an FIR under sections 395,436,427 and 506 IPC against Nandu, Sajiwan and others.

34. This witness further deposed that some villagers were talking that accused Anil Kashyap has wrongly been implicated in the case while he was working in 'Jardozi' [Embroidery] factory. The wife and children of this witness have also told him that at the time of alleged incident, accused Anil Kashyap was present in his house and at about 8.00 A.M., he had gone to factory.

35. Susmita (D.W.3) aged about 15 years, (daughter of Vishram Prasad and sister of accused Anil Kashyap) deposed that her two brothers, namely, Anil Kashyap and Sunil had gone to Jardozi factory at 8.00 AM on 3.7.2007. At about 10.00 AM the police came to her house and asked how many members are there in the house. She told that her father had gone outside and her two brothers had gone to Jardozi factory. The police went to Jardozi factory for interrogation of both brothers. She also went to Jardozi factory alongwith police. Thereafter the police brought her brother Anil Kashyap to police station for interrogation.

36. In the cross examination, this witness deposed that she knew the victim 'x' who is her neighbour and friend. She does not know about her age. She used to go on some occasion to mango orchard alongwith victim 'x' for collecting mango but she had not gone to mango orchard alongwith victim 'x' on the date of incident. She further stated that her two brothers had gone to Jardozi factory at 8.00 A.M. on 3.7.2007 and she had gone to Jardozi factory at 10.00 A.M. on 3.7.2007 alongwith police where her both brothers were present.

37. Heard Shri Sunil Kumar Singh, learned counsel for the appellant , Shri Hari Shanker Bajpai, learned counsel for the State- respondent and perused the lower court record as well as impugned judgment and order dated 11.01.2013 passed by the Trial Court.

Submissions of the Appellant's Counsel

38. Learned counsel for the appellant has submitted that the accused appellant has been convicted and sentenced under sections 302,376 (2) (cha) I.P.C. and section 4/25 Arms Act without there being any concrete evidence against him and the findings of conviction recorded by the Trial Court are based on surmises and conjectures. As a matter of fact, it is a case of circumstantial evidence and without there being a complete chain of circumstances, the appellant has been convicted.

39. To substantiate the aforesaid submissions it has been argued by the learned counsel for the appellant that informant Nand Lal (P.W.1) had lodged the first information report against the accused appellant on a false story narrated by Sajiwan Lal (P.W.2) and Radhey Shyam (P.W.3) and further Radhey Shyam (P.W.3)

has been **declared hostile**. The informant P.W.1 is neither an eye-witness nor a witness of any circumstance related to the alleged incident. Chhotakke, who is said to be the eye witness of the alleged incident has not been examined by the prosecution for the reasons best known to the prosecution. Being said to be an eye-witness of the incident, he ought to have been produced by the prosecution to prove its case beyond reasonable doubt. There are material contradictions and discrepancies in the testimonies of the prosecution witnesses.

40. Learned Counsel for the accused appellant has submitted that accused appellant had been seen coming out from mango orchard by P.W.2 Sajiwan Lal, P.W.3 Radhey Shyam (declared hostile) and Chhotakke (not examined) while during the cross-examination Sajiwan Lal (P.W.2) had stated that on the date of incident he was present in his mango orchard and on hearing screaming, he saw the accused appellant coming out from the near mango orchard and the accused-appellant fled away seeing them.

41. As regards, the recovery of the knife, learned counsel for the appellant has argued that there was no independent witness of the alleged recovery of blood stained knife allegedly made at the instance of the accused appellant and the recovery has been planted in order to frame the accused in the case. According to him, as a matter of fact none has witnessed the incident and the informant on the basis of story as narrated by Sajiwan Lal (P.W.2)and Radhey Shyam (P.W.3) lodged the FIR implicating the appellant.

42. It has been empathetically argued by the learned counsel for the appellant that as per the post-mortem report of the victim 'x' neither there was any abrasion nor contusion was found on the hands and legs nor any stain of semen was found in the vaginal smear of the deceased. As per the report of Forensic Science Laboratory, U.P. Lucknow, no spermatozoa and gonococci was found in vaginal swab, smear slide, Kurta, Baniyayin and under wear of the victim 'x', and further no blood was found in the plain earth and smear slide whereas if the prosecution witnesses have stated that blood was oozing from the neck and private part of the victim 'x' and the Investigating Officer had collected the blood stained earth from the place of incident, and as per the report of Forensic Science Laboratory blood was found in vaginal swab, Kurta, Baniyayin, underwear, blood stained earth with leaves and knife. Since the blood of victim 'x' had not been matched with the aforesaid articles, the aforesaid facts create doubt on the prosecution story as alleged by the prosecution.

43. Next argument of the learned Counsel for the appellant is that the trial court materially erred in not believing the testimonies of defence witnesses, who categorically stated that at the time of alleged incident the accused appellant was not present.

44. It has also been argued by the learned counsel for the appellant that cogent reasons have not been given by the learned trial court for not believing the testimonies of defence witnesses and further the appellant has specifically stated in his statement under Section 313 C.P.C that P.W. 3 Radhey Shyam has given false evidence to save the actual assailant.

45. Learned counsel for the appellant has also argued that the motive to commit

murder of deceased victim 'x' was not proved by the prosecution but even then the trial court had convicted the accused appellant by mis-appreciation of evidence adduced by the prosecution. The accused appellant has been convicted and sentenced under sections 302 and 376 (2) (cha) IPC and section 4/25 Arms Act without having any evidence against him. The judgment of the trial court is based on surmises and conjectures.

Submission on behalf of State-respondent

46. Refuting the assertions of the appellant, learned counsel for the State-respondent submits that adequate evidence is available on record against the accused appellant which indicates the involvement of the accused/appellant in commission of the crime in question. It is pointed out that accused/appellant committed the rape of victim and cut her neck with knife. The deadbody and several articles were discovered at the place of incident and a blood stained knife which was used in the commission of crime was found at the pointing out of accused appellant. All these circumstances show the guilt of the accused/appellant in committing the murder of the deceased.

Finding by this Court

47. Having heard learned counsel for the parties and gone through the material brought on record, it is manifestly clear that the trial Court has convicted the accused/appellant only on the basis of ocular testimony of Sajiwan Lal (P.W.2) as well as recovery of blood stained knife made on the pointing out of accused/appellant.

48. It is important to mention that Radhey Shyam (P.W.3), who is said to be eye witness has been **declared hostile** as he had not supported the prosecution version. It is to be noted that Radhey Shyam (P.W.3) is the cousin of the Informant, who has lodged the FIR. It appears that initially seeing the brutal murder of his niece, he took a stand that he had witnessed the incident but later on when he came to his conscience, he did not support the prosecution story and stated in clear words that he had not seen the occurrence. Had he actually witnessed the accused committing the murder of his niece, then he would have definitely stood and would not allow the actual assailant to go escort free. Similarly, Chhotakke, who was working in the mango orchard alongwith Sajiwan Lal (P.W.2) and Radhey Shyam (P.W.3) has not been produced by the prosecution to support the prosecution version. No plausible explanation has been given for withholding Chhotakke, who was present at the site of the occurrence.

49. Now, we will scrutinize the evidence of Nand Lal (P.W.1), who is the informant and father of the deceased. First of all, it is relevant to point out that Nand Lal (P.W.1) was not present on the spot when the alleged incident took place and had lodged the FIR as per narration alleged to be given by the Radhey Shyam (P.W.3) and Sajiwan Lal (P.W.2). This witness has stated that on 3.7.2007 at about 6.00 AM, his daughter alongwith brother Rajesh had gone to the mango orchard to collect mango. The brother had come back after collecting the mango and the daughter was in the mango orchard. The news of the incident has spread in the village and hearing on the news, he reached at the spot and took the body to the Durgaganj crossing and thereafter gave dictation to one Sushil Kumar for lodging the FIR. In his cross-examination, this witness had

admitted that he had not seen the occurrence and was at the house. He was told about the incident by Sajiwan Lal (P.W. 2) and Radhey Shyam (P.W.3).

50. A conjoint reading of the FIR and statement of Nand Lal (P.W.1) recorded before the court, shows that there is material contradiction in the FIR. As per narration of the incident given in the FIR, an impression is given that he had seen the incident and nowhere he has stated that he has come to know about the occurrence from Sajiwan Lal (P.W.2) and Radhey Shyam (P.W.3). In the FIR, he has stated that dead body of the victim "x' is lying on the spot whereas in the cross-examination he had deposed that he came to know about the occurrence from Sajiwan Lal (P.W.2) and Radhey Shyam (P.W.3). Further, in the FIR it was stated that dead body of the deceased is lying on the spot whereas in his examination-in-chief, this witness had stated in clear words that he took the dead body to Durgaganj Crossing and thereafter dictated the report to one Sushil Kumar. He had also admitted that he had lodged the FIR as was told by the people. Moreover, from the language and tenor of the FIR, it can easily be inferred that the same was lodged after consultation and someone else had dictated the report. Moreover, the prosecution has not produced Sushil Kumar to establish the fact that he had written the report on the dictation of the informant. Therefore, the trial court has committed manifest error in not considering all these important facts while relying upon his testimony.

51. Sajiwan Lal (P.W.2) in his statement had deposed that he had given information about the incident at the house of informant and thereafter went to the police outpost and gave information and thereafter information was given from the police outpost to the police station. Thereafter the police had reached at the place of occurrence with the said witness. Now, again there are contradictions in the statements of Nand Lal (P.W.1) and Sajiwan Lal (P.W.2) as Nand Lal (P.W.1) had stated that he took the dead body to the Durgaganj Crossing whereas Sajiwan Lal (P.W.2) had stated that the dead body was lying on the spot and he reached at the spot alongwith police. Nowhere he had stated that while going to the police out post, police station or going back to the spot, Nand Lal (P.W.1) father of the deceased was also accompanying with him.

52. Radhey Shyam (P.W.3), who, as per prosecution version, was present near the site of occurrence alongwith Sajiwan Lal (P.W.2) in the mango orchard. Sajiwan Lal (P.W.2) had also stated in his cross-examination that he alongwith Radhey Shyam (P.W.3), Chhotakke and Pachcha were working in the mango orchard. However, Radhey Shyam (P.W.3) in his examination-in-chief stated that at the time of murder, he was not protecting the mango orchard in the morning and as such the prosecution requested for declaring him as hostile. It is important to point out here that this witness in his cross-examination gave altogether different story with regard to place where the dead body was lying. He stated that when he went to the spot the dead body was being sealed and the place where the dead body was lying is a leather store of dead animals.

53. Again there are major contradictions with regard to information to the police and lodging of the FIR. Sajiwan Lal (P.W.2) in his statement has stated that after the incident he informed at the house of the deceased, thereafter gave

information to the police at the Police out post (Chowki) and thereafter the information was transmitted to the Police Station. In contrast, S.I. Kamlesh Kumar (P.W.4) who was posted as Head Moharrir at the police station Kakori at the relevant time had stated in his cross-examination that the complainant had come to lodge the FIR alongwith one person Krishna Pal of village Dasdoi. Inspite of the incident, no information was received prior to lodging of the FIR. Thus, it is clear that the learned Trial Court erred in believing the testimonies of Sajiwan Lal (P.W.2) and S.I. Kamlesh Kumar (P.W.4) though they have given altogether different version with regard to receiving of information of the alleged crime.

54. It is said that on 4.7.2007, the police party was searching the accused when an information was given by the Informer that accused Anil Kashyap is going from Kakori towards Mohan Road and when they reached near village Chilaluli, they found one person going on the road, who was intercepted and taken into custody at 00.45 AM. On interrogation, he admitted his guilt and said that he is ready to give the knife on reaching the place of occurrence. When they reached near the Bones Store, he brought the blood stained knife from an unkept place. S.I. Mahendra Pal Singh (P.W.5) has stated in his statement that Fard recovery was prepared on the spot and contains his signature as well as signature of accused and witness Harilal and Raj Kumar. In contrast, Sri Prabhakar Tiwari (P.W.8), who was Investigating Officer of Case Crime No.242/2007 under Section 4/25 Arms Act had deposed before the court that the investigation of this case was entrusted to him on 4.7.2007 and sealed knife was deposited in the police station. He had further deposed that in the Fard Memo there are only police witnesses and there is no public witness. The statement of S.I. Prabhakar Tiwari (P.W.8) and Mahendra Pal Singh, SI (Retd.) (P.W.5) are contradictory to each other and cannot be relied so far as recovery of knife is concerned. It may be added that recovery of knife was made on 4.7.2007 after the midnight and there is no whisper in the statement of P.W.5- Mahendra Pal Singh as to how and from which place, witnesses Harilal and Raj Kumar were taken to accompany the police party.

55. Before proceeding further, it would not be out of place to mention here that typically in a criminal trial, the statements made by witnesses before the Investigating Officer (IO) recorded under Section 161 CrPC are pressed into service to bring out inconsistencies or contradictions or improvements as the case may be on the part of the defence, to discredit the evidence of the prosecution witnesses. Thus, what a witness had stated before IO recorded under Section 161CrPC or a statement recorded under Section 164 CrPC before the Magistrate is generally compared with what the witness testified before the court to bring out the inconsistencies, contradictions in the evidence. Having discussed that previous statement of the witness recorded under Section 161 Cr.P.C. can be used only for the purpose of contradiction in the manner discussed above, a related issue may also be kept in mind.

56. One of the grounds for assailing the conviction of the appellant is that there were impermissible improvements, embellishments and inconsistencies in the evidence of the main prosecution witnesses qua their previous statement, which would

render their evidence unreliable and creates doubt on the prosecution story.

57. In this regard, one may note numerous decisions of the courts in which it has been held that where the material improvements and embellishments has been found, evidence of such witness becomes unreliable and doubtful.

In **M.G. Agarwal Vs. State of Maharashtra AIR 1963 SC 200: (1963) 1 Cri LJ 235** , the Hon'ble Supreme Court has been pleased to observe as under :-

"if the circumstances proved in a case are consistent either with the innocence of the accused, or with his guilt, then the accused is entitled to the benefit of doubt. When it is held that a certain fact has been proved, then the question that arises is whether such a fact leads to the inference of guilt on the part of the accused person or not, and in dealing with this aspect of the problem, benefit of doubt must be given to the accused and a final inference of guilt against him must be drawn only if the proved fact is wholly inconsistent with the innocence of the accused, and is entirely consistent with the guilt."

In **Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116**, the Hon'ble Supreme Court has been pleased to observe as under:-

"Graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on the evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. The principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence."

In **B.N. Mutto & Another Vs. Dr. T.K. Nandi (1979) 1 SCC 361**, the Hon'ble Supreme Court has been pleased to observe as under:-

"It stems out of the fundamental principles of our criminal jurisprudence that the accused is entitled to the benefit of any reasonable doubt. If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of a reasonable doubt. But fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him."

58. The discrepancies in the evidence of eye witnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt.

59. While deciding such a case, the Court has to apply the aforesaid tests. No doubt the mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. However, the omissions which amount to contradictions in material

particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited.

60. In the instant case, as discussed above, there are major contradictions in the statements of witnesses as regard to the place where dead body was found, the timing of the incident, the information received by the police as the star witness in his deposition has stated that after informing at the house of the victim, he informed the police whereas police personnel in their statements have deposed that prior to the lodging of the FIR, no information with regard to incident was received by them.

61. Therefore, this Court also considers appropriate not to rely on the evidence of Sajiwan Lal (P.W. 2), as an eye witness and consequently it also discredits the evidence of Nand Lal (P.W.1) and S.I. Kamlesh Kumar (P.W.4). The inconsistencies and embellishments as pointed out by the learned counsel for the appellant has materially made difference to the crucial aspect of the incident of they being eyewitnesses.

62. One more thing which needs mention is that according to the Investigating Officer, the accused was arrested while they were in search of the accused in the late hours of midnight and on information of Informer, they saw that the accused was going from Kakori to Mohan Road. It is hard to digest that the appellant-accused after committing such a heinous crime will remain present in the village and will not escape when it has come in evidence that on account of incident, there was uproar in the public of the village and they have even blocked the Durgaganj crossing. It is a natural phenomena that if an accused commits the crime and some persons have seen him committing the crime, then he will make all efforts to ran away far place to avoid his arrest. Thus from the evidence of the police personnel it can easily be presumed that accused was not arrested in the manner as suggested or alleged by the police.

63. It is also important to mention here that as per prosecution versions, the incident occurred on 3.7.2007 at about 7.30 AM and the First Information Report was registered at the Police Station Kakori on the same day at 10.05 registered as case crime no. 162 of 2007. Mahendra Pal Singh has been examined by the prosecution as P.W.5, who was posted as Sub Inspector at the relevant time at the Police Station Kakori. He in his statement has stated that case was registered in his presence and on receipt of information, he alongwith other police officers and force had left for the place of occurrence. In his cross-examination this witness had stated that no prior information was received at the police station prior to lodging of the FIR whereas Sajiwan Lal (P.W.2), who is said to be star witness, had categorically stated in his statement that after giving information at the house of victim, had informed about the incident to the Police out-post and the information was transmitted from the police out post to the Police Station. It is the definite case of the prosecution that the FIR was registered at 10.05 AM and prior to lodging of the FIR, no information was received at the Police Station Kakori whereas Mahendra Pal Singh,S.I (Retd.) (P.W.5) has stated in clear words in his cross-examination that the police personnel had reached the site of occurrence at 10.05 AM. It is highly impossible that police will reach the spot at a time when FIR was registered. Thus, his

statement demolishes the entire prosecution story and we find force in the argument of the learned counsel for the appellant that the appellant has falsely been implicated by someone who bore enmity against him and had disclosed his name to the informant and none had actually seen the alleged incident.

64. Our above finding is countenanced by the fact that as per medical evidence no gonococci or sperm was found and as such the story of committing rape by the appellant as narrated by Nand Lal (P.W.1)-informant and Sajiwan Lal (P.W.2) is falsified and create doubt on the prosecution story.

CONCLUSION

65. In the aforesaid facts and circumstances of the case, we are of the considered view that there is no cogent or clinching evidence on record which proves the guilt of the accused appellant beyond reasonable doubt. Henceforth, we hold that the prosecution has failed to prove the guilt of the appellant beyond all reasonable doubt, and the benefit of doubt has to go to the accused-appellant herein. The impugned judgment of conviction, thus found unsustainable and is liable to be set aside and the appellant is entitled to be acquitted by giving him the benefit of doubt.

66. Accordingly, the appeal is **allowed.** The impugned judgment and order dated 11.1.2013 passed by the Additional Sessions Judge, Court No.16, Lucknow in Session Trial No. 809 of 2007 (State Vs. Anil Kumar Kashyap), arising out of Case Crime No. 241 of 2007 under sections 302 and 376 IPC, Police Station Kakori, District Lucknow and Session Trial No. 810 of 2007 (State Vs. Anil Kumar Kashyap), arising out of Case Crime No. 242 of 2007 under section 4/25 Arms Act, Police Station Kakori, District Lucknow, is hereby set aside.

67. Appellant, Anil Kashyap is acquitted of the charges levelled against him under Sections 302, 376 (2) (cha) IPC and section 4/25 Arms Act. He is in jail. He shall be released forthwith, if not wanted in any other case.

68. Appellant Anil Kashyap is directed to file personal bond and two sureties each in the like amount to the satisfaction of the court concerned in compliance of Section 437-A of the Code of Criminal Procedure, 1973.

69. The office is directed to remit the Lower Court Record alongwith a certified copy of this judgment for necessary information and compliance forthwith to the court concerned.

(2022) 9 ILRA 1525
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.09.2022

BEFORE

THE HON'BLE RAMESH YADAV, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 437 of 2017
with Crl. Appeal No. 657 of 2017 & Govt. Appeal No. 1000163 of 2017

Lal Bahadur Patel ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri R.B.S. Rathaur

Counsel for the Respondent:

Sri Pankaj Tiwari, Ld. A.G.A., Sri Sultan Hasan Ibrahim

A. Criminal Law - Criminal Procedure Code, 1973 - Section 157 - Delay in sending FIR to Magistrate - Section 157 Cr.P.C. requires the concerned police officer to promptly forward a copy of the FIR to the Magistrate - But mere delay in sending the report itself cannot lead to a conclusion that the trial is vitiated or the accused is entitled to be acquitted on this ground - where there is an eye-witness account and direct evidence then delay in sending the F.I.R. to the Magistrate is immaterial & F.I.R. cannot be termed as ante-timed on this ground (Para 24, 25, 26)

B. Criminal Law - Evidence Act,1872 - Sections 25 & 27 - How much of information received from accused may be proved - Confession to police office - Its evidentiary value & exception - *Held* - when an accused being in the custody of police makes a St.ment that reveals some information, leading to the recovery of incriminating material or discovery of any fact concerning to the alleged offence, such St.ment can be proved against him - In a St.ment if something new is discovered or recovered from the accused which was not in the knowledge of the Police before disclosure St.ment of the accused is recorded, it is admissible in the evidence (Para 21)

In the instant case recovery of weapon of offence was made at the pointing out of the appellant/convict - At the time of recovery he told the Investigating Officer that this was the Axe, by which he killed his mother - He also got recovered a blood stain shirt, which he wore at the time of committing the crime - on forensic examination human blood was found on both the articles - convict/appellant St.d, at the time of recovery of axe, that this was the axe which he used to hit his mother and after being injured his mother fell down upon him, therefore, his shirt got blood stains and he ran away upon being challenged by the people of the village - Held - St.ment of the accused to the extent it relates to the discovery of articles is admissible in evidence u/s 27 of the Indian Evidence Act and cab be read in evidence (Para 19)

C. Criminal Law - Criminal Procedure Code, 1973 - Section 378 - Appeal against acquittal - The CrPC does not differentiate in terms of power, scope, jurisdiction, or limitation between appeals against convictions or acquittals - the appellate Court is free to consider both the facts and the law, although self - restraint is exercised when dealing with the orders of acquittal, which carry a double presumption of the accused's innocence - It is a well-established principle that if two possible views exist, the High Court should refrain from interfering with the trial Court's judgment - If the view taken by the trial Court is a possible one, the acquittal recorded by the trial Court should not be disturbed (Para 30)

Accused/convict harbored animosity towards his mother following a money dispute - While she was spreading manure in the field, the accused attacked his mother by striking her head with an axe - his sister-in-law & sister raised an alarm - due to the severity of her injuries, the mother later succumbed to her wounds - Held - Prosecution established the charges beyond reasonable doubt against the convict/appellant, u/s 302 I.P.C. which included an eye-witness testimony i.e. P.W. 2, daughter of the deceased was present on the spot, the recovery of the weapon of offense and a blood-stained shirt - the forensic examination confirmed the presence of blood on the recovered items - dead body recovered with injuries on the cadaver of the deceased - there was no reason for falsely implicating the convict in the case - Appellant rightly convicted (Para 28)

Dismissed. (E-5)

List of Cases cited:

1. Kishore Bhadke Vs St. of Mah.

2. Mehboob Ali & ors. Vs St. of Raj.

3. Raju Manjhi Vs St. of Bihar

4. Ombir Singh Vs St. of U.P. & ors.

5. Yogesh Singh Vs Mahabeer Singh & ors.

6. Pala Singh Vs St. of Pun.

7. Sarwan Singh Vs St. of Pun.

8. Anil Rai Vs St. of Bihar

9. Munshi Prasad & ors. Vs St. of Bihar

10. Aqeel Ahmad Vs St. of U.P.

11. Dharamveer Vs St. of U.P.

12. Sandeep Vs St. of U.P.

13. Achhar Singh Vs St. of H. P.

14. Chandrappa Vs St. of Karn.

15. St. of Andhra Pradesh Vs M. Madhusudhan Rao

16. Raveen Kumar Vs St. of H. P.

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. Criminal Appeal No. 437 of 2017 has been preferred by the convict/appellant Lal Bahadur Patel, Criminal Appeal No. 657 of 2017 has been preferred by the complainant-Lal Singh Patel and Government Appeal No. 1000163 of 2017 has been preferred by State-appellant against the judgment and order passed by Additional Sessions Judge/Fast Track Court, Pratapgarh in Sessions Trial No. 26 of 2014 (State Versus Lal Bahadur Patel and others) arising out of Case Crime No. 62 of 2013, under Sections 302/34, 120-B and 506 of the Indian Penal Code, 1860 (in short "I.P.C"), Police Station Manikpur, District Pratapgarh, wherein trial Court convicted the appellant Lal Bahadur Patel, under Sections 302 IPC and acquitted co-accused Vimal Kumar Patel and Smt. Ramkali, under Sections 120-B and 506 IPC.

2. Necessary facts for disposal of these appeals in short are as under:-

A First Information Report (in short F.I.R.) was registered at Case Crime No. 63 of 2013, under Sections 302, 120-B and 506 IPC at Police Station Manikpur, District Pratapgarh on 17.07.2013, on the basis of written report submitted by the complainant Lal Singh Patel. It was narrated in the written report that the father of the complainant was employed in Indian Railways at the post of Class IV. He died during his employment. His elder brother namely Lal Bahadur Patel had developed animosity towards his mother for division of money on the behest of his in-laws. Before two days of incident Ram Kali (mother-in-law) came to his house and threatened to kill his (complainant's) mother. On 17.07.2013 at about 10 A.M., when his mother, sister-in-law Rekha Devi and sister Anita went to spread manure in the agricultural field, Lal Bahadur Patel and his brother-in-law Vimal Kumar Patel reached there. Lal Bahadur Patel was armed with Axe and he on exhortation of Vimal Kumar Patel assaulted his mother on her head. His sister-in-law and sister raised alarm, then the complainant reached at the spot and found her mother ensanguined (Lahu-luhaan). He carried his mother to the Government Hospital, Kunda by Government Ambulance (108) but due to severe injury, she was referred to Swaroop Rani Hospital, Allahabad, where she died during the course of treatment. The complainant reached at the Police Station and lodged the F.I.R.

3. After investigation charge-sheet was submitted against the convict/appellant Lal Bahadur Patel and Vimal Kumar Patel, under Sections 302 and 506 IPC and against Ramkali under Sections 302, 120-B and 506 IPC. The Magistrate concerned took cognizance of the offence and

committed the case for trial to the Sessions Court. The Sessions Court framed the charges against Lal Bahadur Patel and Vimal Kumar Patel under Section 302 read with Section 34 IPC and against Ramkali under Sections 120-B and 506 IPC. All the accused persons denied the charges and claimed to be tried.

4. In order to prove its case the prosecution examined following witnesses:-

(i) **P.W**. 1- Lal Singh Patel, the complainant;

(ii) **P.W**. 2- Anita Devi, the daughter of the deceased;

(iii) **P.W**. 3- Dr. Shailendra Kumar, who conducted autopsy of the deceased;

(iv) **P.W**. 4- Constable Chandra Mauli Sharma;

(v) **P.W**. 5-Mohammad Hashim-In-charge Inspector;

(vi) **P.W**. 6- Balram Mishra- In-charge Inspector.

Apart from above witnesses, relevant documents have also been proved by the prosecution, which are as under:-

(i) **Exhibit Ka-1**- Written report;

(ii) **Exhibit Ka-2**- Post-mortem-examination report;

(iii) **Exhibit Ka-3**- Chik F.I.R.;

(iv) **Exhibit Ka-4**- Carbon copy of General Diary (G.D.);

(v) **Exhibit Ka-5**- Site-plan;

(vi) **Exhibit Ka-6-** Recovery Memo of blood soaked and plain soil from the spot;

(vii) **Exhibit Ka-7**- Recovery memo of broken bangles found at the spot;

(viii) **Exhibit Ka-8**- Carbon copy of entry in G.D. of taking the accused Lal Bahadur Patel on
police custody remand;

(ix) **Exhibit Ka-9**- Carbon copy of G.D. of recording statement of the accused Lal Bahadur Patel in police custody;

(x) **Exhibit Ka-10**- Recovery memo of weapon of offence i.e. Axe and one shirt stained with blood;

(xi) **Exhibit Ka-11**- Carbon copy of entry made in G.D. about the recovery of weapon;

(xii) **Exhibit Ka-12-** Site-plan of place of recovery of offence;

(xiii) **Exhibit Ka-13**- Charge-sheet;

(xiv) **Exhibit Ka-14**- Inquest report;

(xv) **Exhibit Ka-15**- Letter to Chief Medical Officer, Allahabad for conducting post-mortem;

(xvi) **Exhibit Ka-16**- Letter to Reserve Inspector for post-mortem;

(xvii) **Exhibit Ka-17**- Police Form No. 13;

(xviii) **Exhibit Ka-18**- Photo nash;

(xix) **Exhibit Ka-19-** Specimen seal;

(xx) **Exhibit Ka-20**- Report of Forensic Science Laboratory, Lucknow.

5. After completion of evidence of prosecution, statements of accused persons under Section 313 of the Code of Criminal Procedure, 1973, (in short Cr.P.C.) were recorded, wherein accused persons denied the crime and stated that all the witnesses have deposed against them falsely and documentary evidence is also false and fabricated. Accused Ramkali has further stated that the complainant has falsely implicated her to harass her and she is innocent. The accused Lal Bahadur Patel stated that while his mother was guarding the Orchard, some unknown person killed her there and he has been implicated just for harassment. The accused Vimal Kumar Patel also stated that he has been implicated by the complainant only to harass him and he is innocent and has committed no offence.

6. In defence the accused persons examined Dr.Rajendra Kumar Tripathi, Medical Officer, Community Health Centre, Kunda, Pratapgarh as D.W. 1 and Vinod Kumar as D.W. 2.

7. After close of evidence, learned trial Court heard the arguments of both the sides. After analyzing the evidence available on record, the trial Court came to the conclusion that the prosecution has failed to prove the charges against the accused Vimal Kumar Patel and accused Ramkali but found sufficient evidence against the accused Lal Bahadur Patel for holding him guilty of the charges framed under Section 302 IPC. Learned trial Court concluded that there is sufficient evidence that the accused Lal Bahadur Patel killed his mother by assaulting on her with an Axe, due to which she died. As a result, learned trial Court acquitted Vimal Kumar Patel and Ramkali and convicted Lal Bahadur Patel, under Section 302 IPC and sentenced him to life imprisonment coupled with a fine of Rs.20,000/- and in default of payment of fine further imprisonment of one year. Being aggrieved of this conviction Lal Bahadur Patel preferred Criminal Appeal No. 437 of 2017. The State preferred appeal against the acquittal of Vinod Kumar Patel and Ramkali being Government Appeal No. 1000163 of 2017, while the complainant Lal Singh Patel preferred appeal i.e. Criminal Appeal No. 657 of 2017 against the acquittal of Vinod Kumar Patel and Ramkali.

8. Heard Shri R.B.S. Rathaur, learned counsel for the convict/appellant Lal Bahadur Patel in Criminal Appeal No. 437 of 2017, Shri S.H. Ibrahim, learned counsel for the appellant/complainant-Lal Singh Patel in Criminal Appeal No. 657 of 2017 and Shri Pankaj Tiwari, learned Additional Government Advocate for the State/appellant in Government Appeal No. 1000163 of 2017.

9. Learned counsel for the convict/appellant-Lal Bahadur Patel submitted that learned trial Court has committed error in holding guilty and sentencing the convict/appellant under Section 302 IPC. He further submitted that the F.I.R. is ante-timed as special report was sent after a considerable delay. He further submitted that deceased was admittedly alive for considerable time but her statement was not recorded. He further submitted that the deceased received only one injury on the back side of the head, which could not have been caused by the Axe allegedly recovered at the pointing out of the convict/appellant. He further submitted that the statement of P.W. 1-Anita Devi is not trust-worthy. He further submitted that the evidence of D.W. 1 and D.W. 2 has been ignored by the learned trial Court. There is no sufficient evidence to prove the case of the prosecution beyond reasonable doubt, hence the impugned judgment should be set aside and the convict/appellant should be acquitted.

10. Learned counsel for the appellant/complainant-Lal Singh Patel has submitted that acquittal order of Vimal Kumar Patel and Ramkali passed by the trial Court is not in accordance with law. Learned trial Court has committed manifest error in acquitting these two persons. There was ample evidence to establish the charges framed against them. Ramkali conspired with two other persons to get killed the deceased, therefore, impugned judgment is erroneous to that extent and should be set aside.

11. Learned A.G.A. appearing on behalf of the State/appellant in Government

Appeal No. 1000163 of 2017 submitted that learned trial Court has not considered the evidence in right perspective and erroneously acquitted the accused Vimal Kumar Patel and Ramkali. The incident was caused by the accused Lal Bahadur Patel on exhortation of Vimal Kumar Patel, who is brother-in-law of Lal Bahadur Patel. He further submitted that Ramkali came to the house of the deceased before two days of the incident and threatened to get her killed. She conspired with other co-accused persons and thus killed the deceased, hence the judgment of the trial court is erroneous to that extent and should be set aside and Vimal Kumar Patel and Ramkali should also be punished according to law. He further submitted that Anita Devi is the eye-witness of the incident and she has supported the case before the trial Court. Weapon of offence i.e. Axe was recovered at the pointing out of the convict/appellant and he confessed the crime, that will be read in evidence under Section 27 of the Indian Evidence Act. Human blood was found on the axe in the forensic examination. Shirt of the convict/appellant was also recovered and taken into custody, on that also human blood was found in the forensic examination. He further submitted that statement of D.W. 1 is not reliable as he has deposed only to save the convict/appellant and statement of D.W. 2 is of no help to the convict/appellant. He further submitted that strong motive was there to commit the crime as there was dispute over the money received after the death of the husband of the deceased, who was a Government employee, hence the appeal of the convict/appellant-Lal Bahadur Patel should be dismissed.

12. Considered the rival submissions and perused the original record as well as record of the appeals.

13. It is a case of matricide wherein the convict/appellant-Lal bahadur Patel allegedly killed his mother for the dispute over the money received by his mother on the death of her husband and father of the convict, who was a Government employee and died during his employment.

14. The first information report of the incident was lodged by another son of the deceased, who is real younger brother of the convict/appellant. It was mentioned in the F.I.R. that the father of the complainant was employed in Indian Railways. He died during his employment. The convict/appellant Lal Bahadur Patel was dissatisfied with his mother over division of money on the behest of his in-laws. On 17.07.2013 at about 10 A.M., when his mother, sister-in-law Rekha Devi and sister Anita went to spread manure in the agricultural field, Lal Bahadur Patel and his brother-in-law Vimal Kumar Patel reached there. Lal Bahadur Patel was armed with Axe and he on exhortation of Vimal Kumar Patel assaulted his mother on her head. His sister-in-law and sister raised alarm, then the complainant reached at the spot and found her mother ensanguined (Lahu-luhaan). He carried his mother to the Government Hospital, Kunda by Government Ambulance (108) but due to severe injury, she was referred to Swaroop Rani Hospital, Allahabad, where she died during the course of treatment. The complainant reached at the Police Station and lodged the F.I.R.

15. The complainant has been examined as P.W. 1. He has narrated the entire story before the trial Court step by step and fully proved the facts whatever has been stated in the F.I.R. A lengthy cross-examination has been made by the defence counsel but no major contradiction or

adverse facts could be brought in the cross-examination. Anita, the daughter of the deceased has been examined as P.W. 2, who went with her mother along with her sister-in-law to spread manure in the field. She is an eye-witness of the incident. She has stated before the trial Court that she has three brothers namely Lal Ji, Lal Bahadur and Lal Singh. Her father used to work as Cabin-man in Railway Department. He died during his service. Her elder brother Lal Ji got the service on his place. After the death of her father Rs. 9 Lacs were received as death cum retiral dues. The mother-in-law and brother-in-law of Lal Bahadur Patel used to instigate him to get the money distributed from her mother namely Kewla Devi and they used to altercate with her mother but her mother used to say that she will distribute the money only after the marriage of her daughter and son, who are to be married. She has further stated that when her mother was on the field to spread the manure, Lal Bahadur Patel and his brother-in-law came there and Lal Bahadur Patel hit her mother on her head by the Axe from back side. Her mother sustained injury on her head. She raised hue and cry, thereupon her younger brother Lal Singh and 2-4 more persons came there and the accused persons ran away. She has further stated that her mother was carried to the Hospital in a Government Ambulance from where she was referred to Swaroop Rani Nehru Hospital, Allahabad, where she died. A lengthy cross-examination has been made of this witness also but nothing adverse could be brought in cross-examination evidence which could damage the case of prosecution. No material contradiction is there in her evidence.

16. P.W. 3 is Doctor, who conducted autopsy on the cadaver of the deceased. In the post-mortem examination he found following ante-mortem injuries on the cadaver:-

"(i) Lacerated wound 6 cm X 3 cm bone deep on right side of head 6 cm above right ear on opening scalp big hematoma present on right side of head;

(ii) Fracture of right temporal bone and right middle cranialfossa."

In the opinion of Doctor, injuries found on the cadaver of the deceased might have occurred by the back side of Axe. In the postmortem report, cause of death has been shown as coma as a result of ante-mortem injury.

17. Eye-witness account of the incident is there. P.W. 2- Anita, daughter of the deceased went to the field and she was present on the spot. Upon her cry, the complainant and other persons reached at the spot. As per the statement of the complainant- P.W. 1 at the time of incident he was present at the Orchard, he was at the distance of 10-15 paces and he reached at the spot as he was moving towards the place of incident from his Orchard and he saw that Lal Bahadur Patel was altercating with his mother for the money and thereafter Lal Bahadur Patel assaulted his mother on head with the back side of an axe. He has stated that at the time of incident his sister-in-law and sister were present at the spot.

18. Recovery of weapon of offence was made at the pointing out of the appellant/convict Lal Bahadur Patel. At the time of recovery he told the Investigating Officer that this was the Axe, by which he killed his mother. He also got recovered a shirt, which he wore at the time of committing the crime. The shirt had blood

stains. The Axe and shirt were sent for forensic examination and human blood was found on both the articles. The convict/appellant stated at the time of recovery of axe used in the crime that this is the axe which he used to hit his mother and after being injured his mother fell down upon him, therefore, his shirt got blood stains and he ran away upon being challenged by the people of the village. Recovery memo is Exhibit 10. This statement of the accused to the extent it relates to the discovery of articles is admissible in evidence under Section 27 of the Indian Evidence Act and will be read in evidence.

19. Hon'ble Apex Court in the case of ***Kishore Bhadke Versus State of Maharashtra (2017) 3 Supreme Court Cases 760*** has held that "Section 27 of the Evidence Act is an exception to Section 25 of the Act. Section 25 mandates that no confession to a Police Officer while in police custody shall be proved as against a person accused of any offence. Section 27, however, provides that any fact deposed to and discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

20. In ***Mehboob Ali and another Versus State of Rajasthan (2016) 14 Supreme Court Cases 640***, the Hon'ble Apex Court in this regard has held as under:-

"12. Section 25 of the Evidence Act provides that no confession made to a Police Officer shall be proved as against a person accused of any offence. Section 26 provides that no confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Section 27 is in the form of a proviso, it lays down how much of an information received from accused may be proved. 13. For application of section 27 of Evidence Act, admissible portion of confessional statement has to be found as to a fact which were the immediate cause of the discovery, only that would be part of legal evidence and not the rest. In a statement if something new is discovered or recovered from the accused which was not in the knowledge of the Police before disclosure statement of the accused is recorded, is admissible in the evidence."

21. Hon'ble Apex Court further held in the above case as under:-

"16. This Court in State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru [(2005) 11 SCC 600] has considered the question of discovery of a fact referred to in section 27. This Court has considered plethora of decisions and explained the decision in Pulukuri Kottaya & Ors. V. Emperor [AIR 1947 PC 67] and held thus :

"125. We are of the view that Kottaya case [AIR 1947 PC 67] is an authority for the proposition that "discovery of fact" cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place.

126. We now turn our attention to the precedents of this Court which followed the track of Kottaya case. The ratio of the decision in Kottaya case reflected in the underlined passage extracted supra was

highlighted in several decisions of this Court.

127. The crux of the ratio in Kottaya case was explained by this Court in State of Maharashtra v. Damu. Thomas J. observed that: (SCC p. 283, para 35)

'35. ...The decision of the Privy Council in Pulukuri Kottaya v. Emperor (supra) is the most quoted authority for supporting the interpretation that the "fact discovered' envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

22. In ***Raju Manjhi Versus State of Bihar (2019) 12 Supreme Court Cases 784,*** the Hon'ble Apex Court has held as under:-

"13. The other ground urged on behalf of the appellant is that the so called confessional statement of the appellant has no evidentiary value under law for the reason that it was extracted from the accused under duress by the police. It is true, no confession made by any person while he was in the custody of police shall be proved against him. But, the Evidence Act provides that even when an accused being in the custody of police makes a statement that reveals some information leading to the recovery of incriminating material or discovery of any fact concerning to the alleged offence, such statement can be proved against him. It is worthwhile at this stage to have a look at Section 27 of the Evidence Act.

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

14. In the case on hand, before looking at the confessional statement made by the accused-appellant in the light of Section 27 of the Evidence Act, may be taken into fold for limited purposes. From the aforesaid statement of the appellant, it is clear that he had explained the way in which the accused committed the crime and shared the spoils. He disclosed the fact that Munna Manjhi was the Chief/Head of the team of assailants and the crime was executed as per the plan made by him. It also came into light by his confession that the accused broke the doors of the house of informant with the aid of heavy stones and assaulted the inmates with pieces of wood (sticks). He categorically stated that he and Rampati Manjhi were guarding at the outside while other accused were committing the theft. The recoveries of used polythene pouches of wine, money, clothes, chains and bangle were all made at the disclosure by the accused which corroborates his confessional statement and proves his guilt. Therefore, the confessional statement of the appellant stands and satisfies the test of Section 27 of the Evidence Act."

23. Learned counsel for the convict/appellant also argued that the copy of the F.I.R. was not sent to the Magistrate concerned within the time prescribed under the law, hence adverse inference should be drawn against the prosecution.

24. This argument of the learned counsel for the convict/appellant is not tenable because where there is an eye-witness account and direct evidence then delay in sending the F.I.R. to the concerned

Magistrate is immaterial. Therefore, F.I.R. cannot be termed as ante-timed and it cannot be treated as fatal.

25. In ***Ombir Singh versus State of Uttar Pradesh and another (2020) 6 Supreme Court Cases 378***, the Hon'ble Apex Court in this regard has held as under:-

"19. The obligation is on the investigation officer to communicate the report to the Magistrate. The obligation cast on the investigating officer is an obligation of a public duty. But it has been held by this Court that in the event the report is submitted with delay or due to any lapse, the trial shall not be affected. The delay in submitting the report is always taken as a ground to challenge the veracity of the FIR and the day and time of the lodging of the FIR.

20. In cases where the date and time of the lodging of the FIR is questioned, the report becomes more relevant. But mere delay in sending the report itself cannot lead to a conclusion that the trial is vitiated or the accused is entitled to be acquitted on this ground."

26. In ***Yogesh Singh versus Mahabeer Singh and others, (2017) 11 Supreme Court Cases 195***, the Hon'ble Apex Court in this regard has held as under:-

"40. It has been consistently held by this Court through a catena of judicial decisions that although in terms of Section 157 Cr.P.C., the police officer concerned is required to forward a copy of the FIR to the Magistrate empowered to take cognizance of such offence, promptly and without undue delay, it cannot be laid down as a rule of universal application that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable and the trial stands vitiated. When there is positive evidence to the fact that the FIR was recorded without unreasonable delay and investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the Court, then in the absence of any prejudice to the accused, it cannot be concluded that the investigation was tainted and the prosecution story rendered unsupportable. [See Pala Singh Vs. State of Punjab, (1972) 2 SCC 640; Sarwan Singh Vs. State of Punjab, (1976) 4 SCC 369; Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; Munshi Prasad & Ors. Vs. State of Bihar, (2002) 1 SCC 351; Aqeel Ahmad Vs. State of U.P., (2008) 16 SCC 372; Dharamveer Vs. State of U.P., (2010) 4 SCC 469; Sandeep Vs. State of U.P., (2012) 6 SCC 107]."

27. Learned counsel for the convict/appellant has insisted much on the evidence of D.W. 1 wherein he has stated that the deceased was brought by her daughter Sunita in injured condition in the Dispensary where he was working and she told him that she did not want any legal proceeding. Learned counsel for the convict/appellant while referring this statement argued that if the deceased was hit by the convict/appellant then her daughter Sunita might have told the same to the Doctor (D.W.1), so adverse inference should be drawn. This argument of the defence counsel is also not tenable because it is not necessary for the person reaching the hospital to tell the cause of injury everytime. It might be possible that she was not expecting the death of her mother at that time. Hence, this argument is also of no help. The evidence of D.W. 2 is also of no help to the convict/appellant because

there is an eye-witness account of the incident and the complainant and P.W. 2 have stated about the incident and no material contradictions have been found in their evidence. Furthermore, there is no cogent reason to believe the testimony of D.W. 2.

28. To sum up, the prosecution has proved the charges levelled against the convict/appellant Lal Bahadur Patel under Section 302 IPC beyond reasonable doubt and the learned trial Court rightly relied upon the evidence of prosecution. An eye-witness account was there; recovery of weapon of offence and the blood stained shirt was made at the pointing out of the convict/appellant Lal Bahadur Patel. In the forensic examination blood was found on the recovered articles. Furthermore, there was no reason for false implication of the convict/appellant.

29. So far as co-accused persons Vimal Kumar Patel and Ramkali are concerned, the prosecution could not prove the charges levelled against them beyond reasonable doubt as there is no recovery from their possession or at their pointing out. The trial Court rightly gave them benefit of doubt. It is well settled that acquittal recorded by the trial Court would not be disturbed if the view of the trial Court is a possible view.

30. Hon'ble Apex Court in the case of ***Achhar Singh Vs. State of Himachal Pradesh reported in 2021 SCC Online HP 870*** in this regard has laid down as under:-

"It is thus a well crystalized principle that if two views are possible, the High Court ought not to interfere with the trial Court's judgment. However, such a precautionary principle cannot be overstretched to portray that the "contours of appeal" against acquittal under Section 378 CrPC are limited to seeing whether or not the trial Court's view was impossible. It is equally well settled that there is no bar on the High Court's power to re-appreciate evidence in an appeal against acquittal11. This Court has held in a catena of decisions (including ***Chandrappa v. State of Karnataka, (2007) 4 SCC 415, 42. State of Andhra Pradesh v. M. Madhusudhan Rao, (2008) 15 SCC 582 20-21 and Raveen Kumar v. State of Himachal Pradesh, 2020 SCC Online SC 869****, 11.) that the Cr.P.C does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal and that the appellate Court is free to consider on both fact and law, despite the self-restraint that has been ingrained into practice while dealing with orders of acquittal where there is a double presumption of innocence of the accused".*

31. In the result, these three appeals are ***dismissed***.

32. The convict/appellant Lal Bahadur Patel is stated to be in jail, accordingly he shall serve out the sentence awarded by the trial Court.

33. The accused respondents namely Vimal Kumar Patel and Smt. Ramkali in Criminal appeal No. 657 of 2017 as well as Government Appeal No. 1000163 of 2017, who have already been acquitted by the Court below, are directed to file their personal bonds and two sureties each in the like amount to the satisfaction of the court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973.

34. Office is directed to send a copy of this judgment along with lower Court record to the trial Court concerned for

necessary information and compliance, forthwith.

(2022) 9 ILRA 1536
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2022

BEFORE

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

Crl. Appeal No. 1152 of 2004
and
Crl. Appl. No. 5391 of 2004
and
Crl. Appl. No. 929 of 2004

Budh Sen & Ors. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Taha Bin Islam, Sri Ambrish Kumar Kashyap(A.C.), Sri Anil Raghav, Sri Arun K. Singh Deshwal, Sri Bal Krishna Yadav, Sri I.M. Khan, Sri J.S. Sengar, Sri J.S. Tomar, Sri Janardan Prasad Tripathi, Sri K.D. Mishra, Sri Rohit Sharan Tomar, Sri S.P.S. Raghav, Sri Sabhajeet Singh, Sri Sanjay Kumar, Sri Vindeshwari Prasad

Counsel for the Respondents:
Govt. Advocate

A. Criminal Law - Evidence Act, 1872 - Section 8 - Motive - there is no principle of law that the failure of the prosecution to prove the motive for commission of the crime, must necessarily result in acquittal of the accused - rather, the prosecution is not bound to prove the motive, when crime is proved by direct evidence - where ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of crime has not been proved (Para 37, 41)

B. Criminal Law - Indian Penal Code, 1860 - Section 302 - Murder - Evidence Act, 1860 - Section 3 - Testimony of related/partisan witness - The mere fact of a witness being related to the victim should not lead to the rejection of their testimony - In fact, related witnesses are often the last people who would allow the real culprit to go free and wrongly implicate an innocent person - wholly independent witnesses are rarely available or may be hesitant to come forward due to potential future troubles they may face - Therefore, the relationship between eyewitnesses should not be a reason to dismiss their testimony - It would be illogical to believe that related witnesses would shield the actual perpetrators and substitute innocent individuals in their place. (Para 42)

C. Criminal Law - Indian Penal Code, 1860 - Section 302 - Murder - Evidence Act, 1872 - Section 3 – Appreciation of witness - Maxim 'falsus in uno, falsus in omnibus' - In case even a part of the statement of a witness is found to be untruthful, it cannot be made the basis for discarding his whole testimony as the principal of is not applicable in India - The fact that a witness may have made some improvements or exaggerations in their testimony cannot belie his whole statement - In cases where witnesses come from rural areas and are illiterate, minor contradictions are possible and cannot be ruled out. (Para 51, 52)

D. Criminal Law - Indian Penal Code, 1860 - Section 302 - Evidence Act - Murder - Post occurrence reaction of witness - The fact that the witnesses did not make an effort to rescue the deceased does not in itself raise doubts about their presence at the scene - Every person who witnesses a murder reacts in his own way - Some are stunned, become speechless and stand rooted to the spot - Some become hysteric and start wailing - Some start shouting for help - Others run away to keep themselves as far removed from the spot as possible - Yet others rush to the rescue of the victim, even going to the extent of

counter-attacking the assailants - Every one reacts in his own special way - There is no set rule of natural reaction - To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way (Para 53)

E. Criminal Law - Evidence Act, 1872 - Non recovery of weapon - Effect - it is an established proposition of law that mere non-recovery of weapon does not falsify the prosecution case where there is ample unimpeachable ocular evidence (Para 57)

Dismissed. (E-5)

List of Cases cited:

1. Thaman Kumar Vs State of Union Territory of Chandigarh 2003 (47) ACC 7

2. Rameshwar & ors. Vs State 2003 (46) ACC 581

3. State of Haryana Vs Sher Singh & ors. 1981 Cr. Ruling 317 SC

4. Brahm Swaroop & anr. Vs St. of U.P. (2011) 6 SCC 288

5. Dalip & ors. Vs St. of Pun. A.I.R. (1953) SC 364

6. Masalti Vs St. of U.P. (A.I.R.) 1965 SC 202

7. Masalti Vs St. of U.P. A.I.R. 1965 SC 202

8. Rameshwar & ors. Vs State 2003 (46) ACC 581

9. Rana Pratap Vs St. of Har.AIR1983 SC 680

10. Lakahan Sao Vs St. of Bihar & anr., (2000) 9 SCC 82

11. State of Rajasthan Vs Arjun Singh & ors., (2011) 9 SCC 115

12. Manjit Singh & anr.. Vs St. of Pun., (2013) 12 SCC 746

13. Lakahan Sao Vs St. of Bihar & anr. (2000) 9 SCC 82

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

1. These criminal appeals emanate from the judgment and order dated 10.02.2004 passed by the learned Additional District & Sessions Judge, Court No. 3, Rampur in Sessions Trial No. 624 of 1999 (State Vs. Buddhsen and others), arising out of Crime No. 93 of 1999, under Sections 148, 302/149 IPC; Sessions Trial No. 625 of 1999 (State Vs. Veerpal) arising out of Crime No. 94 of 1999, under Section 25 Arms Act and Sessions Trial No. 626 of 1999 (State Vs. Janki) arising out of Crime No. 95 of 1999, under Section 25/4 Arms Act, Police Station Patwai District Rampur, whereby the appellants-Buddhasen, Jairam, Hori Lal, Mahipal, Janki and Veerpal, each have been convicted and sentenced under Section 148 IPC for six months rigorous imprisonment and Section 302/149 IPC for life imprisonment and fine of Rs.5,000/-; in default of payment of fine they have to undergo additional imprisonment for a period of six months. Appellants Janki and Veerpal were acquitted of the charges under Section 25 Arms Act.

2. The prosecution case in brief is that on 13.7.1999 at about 8.30 a.m., an F.I.R. was lodged at the Police Station Patwai, District Rampur by the informant Lakhan Singh, who happened to be the brother of deceased Trimal, father of deceased Sompal and uncle of deceased Jamna r/o Village Madauli, Police Station Patwai, District Rampur, by filing a written report. It was stated therein that his mango orchard was located in the south-west direction of the village. His brother Trimal, son Sompal

and nephew Jamna s/o Chhiddan used to go and sleep in the orchard to keep a watch. In the intervening night of 12/13.07.1999, at about 2 A.M., first informant, his brother Chheddan, nephew Dharmpal and a resident of his village Lalman went to the orchard where they saw that the appellants Buddhasen with gandasa, Jairam with spear, Horilal and Veerpal with countrymade pistols; Mahipal & Janki with knives entered into the orchard and committed the murder of Trimal, Sompal and Jamna by causing injuries to them. The first informant and other persons identified the assailants and when they made noise, all the appellants ran away towards Kosi River. In the night owing to the fear, they did not go to lodge the F.I.R. In the morning, on the basis of the written report (Tahreer) filed by the informant, the case was registered as Crime No. 93 of 1999 under Sections 147, 148, 149, 302 IPC. The detail of the case was entered into the G.D. at report No. 14.

3. The investigation of the case was handed over to the Station House Officer N.K. Solanki.

4. The inquest of deceased Sompal, Jamna and Trimal, were conducted by A.S.I. Ram Mohan Sharma on the direction of S.I. N.K. Solanki on the same day and the inquest reports were prepared by him along with other relevant papers required for the purpose of post-mortem. Dead bodies were sealed and handed over to constable Bhagwan Das, Anek Singh and Hridesh Kumar who brought them to the Mortuary, District Hospital, Rampur.

5. The post-mortem of the dead bodies of three deceased were conducted on 14.07.1999. It is mentioned in the post-mortem reports that the dead bodies were brought in the Mortuary by constable Bhagwan Das and Hridesh Kumar, sent by S.O. Patwai, Rampur in a sealed cloth with enclosures ten in number. The findings recorded in the post mortem report of Trimal are as under:

Time after death about one and a half day; aged about 32 years; average built body; rigor mortis all over the body; decomposition not yet started; both eyes closed; natural orifices NAD.

Ante-mortem injuries: 1. Incised wound 10 cm x 4 cm x brain cavity deep obliquely placed over left side of forehead underneath fractured bone (frontal) eye orbit , brain tissues peeping out.

2- Incised wound 2 cm x 1 cm x skin deep over right side of forehead above.

3- Incised wound 6 cm x 2 cm over abdomen vertically placed 3 cm above umbilicus omentum coming out.

4- Gun shot wound of entry 6 cm x 4 cm over the left arm pit blackening and tattooing present, underneath 2nd, 3rd & 4th ribs fractured.

5-Incised wound 4 cm x 2 cm skin deep over the right hand.

6- Multiple incised wounds in an area of 28 cm x 20 cm x skin deep of 4 cm x 2 cm in size x 1 to 2 cm in size over back of abdomen.

Internal examination:Neck injuries noted. Scalp, skull-underneath frontal bone fractured in multiple pieces. Membranes-cut underneath, a big size of extradual blood clot in the brain tissues. Brain-body cut underneath with large size of blood clot. Base of the skull fractured. Vertebrate-NAD. Spinal cord-not exposed.

Thorax: walls, ribs & cartilages-injuries noted fractured 2nd, 3rd and 4th ribs. Pleurac-lacerated underneath. Larynx-NAD contain bloody froth. Right lung-

NAD congested. Left lung-lacerated underneath with (two tikali one card, 15 pallets recovered and sealed) about 500 CC of clotted fluid blood. Pericardium-NAD. Heart-NAD 160 gms both chambers empty. Blood vessels-NAD.

Abdomen: Wall injuries noted, peritoneum cut underneath injury no. 3 omentum coming out about 200 cc of clotted blood (fluid) in abdomen. Buccal Cavity-NAD & teeth-16/16. Esophagus-NAD. Contents-NAD empty. Small intestine-NAD, content-D.F.M. Large intestine-NAD faecal matter. Liver & Gall bladder-NAD wt. one kg congested. Pancreas-NAD. Spleen-NAD wt. 140 gms. congested. Kidneys-NAD 200 gms congested. Urinary bladder-NAD empty. Generation organs NAD.

Cause of death was coma as a result of antemortem injuries.

6. The findings recorded in the post mortem report of Jamna are as under:

Time after death about one and a half day; aged about 18 years; average built body; rigor mortis all over the body; decomposition not yet started; both eyes closed.

Ante-mortem injuries: 1. Incised wound 3 x 2 cm x cavity deep over right side of front chest 2 cm above nipple transversely oblique.

2- Incised wound 4 cm x 2 cm x over front of right lower chest, 6 cm below and inner to right nipple, chest cavity deep.

3- Incised wound 8 cm x 2 cm x cavity deep vertically oblique over the lower part of right chest, 6 cm below and inner to injury no. 2.

4- Incised wound 4 cm x 2 cm x muscle deep over front of right upper and in the middle.

5-Incised wound 3 cm x 2 cm x muscle deep over the inner side of right arm middle.

6- Multiple incised wound 4 cm x 2 cm x muscle deep over the inner side of right elbow.

7- Incised wound 4 cm x 2 cm skin deep over the dorsal of right hand.

8- Multiple incised wound 1 to 2 cm long skin deep over the dorsal of right hand at base of 2nd, 3rd and 4th finger.

9-four incised wounds of 2-6 cm long x 1 to 2 cm wide x muscle deep over the back in the area of 28 cm x 22 cm between the both scapula.

Thorax: walls, ribs & cartilages-injuries noted. Pleura-cut underneath injury no. 1, 2, 3. Larynx trachea & bronchi-NAD contain bloody muscle. Right lung-cut underneath injury no. 1, 2, 3 and about 1 and half litter of cloted blood and fluid in right chest cavity. Left lung-NAD pale. Pericardium-NAD. Heart-NAD wt. 160 gms both chambers empty. Blood vessels-NAD.

Abdomen: Wall-NAD, peritoneum-NAD, Cavity-NAD. Buccal Cavity-NAD & teeth-15/15. Oesophagus-NAD. Contents-NAD contains of fluid materials. Small intestine-NAD D.F.M. Large intestine-NAD contains gases and faecal matter. Liver & Gall bladder-NAD wt. 1200 pale. Pancreas-NAD. Spleen-NAD pale wt. 150 gms. Kidneys NAD pale 200 gms both. Urinary bladder-NAD empty. Genitals-NAD.

Cause of death was shock and haemorage as a result of antemortem injuries.

7. The findings recorded in the post mortem report of Sompal are as under:

Time after death about one and a half day; aged about 17 years; average built body; rigor mortis all over body;

decomposition not yet started; both eyes closed.

Ante-mortem injuries: 1. Incised wound 4 cm x 2 cm x chest deep over right side of chest, 8 cm above inner side of right nipple underneath ribs cut oblique vertically placed.

2- Vertical incised wound 4 cm x 2 cm x muscle deep over left side of chest in the arm pit.

3- Incised wound 4 cm x 2 cm over back of left forearm in upper 1/3.

4- Incised wound 12 cm x 2 cm x oral cavity deep transversly oblique over the face extend from below right eye nose to the left cheek underneath maxillary bone cut. 5- Multiple incised wounds in 3 to 2 cm long x 1/2 to 1 cm x skin deep over front of neck.

6- Incised wound 2 cm x 1/2 cm x skin deep over front of left hand.

7- Incised wound 10 cm x 4 cm x muscle deep over the front and outer part of thigh above knee joint.

8- Incised wound 8 cm x 2 cm x skin deep over underneath inner side of right thigh in upper 1/3.

9- Two incised wounds 3 cm x 1/2 cm over right flank of abdomen.

10- Incised wound 4 in number in an area of 40 cm x 30 cm over the upper back of size 4 cm x 3 cm x 1/2 to 1 cm x skin deep.

Thorax: walls, ribs & cartilages-injuries noted rib cut underneath injury no. 1. Pleura-cut underneath over right side. Larynx trachea & bronchi-NAD. Right lung-cut underneath injury and about 1/2 litter of clotted blood fluid in right chest cavity. Left lung-NAD pale. Pericardium-Pale. Heart-NAD wt. 160 gms both chambers empty. Blood vessels-NAD.

Abdomen: Wall NAD, peritoneum NAD, Cavity NAD. Buccal Cavity-NAD & teeth-15/15. Oesophagus-NAD. Contents-NAD empty. Small intestine-NAD D.F.M. Large intestine-NAD gases and faecal matter. Liver & Gall bladder-NAD wt. 1200 pale. Pancreas-NAD. Spleen-NAD 130 gms pale. Kidneys-NAD pale 150 gms both. Urinary bladder-NAD empty. Genitals-NAD.

Cause of death was shock and haemorage as a result of antemortem injuries.

8. During investigation, blood stained cot weaving thread, one empty cartridge 12 bore, one empty cartridge 315 bore, plain and blood stained soil were taken into possession and torches in the light of which appellants were seen by the informant were taken into possession and given into the custody of the informant and recovery memo was prepared. After inspection of the place of occurrence, site plan was prepared and statements of witnesses conversant to the facts of the case were recorded. The weapons used in the commission of murder, one Gandasa, one Countrymade pistol, three cartridges 12 bore, one knife and one spear were also recovered at the instance of appellants-Buddhsen, Veerpal and Janki. Recovery memo was prepared. On the basis of the material collected during investigation, prima-facie case was found to be made out against the accused persons under Sections 147, 148, 149, 302 IPC and the charge sheet was submitted to the court concerned. Charge sheet was also submitted under Section 4/25 Arms Act against appellants Janki and Veerpal.

9. Learned Chief Judicial Magistrate took cognizance of the offence and provided copies of the prosecution papers in compliance of Section 207 Cr.P.C. to the accused persons and committed the case to the Court of sessions for trial.

10. The trial court after taking into consideration the material on record, framed the charges under Sections 148, 302/149 IPC against all the appellants; Section 25 Arms Act against appellant Veerpal and Section 4/25 Arms Act against appellant Janki.

11. Charges were read-over and explained to the appellants, the accused appellants pleaded not guilty, denied the charges and demanded trial. Consequently, the case was fixed for prosecution evidence.

12. In support of its case, the prosecution examined P.W.1 Lakhan Singh who is the first informant and happened to be brother of the deceased Trimal, father of deceased Sompal and uncle of deceased Jamna; P.W.2 Chheddan, who happened to be the brother of deceased Trimal, father of deceased Jamna and uncle of deceased Som Pal; P.W. 3 Lal Man resident of the same village as witnesses of facts; P.W.4 Dr. Arvind Kumar Vaishya who conducted the autopsy and prepared the postmortem reports; P.W. 5 HCP Bhuri Singh who prepared check F.I.R. on the basis of written report (tahreer) and made entry in the G.D.; P.W. 6 constable Hridesh Kumar who brought the dead bodies to the mortuary for post-mortem; P.W. 7 A.S.I. Ram Mohan Sharma who conducted the proceedings of the inquest and prepared the inquest reports and other relevant papers; P.W.8 S.I. Raj Singh who made arrest of appellant Buddhsen, Jai Ram, Veerpal, Janki, recorded the disclosure statements of the appellants, recovered the weapons used in the incident and prepared the recovery memo; P.W.9 S.I. N.K. Solanki who investigated the case and prepared the site plan, recorded the statement of witnesses and submitted charge sheet; P.W.10 A.S.I. Ram Mohan Sharma who also conducted investigation relating to the cases under Section 4/25 and 25 Arms Act and submitted charge sheet; P.W.11 Dheeraj Singh who took the case property relating to Crime No. 93 of 1999 for chemical examination to the Forensic Science Laboratory, Agra.

13. On conclusion of the prosecution evidence, statements of the appellants were recorded under Section 313 Cr.P.C. wherein they had denied all the allegations made against them on account of enmity. The appellant Buddhsen has made statement regarding disclosure statement and recovery to be false. Further stated that at that time he was busy in his field located at village Madauli for plantation of paddy crop from where police had arrested him at 10 o'clock but nothing was recovered from him. The appellants Horilal and Mahipal made similar statements except regarding recovery. The appellant Veerpal has also made similar statement; regarding recovery he stated that it was false and he was arrested by the police from the ice cream factory situated at the Bareilly gate Kanpur, nothing had been recovered from him or at his instance. The appellant Jai Ram had also made the similar statement regarding recovery, he stated that it was false and he was arrested by the police when he was present in the field at Nayagaon and was doing the plantation work of paddy, nothing was recovered from his possession nor at his instance. The appellant Janki had also made similar statement regarding recovery, he stated that it was false, he was arrested by the police from his field at Hazi Nagar where he was working, nothing was recovered from his possession.

14. In defence, D.W. 1 Sultan Khan was examined.

15. The learned trial court passed the order dated 10.02.2004 for convicting and sentencing the appellants as aforesaid, hence this appeal.

16. Heard Sri Arun Kumar Singh Deshwal, Sri Ambrish Kumar Kashyap, Sri J.S. Tomar & Sri Vivek Kumar Mishra, learned Advocates for the appellants and Sri Patanjali Mishra, learned A.G.A. for the State and perused the record.

17. Learned counsel for the appellants submits that the trial court had erred in convicting the appellants without considering and appreciating the evidence on record. The prosecution could not prove its case with cogent and reliable evidence. The appellants are innocent and had committed no offence as alleged against them. There are material contradictions in the statements of prosecution witnesses. The prosecution witnesses are relatives of the deceased. There was enmity between the informant and the appellants and that was the reason, why they were implicated falsely in this case. The incident took place in the night hours and no one had seen it. The recovery of weapons said to have been used in commission of the murder was false and not proved. Spear was said to be in the possession of appellant Jai Ram but no punctured wound was found on the persons of deceased which raises an inference of false implication of the appellants. No independent witness was produced by the prosecution. No witness relating to the memo of recovery was examined. Lastly, it is submitted that the trial court without considering all the above facts had convicted the appellants and the finding recorded by the trial court is based only on hypothesis beyond the evidence on record which gets support from the fact that the charges under Sections 4/25 and 25 Arms Act not found to be proved by the prosecution and the appellants were acquitted of the said charges. In this way judgment in question, thus, pleaded to be erroneous and that the appellants deserve acquittal by allowing the appeals.

18. Learned A.G.A. in rebuttal urged that there is sufficient evidence on record on the basis of which the learned trial court has concluded that the appellants had committed the murder of three deceased persons in their orchard while they were sleeping therein. Prosecution witnesses are natural witnesses because they also went to keep watch on their Mango orchard and they had seen the occurrence in the light of torches. On their making noise, appellants left the place after causing the murder of three persons brutally. The weapons said to be in the hands of appellants were used in the commission of the offence and they were recovered at the instance of accused appellants and also sent to chemical examination to F.S.L. The report disclosed that human blood was found on the weapons which also corroborates the prosecution case. The appellants had motive to commit the murder of the deceased persons because the brother of appellant Buddhsen was murdered prior to this incident in which deceased Trimal and Sompal were named accused and trial was going on. There was strong motive with the appellants to commit the murder of the deceased persons. Though the prosecution witnesses P.Ws. 1 and 2 were relatives of the deceased persons but P.W. 3 Lalmani was not a near relative but he was resident of the village where appellants also resided. There was no enmity of Lalmani with the appellants. The testimony of P.Ws. 1 & 2, thus, gets support with the testimony of an independent witness P.W. 3 Lalmani. The F.I.R. was promptly lodged in the morning.

The occurrence though took place in the night at about 2 a.m., but the first informant categorically stated that because of fear, he could not go to the police station which was 13 Km. away from the place of occurrence. The delay in lodging the F.I.R. as alleged cannot be said to be inordinate but it was natural. The acquittal of appellants of the charges under Section 25 Arms Act is immaterial in so far as conviction in other offence is concerned. The appellants were rightly convicted and sentenced under Sections 148, 302/149 IPC which cannot be said to be against law. The decision of the learned trial court is perfectly sound in law and the present appeals being devoid of merit are liable to be dismissed.

19. From the submissions made by the learned counsel for the parties, the questions to be considered by this Court are that whether there was any delay in lodging of the F.I.R. which could be termed as inordinate delay. Whether it is a case of false implication of the appellants on account of enmity. Whether the motive to commit the murder as stated was present in the case and whether the prosecution witnesses being relatives of the deceased persons can be said to have made false statements only on account of suspicion. Whether there were material contradictions in the statements of the prosecution witnesses so as to discard the prosecution case. The contention that appellant Jai Ram was though assigned spear in his hand but no punctured wound was found on the person of the deceased, the conviction recorded by the learned trial Court, thus, becomes wrong, has also to be examined by us.

20. Before we deal with the contentions of the learned counsel for the appellants, it would be convenient to take note of the evidence adduced by the prosecution.

21. The prosecution had examined eleven witnesses out of which P.Ws. 1 to 3 are the witnesses of fact.

22. P.W. 1 Lakhan Singh, related to three deceased & the first informant, stated that in the south west direction of the village, there was a Mango Orchard measuring six and half bighas. It was the season of Mango and to keep watch a hut was built in the orchard under a tree. The orchard was owned by him, his brothers Chhiddan and Trimal. On the fateful night his brother Trimal, son Sompal, nephew Jamna were there in the garden to keep watch. All those persons used to sleep there. In a routine manner, three deceased persons were sleeping on the cots in front of hut. At about 2 o'clock in the night, he, Chhiddan, nephew Dhrmpal and Lalman went to the orchard as usual, they saw Buddhsen, Jairam, Mahipal, Veerpal, Janki and Hori Lal assaulting the deceased with *gandasa, spear, knives and countrymade pistol.* Buddhsen was carrying gandasa, Jairam spear, Mahipal & Janki knives, Veerpal and Hori Lal were carrying countrymade pistols. He knew Veerpal and Janki prior to this incident being relatives of Buddhsen and that they used to come to his house. At the time of the incident the witnesses had torches with them and in the light of the torches they saw the incident. Narrating the motive to commit the crime it was stated that 3-4 years prior to the incident, brother of Buddhsen was murdered wherein Trimal and Chhiddan were named as accused and at the time of the incident, the trial was going on. He further stated that he wrote the written report (tahreer) himself and presented it in

the police station and he proved the tahreer in his handwriting and signature as Ext.Ka-1.

23. P.W. 2 Chhiddan, the brother of first informant & deceased Trimal, the father of deceased Jamna and uncle of deceased Sompal, stated that an Orchard of Mango measuring six and half *bighaas* was situated on the west side of the village. Mango trees therein were bearing fruits, there was a hut to keep watch in the garden. His son Jamna, nephew Sompal and brother Trimal used to go and in the night and sleep there. On the fateful night, all of them had gone there as usual. Jamna, Sompal and Trimal were lying asleep on two cots and the incident took place at about 1 O'clock. He, his brother Lakhan Singh, son Dharmpal and uncle Lalman in the light of torches saw that the appellants Buddhsen with gandasa, Horilal and Veerpal with countrymade pistol, Mahipal and Janki with knives and Jai Ram with spear were assaulting the deceased Jamna, Trimal and Sompal. Janki and Veerpal were relatives of appellant Buddhsen whom he knew prior to this incident as they used to come to the house of Buddhsen. The appellants ran away towards the river after committing the murder. Further stated that four years prior to this incident, brother of Buddhsen namely Horilal was murdered wherein his brother Trimal was named falsely. Owing to this enmity these murders were committed. It was stated that Lalman went to his field to keep watch of the engine at his field with him. They had torches. Report relating to this incident was filed by Lakhan. Torches were taken into possession by the sub-inspector and then returned to them. Trimal was shot and also assaulted with other weapons.

24. P.W. 3 Lalman had deposed that on the fateful day at about 2 O'clock in the night, he was going to keep watch of his engine in his field. On the way, he met Chhiddan, Lakhan and Dharmpal who were carrying torches and they were going to their orchard. He also joined them and reached near the orchard of Chhiddan at about 2 O'clock in the night. Hearing noise in the garden of Chhiddan, Lakhan and Dharmpal they flashed light with their torches and saw that the appellants Buddhsen having gandasa, Jai Ram with spear, Hori Lal and Veerpal with countrymade pistols, Mahipal and Janki with knives were assaulting Trimal, Jamna and Sompal. When they shouted the appellants ran away in the south direction. When they reached at the place where the incident took place, Trimal, Jamna and Sompal were found dead. The motive of murder as narrated by this witness is same as that of P.W.1 and P.W.2. P.W.3 stated that he knew appellants Veerpal and Janki who used to come to his village.

These three witnesses (P.W.1, P.W.2 and P.W. 3) were subjected to lengthy cross-examination by the defence but they were consistent throughout and none of them could be shaken about their stand in their examination-in-chief relating to the incident.

25. P.W.4 Dr. Arun Kumar Vaishya had conducted the post-mortem of the three deceased. He proved the postmortem reports being in his handwriting and signature which he proved as Ext. Ka-5, 6 & 7.

26. P.W.5 Bhuri Singh posted at the police station concerned on the day of incident, proved the check F.I.R. as Ext. Ka-8 being in his handwriting and signature. He stated that the case was registered on the basis of written report (tahreer) Ext. Ka-1 presented by the

informant, Lakhan Singh and that he entered its detail in the G.D. report no. 14. He had also proved the carbon copy of the G.D. by comparing with the original as Ext. Ka-9.

27. P.W. 6 constable Hridesh Kumar brought the dead bodies to the mortuary for post-mortem. He proved that the dead bodies were in his custody and he kept them safe in the sealed state and did not allow any other person to touch it.

28. P.W.7 A.S.I. Ram Mohan Sharma stated that on the direction of S.O. Solanki he had prepared the inquest of three deceased Sompal with other relevant papers which he proved to be in his hand-writing and signature as Ext. Ka-10 to 15; Ext. Ka-16 to 21; Ext. Ka-22 to 27 and stated that the dead bodies were handed to constable Hridesh Kumar (P.W.6) for taking them to the Mortuary for the post-mortem

29. P.W.8 S.I. Raj Singh made arrest of appellants Buddhsen, Jai Ram, Veerpal, Janki, recorded their disclosure statements leading to recovery of gandasa, spear, knife and countrymade pistol 12 bore at the instance of the appellant Veerpal along with three live cartridges of 12 bore. He had prepared recovery memo at the dictation of Station House Officer which he proved being in his handwriting and signature as Ext. Ka-28. He also proved the recovered articles blood stained gandasa as Material Ext-1, blood stained bhala as Material Ext.-2, knife as Material Ext.-3 and country-made pistol and cartridges as Material Ext.4 to 7 in his deposition.

30. P.W.9 S.I. N.K. Solanki, the Investigating Officer, proved the documents prepared during investigation of the case, site plan as Ext. Ka-29. Fard relating to blood stained and plain earth, three empty cartridges 315 bore and 12 bore and the weaving thread of cot (bandh) as Ext. Ka-30, 31, and 32 being in his handwriting and signature and also proved the entries in the G.D.

He proved the charge sheet being in his handwriting and signature as Ext. Ka-38.

31. P.W.10 A.S.I. Ram Mohan Sharma, is the witness of the case registered investigated the cases relating to Crime Nos. 94 of 1999 and 95 of 1999 under Sections 25 Arms Act and 4/25 Arms Act wherein the appellants have been acquitted.

32. P.W. 11 Dheeraj Singh proved the fact that he took the case property to the F.S.L. Agra for chemical examination.

33. There is no dispute regarding the place of the occurrence. The incident took place in the Mango Orchard of the informant. At the time of the incident, deceased persons were lying on the cots, blood stained weaving threads of the cots were taken into possession, blood stained and plain earth collected from the place of the occurrence and all the collected materials were sent to F.S.L for chemical examination. The reports sent by F.S.L. are on record and proved as Ext. Ka-3 & 4. These reports show that human blood was found on all these things and the blood stained and plain earth similar in its characteristics. The above material on record proves the place of occurrence being the Mango Orchard of informant. P.Ws. 1 to 3 also proved the place of occurrence being the Mango Orchard in their fields in their testimony. None of these facts could be disputed by the defence.

34. The ante-mortem injuries found on the person of the deceased were proved to have been caused by weapons like *gandasa, knife & fire-arm.* P.W. 4 Dr. Arun Kumar Vaishya who conducted the post-mortem of the dead bodies opined that the injuries might have been caused with countrymade pistol, gandasa and knives on the day 12/13.7.1999 at about 2 O'clock in the night. He categorically stated that the injuries on the person of the deceased were caused with sharp edged weapon like knife, gandasa, sharp edged spear. P.Ws. 1 to 3 also stated that the deceased persons were assaulted with Gandasa, country-made pistol, knife and spear. In this way, the medical evidence about the manner of death of three deceased correlates with the ocular evidence about the date, time and manner of the injuries caused, i.e. the weapon used.

35. The incident took place at 2 o'clock in the night and the F.I.R. was lodged by the informant at the police station, which was 13 Km. away from the village, on the next morning at about 8.30 a.m. The first informant mentioned in the written report (Ext. Ka-1) that he could not go to the police station during night due to fear. Where three deaths were caused in the night in such a ghastly manner, it was natural that the inmates of the deceased persons would be frightened. They might not be in a position to do something at the instant moment. The police station was at a distance of about 13 Km. from the place of the incident. To go to the police station for lodging the F.I.R., against those who caused brutal murder of three persons did not seem possible. In the morning, without making any delay the informant had reached the police station by bicycle and lodged the F.I.R. In the said circumstance of the case, it cannot be said that there was any inordinate delay in lodging of the F.I.R. at the police station. The delay, if any, was natural and the explanation offered by the informant is liable to be accepted.

36. As brought on record, there was strong motive with the appellants to commit the murder of the deceased persons. The informant had mentioned in the F.I.R. that there was old enmity with the appellants. During his examination before the Court, the informant disclosed that in the murder of the brother of Buddhsen, namely Hori Lal 3-4 years prior to the instant incident the deceased Trimal and Chhiddan were named and at the time of the incident, the trial was going on. P.Ws. 2 & 3 has also stated the same motive. The appellants in their statements under Section 313 Cr.P.C. asserted that the witnesses made statements against them on account of enmity which also supports the version of the informant that there was enmity between the parties.

37. It is settled that enmity is a double edged weapon, it can be used to implicate falsely, on the other hand it can become motive to commit the offence. Further, there is no principle of law that where if the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Where ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of crime has not been proved.

38. In ***State of Himachal Pradesh Vs. Jeet Singh 1999 (38) ACC 550 SC***, it was held that no doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no

offence was committed if the prosecution failed to prove the precise motive of the accused to commit it as it is almost impossible for the prosecution to unravel full dimension of the mental disposition of an offender towards the person whom he offended.

39. In ***Nathuni Yadav and others vs. State of Bihar and others 1997 (34) ACC 576***, it was held that motive for committing a criminal act, is generally a difficult area for prosecution as one cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act and such impelling cause unnecessarily need not be proportionately grave to grave crimes. It was further held that many murders have been committed without any known or prominent motive and it is quite possible that the aforesaid impelling factor would remain undiscoverable.

40. In the case of ***Thaman Kumar vs. State of Union Territory of Chandigarh 2003 (47) ACC 7*** the Hon'ble Apex Court has reiterated the same view after taking into consideration the abovementioned cases.

41. This Court has also made such observations in the case of ***Rameshwar and others vs. State 2003 (46) ACC 581*** that when there is direct evidence, the motive was not important. Likewise in the case of ***State of Haryana vs. Sher Singh and others 1981 Cr. Ruling 317 SC*** it has been held that the prosecution is not bound to prove the motive, more so, when crime is proved by direct evidence.

42. P.Ws.1 & 2, are related to each other and also to the deceased persons regarding which argument had been made that all these witnesses being relative and highly interested, are not reliable and lack of account of independent witnesses in support of the case is fatal to the prosecution story. No doubt the prosecution witnesses from PW-1 to 2 are members of the same family being in direct relation with the deceased persons but the relationship itself is not a ground to reject the testimony of these witnesses, rather being family members they would be the last persons to leave the real culprit go scot free to falsely implicate the appellants.

43. In the case of **Brahm Swaroop and another vs. State of U.P. (2011) 6 SCC 288** the Apex Court in Para No.21 has observed as under:-

"merely because the witnesses were related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that affects the credibility of a witness, more so, a relation would not conceal the real culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its false implication. However, in such cases the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence."

44. The Apex Court also referred cases of **Dalip and others vs. State of Punjab A.I.R. (1953) SC 364; Masalti vs. State of U.P. (A.I.R.) 1965 SC 202**.

45. In **Masalti vs. State of U.P. A.I.R. 1965 SC 202**, the Apex Court observed in Para No.14:-

"but it would, we think, be unreasonably to contend that evidence

given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on sole ground that it's partisan would inveriably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it's partisan cannot be accepted as correct.

46. It is of common knowledge that village life is faction ridden and involvement of one or the other in the incidents is not unusual. One has also to be cautious about the fact that wholly independent witnesses are seldom available or are otherwise not inclined to come forth. Lest they may invite trouble for themselves for future. Therefore, relationship of eye-witnesses inter se, cannot be a ground to discard their testimony. There is no reason to suppose the false implication of the appellants at the instance of the eye-witnesses. It would also be illogical to think that witnesses would screen the real culprits and substitute the appellants for them.

47. This Court has also made such observations in Para No.14 of **Rameshwar and others vs. State 2003 (46) ACC 581.**

48. Further P.W. 3 Lalman is not related either to the deceased or the witnesses namely P.Ws. 1 & 2. He resided in the same village where the appellants Buddhsen, Jairam, Hori Lal, Mahipal also resided. Other appellants Janki and Veerpal being relative of appellants Buddhsen used to go to the village of the witnesses though were resident of another village situated at a distance of about 8 to 10 Km. This witness cannot be said to be inimical to any of the appellants. It was categorically stated by PW3 that he knew all the appellants before the incident.

49. Now, we are required to consider as to whether the testimony of three witnesses namely P.Ws. 1, 2 & 3 is reliable or worthy of credit. In this regard, it is to be noted that P.Ws. 1 & 2 are relatives of the deceased persons and also inimical to the appellant Buddhsen whose brother was murdered. Wherein deceased Trimal was an accused. As aforesaid, the testimony of related and interested witnesses may play double role of false implication or to commit the offence, more caution is, therefore, required in appreciating their testimony.

50. On analysis, P.W.1 & P.W. 2 had clearly deposed about the commission of murder of the deceased persons by the appellants. They were residents of the same village and appellants Janki and Veerpal were the relatives of appellant Buddhsen. There was no reason to implicate these appellants falsely for the commission of murder leaving the real culprits. Further, deceased Trimal was accused in the murder case of brother of appellant Buddhsen, so there may be reason to implicate him but for other appellants there was no reason for false implication at the cost of absolving real culprits. There was no confusion in the identification of the appellants because the witnesses proved to have seen all of them in the light of torches carried by them. The torches were shown to the Investigating Officer. The appellants being the residents of the same village were well known and identifiable to the witnesses. Both the witnesses were consistent during their cross-examination, there was no deviation

in their statements. As per their version, the deceased persons were sleeping in the Mango Orchard and they were there for the purpose of keeping a watch. Arrival of P.W.1 & P.W. 2 can not be said to be unnatural because at that time Mango trees were bearing fruits and people living in the village always try to keep watch on their crops for protecting them from damage by any outside source. Further relevant to note that the first informant/P.W.1 went to the police station concerned, 13 Km. away from his village, by bicycle and reached there at about 8.30 a.m. and lodged the F.I.R. without any delay. There was no time gap to concoct a false story after consultation. In case, P.Ws. 1 & 2 had not seen the occurrence in the night, they would have no knowledge of the murder even early in the morning, resultantly the prompt lodging of the F.I.R. was not possible. In this way, the plea of false implication by the informant is not fortified with the circumstances of the case. In addition to this, P.W. 3 Lalman was not related to the deceased persons, and there is no evidence that he was inimical to the appellants. Being a resident of the same village, his presence on the spot with the P.Ws. 1 & 2 also seems to be natural as he gave a reason that he was going to keep watch in his field where engine was installed. There is no inconsistency in the statement of P.W.3 with that of P.Ws.1 and 2. He did not deviate in his cross-examination. The testimony of P.W. 3 renders full support to the testimony of P.Ws. 1 & 2 and makes their version wholly reliable and creditworthy.

51. The learned counsel for the appellants lastly indicated the contradictions found in the statements of prosecution witnesses about the time. P.Ws. 1 & 2 stated that they went at the field at 12-1 O'clock whereas P.W.3 Lalman stated that he went there at about 2.15 a.m. The argument is that it is doubtful for P.W.3 to have met P.Ws. 1 & 2 on the way to the field. A perusal of the statement of P.W.3 shows that he also stated in para nos. "6' and "15' of the statement that he went to the field at about 1½- 2 O'clock and on the way he met P.Ws. 1 & 2. He further stated that he went to start engine in his field. P.W.1 & 2 also stated that Lakhan met them before they had reached the Orchard. Likewise P.W. 3. further said that he did not see the weapons. P.Ws. 1 & 2 stated that they remained on the spot throughout the night but P.W.3 stated that P.W.1 Lakhan went to call someone. In this regard, it is noteworthy that the witnesses belong to rural area. They being illiterate persons, possibility of minor contradictions cannot be ruled out. In case even a part of the statement of such a witness is found to be untruthful, it cannot be made the basis for discarding his whole testimony as the principal of "falsus in uno, falsus in omnibus' is not applicable in India. Further, making of some improvement or exaggerations in their testimony by a witness cannot belie his whole statement.

52. The contradictions in the statements of P.W.3 as indicated by the learned counsel for the appellants seem to be of minor character. They cannot be said to be material contradictions as to affect the credibility of prosecution witness. These contradictions are natural and do not strike at the very root of the statements of the witnesses about the incident rather they make their statements more truthful and trustworthy.

53. It was also urged that P.Ws. 1 & 2 were relatives of the deceased persons and they say that they saw the entire incident

but did not make any efforts to rescue the deceased, it falsifies their presence on the spot. In this regard, it is to be noted that P.Ws.1, 2 & 3 were not equipped with weapons whereas appellants were carrying deadly weapons and they were seen by the witnesses causing murder of three deceased persons. In such a horrible situation, it cannot be expected that the witnesses (P.Ws.1 & 2) could have gathered courage to resist the assault. They say that they reached the place of the incident making a noise and on their noise the culprits ran away. The argument of the learned counsel that since the witnesses did not react to the incident by making endeavor to rescue the life of deceased persons, this creates doubt on their presence on the spot cannot be said to be realistic. On this point we may refer para "6' of the judgment by the Apex Court in the case of **Rana Pratap Vs. State of Hariyana AIR1983 SC 680**:-

6. Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

54. In this way the testimony of the three witnesses (P.Ws. 1 to 3) is found to be wholly trustworthy and reliable.

55. As regards, the testimony of D.W. 1 Sultan Khan, he has stated that appellant Veerpal was working as a labourer in his ice cream factory on 13.7.1999 at about 12-01 P.M. and the police took him away but the incident took place in the night of 12/13.07.1999 and this witness had nowhere stated that Veerpal stayed there in the factory throughout the night. So the presence of Veerpal (appellant) on the spot cannot be said to be impossible and the statement of this D.W. is of no use in this regard.

56. In the present case, we do not find any major contradiction either in the evidence of the witnesses or any such conflict in the medical and ocular evidence which would tilt the balance in favour of the appellants. The minor improvements, embellishments etc., apart from being far yield of human faculties are insignificant and ought to be ignored since the evidence of the witnesses otherwise overwhelmingly corroborate each other in material particulars.

57. The next submission of the learned counsel for the appellants is that the recovery evidence was false and fabricated. We feel no need to address this issue since it had already been validly discarded by the trial court while convicting the appellants. In any case, it is an established proposition of law that mere non-recovery of weapon does not falsify the prosecution case where there is ample unimpeachable ocular evidence. **Lakahan Sao Vs. State of Bihar and Anr., (2000) 9 SCC 82; State of Rajasthan Vs. Arjun Singh & Ors., (2011) 9 SCC 115 and Manjit Singh and**

Anr. Vs. State of Punjab, (2013) 12 SCC 746.

58. In the case of **Lakahan Sao Vs. State of Bihar and Another (2000) 9 SCC 82**, it was held that the non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is available/acceptable.

59. Having given our anxious considerations to the submissions made by the learned counsel for the parties, we are clearly of the opinion that the prosecution has succeeded in establishing its case against the appellants beyond any shadow of doubt and the view taken by the learned Sessions Judge is absolutely correct in the eye of law.

60. In the result, the appeals lack merit and are hereby **dismissed.**

61. The appellants Buddhsen, Mahipal, Veerpal, Janki and Hori Lal are in jail, they will serve out the remaining period of sentence. The appellant Jairam is on bail, he shall be taken into custody forthwith and sent to jail to serve the sentence.

62. Copy of this judgment alongwith the original record be transmitted to the Court concerned for necessary compliance. A compliance report be sent to this Court within one month. The office is directed to keep the compliance report on record.

(2022) 9 ILRA 1551
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

THE HON'BLE SHIV SHANKER PRASAD, J.

Crl. Appeal No. 3561 of 2004

Mani Ram Chaudhary ...Appellant
Versus
State of Uttar Pradesh ...Respondent

Counsel for the Appellant:
Sri S.K. Pandey, Sri Rajesh Kumar Chaudhary

Counsel for the Respondents:
Govt. Advocate

Criminal Law - Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3 (2) (v) - Punishment for offence of atrocities - Section 3 (2) (v) SC/ST Act apply only if the offence under the IPC punishable with imprisonment for a term of ten years or more is committed by a person of upper caste against a person of scheduled caste or scheduled tribe on the ground that such person is a member of scheduled caste or scheduled tribe - It is necessary to prove that the offence was committed on the ground of the victim being of scheduled caste - In the instant case prosecution failed to bring on record any evidence which may demonstrate that the minor victim was raped on the ground of her being a scheduled caste - Merely because minor victim is a scheduled caste would not attract the offence under Section 3(2)(v) of the SC/ST Act - Conviction u/s 3(2(v) of the SC/ST Act set aside(Para 29, 32)

Criminal Law - Indian Penal Code, 1860 - Section 376 - Evidence Act, 1872 - Section 3 - Rape - Informant belonged to scheduled caste and her daughter was a student of Class Vth - On 09.12.2002, at about 1.00 pm, at around 1:00 pm, the informant's daughter was returning from school when the accused appellant noticing her alone, forcefully took her into his house and raped her - a prompt report was lodged at 16.45 pm - victim was admitted to a hospital for nearly four days

on account of injuries on her private part - Presiding Officer found the victim to be mature and sensible and relied upon her statement - she clearly stated that accused appellant grabbed her and brought her inside the Ghaari and raped her - she identified the accused appellant and supported the prosecution version - the victim and her mother have clearly deposed in support of the charge - medical report clearly supported the ocular testimony - offence of rape proved against the accused appellant beyond reasonable doubt - Held - no infirmity in holding the accused appellant guilty of the offence u/s 376 IPC - Conviction proper (20, 21)

Partly Allowed. (E-5)

List of Cases cited:

1. Dinesh @ Buddha Vs St. of Raj. (2006) 3 SCC 771

2. Ramdas and others Vs St. of Mah., 2006(8) SC 635

3. Asharfi Vs St.of U.P., (2018) 1 SCC 742

4. Khuman Singh Vs St. of M. P. Criminal Appeal No. 1283 of 2019, decided on 27.8.2019

5. Patan Jamal Vali Vs State of Andhra Pradesh, AIR 2021 Supreme Court 2190

6. Dharmendra Vs State of U.P., 2011 Cr.L.J. 204

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Shiv Shanker Prasad, J.)

1. This criminal appeal is directed against the judgment and order dated 21.5.2004, passed by the Special Judge Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, Basti, District Basti in Special Sessions Trial No. 14 of 2003, State vs. Maniram Chaudhary; whereby the appellant has been convicted under sections 376 IPC and Section 3(2)(v) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and consequently sentenced to rigorous life imprisonment along with fine of Rs.20,000/- for the offence under Section 376 IPC and rigorous life imprisonment for the offence under Section 3(2)(v) SC/ST Act along with fine of Rs. 20,000/- and on failure to deposit the fine appellant is to undergo two years additional rigorous imprisonment. Both the sentences are to run concurrently.

2. As per the prosecution case a written report (Ext.A-1) was given to the Police Station Kaptanganj, District Basti by Shanti Devi (PW-1) stating that she belongs to scheduled caste and her daughter is a student of Class Vth in the Primary School, Bheeta. On 9th December, 2002, at about 1.00 pm, the informant's daughter was returning from her school to have lunch. On her way situated the house of accused appellant. Accused appellant on spotting the victim alone dragged her inside his house and raped her. The victim somehow reached her house and informed her mother, who has filed the written report (Ex.A.1).

3. The scribe of the written report is one Sitaram (PW-3), the President of Bahujan Samaj Party, Kaptanganj. On the basis of written report a first information report (Ex.Ka.5) was lodged as Case Crime No. 254 of 2002, under Section 376 IPC read with Section 3(1)XII of the SC/ST Act, 1989.

4. The victim was thereafter medically examined by Dr. Seema Chaudhary, Emergency Medical Officer, Woman Hospital, Basti (PW-5) on 9.12.2002, at 7.15 pm. Injury report of victim is Exhibit Ka-3. As per the report

the victim was 4' 6" tall and weighed 24 Kg. No external injury was seen but blood stains were seen on victim's Vulva Perineum and Thigh. Hymen was found torn in midline alongwith bleeding. Bleeding was also seen in vagina. Vaginal semen was taken and sent for pathological examination. The patient was examined under general anesthesia and lateral vaginal laceration near left fornix was seen bleeding and she was advised admission; vaginal pulsing was done and she was kept under observation. The victim was also sent to radiologist for x-ray and determination of her age.

5. The radio-logical x-ray was done on 10th December, 2002 by Dr. Sudhakar Mishra (PW-7). X-ray of victim's right elbow and right knee was held by Dr. Sudhakar Mishra on 10.12.2002 and his report is Exhibit Ka-7. The victim was also examined by Dr. Jagdish Singh, Dental Surgeon (PW-8), who determined victim's age to be 12 years.

6. The victim was kept in the hospital from 9.12.2002 to 13.12.2002. The investigation proceeded thereafter and statement was recorded of PW-1, PW-2, PW-4 under Section 161 Cr.P.C. and the site plan was also prepared. Upon conclusion of investigation a chargesheet came to be submitted against the accused appellant under Section 376 IPC read with Section 3(1)XII SC/St Act on which the Magistrate took cognizance and committed the case to Sessions. Charges were accordingly framed by the Court of Sessions against the accused appellant who denied the same and demanded trial.

7. On behalf of the prosecution documentary evidence in the form of FIR (Ext.Ka-5); Written report (Ext.A-1); Injury reports (Exts. Ka-3, 4, 7, 8) and Recovery memo (Ext. Ka-2) was proved and was duly exhibited. Oral deposition was made by Shanti Devi (PW-1), Victim (PW-2), Sita Ram (PW-3), Kashi Ram (PW-4), Dr. Seema Chaudhary (PW-5), Vishwanath Yadav (PW-6), Dr. Sudhakar Mishra (PW-7), Dr. Jagdish Singh (PW-8) and Om Prakash (PW-8).

8. The accused appellant was confronted with the incriminating material which has surfaced against him during trial under Section 313 Cr.P.C. He denied the accusations that while victim was returning home to have her lunch the accused appellant grabbed and dragged her inside the house and raped her. About lodging of report the accused appellant termed it to be false. Other accusations made against the accused appellant were also denied. In reply to question no. 6 he has stated that on account of enmity with Sita Ram (PW-3), the accused has been falsely implicated in collusion with the investigating officer.

9. It is worth noticing that after the trial proceeded in the matter and hearing was concluded the Court of Sessions before delivering the judgment altered the charge under Section 3(1)XII SC/ST Act to Section 3(2)(v) SC/ST Act. The prosecuting officer made statement that the prosecution does not intend to produce any additional evidence in respect of the charge. Counsel for the accused appellant also made a statement that the accused appellant does not intend to submit any further evidence in the matter.

10. On the basis of aforesaid material the Court of Sessions has found the charge of rape under Section 376 IPC proved against the accused appellant. The court below also found the charge under Section

3(2)(v) of SC/ST Act to be proved beyond reasonable doubt.

11. Feeling aggrieved by aforementioned judgment and order the accused appellant has filed the present appeal. We have heard Sri Rajesh Kumar Chaudhary for the appellant and Mrs. Archana Singh, learned AGA for the State and carefully perused the records.

12. It is urged on behalf of the accused appellant that he has been falsely implicated in the present case at the instant of PW-3 with whom he had political rivalry. It is argued that the offence under Section 376 IPC has not been established on the basis of evidence led by the prosecution.

13. Learned counsel for the appellant further submits that the charge under Section 3(2)(v) SC/ST Act has not been substantiated by the prosecution, inasmuch as, it is neither shown that accused appellant was aware about the caste of the victim, nor is it shown that the offence itself was committed upon the victim on the ground of her being a member of the scheduled caste. It is also contended that the accused appellant has not been confronted under Section 313 Cr.P.C. with the charge under Section 3(2)(v) SC/ST Act and in its absence the conviction and sentence of appellant under Section 3(2)(v) SC/ST Act would be impermissible.

14. Learned counsel for the appellant has produced the custody certificate dated 12.6.2022 of accused appellant to submit that he has undergone sentence with remission of over 25 years and his continued incarceration in jail is unwarranted.

15. Learned AGA, on the other hand, submits that the offence of rape is proved against the accused appellant beyond reasonable doubt since the victim and her mother have clearly deposed in support of the charge which is otherwise supported with medical evidence. It is further argued that the victim being a member of scheduled caste had been subjected to rape and, therefore, the charge under Section 3(2)(v) SC/ST Act is also made out. Submission is that deposition of prosecutrix with regard to commissioning of offence of rape upon her is clearly corroborated with the medical evidence and the appeal lacks merit.

16. The accused appellant has primarily been charged of offence under Section 376 IPC and Section 3(2)(v) SC/ST Act. The trial Court has found both the charges to be proved against the accused appellant beyond doubt. So far as the first charge under Section 376 IPC is concerned, we find from the evidence on record that the victim was a Class Vth student and while returning from her school for lunch had to cross the house of the accused appellant. The site plan is on record which shows existence of paved road from east to west. Towards east of the road there existed a dirt track to the school. The house of accused appellant was on the junction of paved road and dirt track. After the house of the accused appellant there existed two temples of goddess Kali and Durga, whereafter one could reach the school. The victim while was returning from the school was grabbed by the accused appellant who dragged her inside and she was raped. The offence itself was committed at 1.00 pm and a prompt report was lodged in respect of the offence at 16.45 pm. The distance between the police station and place of occurrence is about 10 kms.

17. It appears that the first informant is an illiterate lady and she took services of

PW-3 for writing the written report on the basis of which the FIR was registered. The victim has been examined by Emergency Medical Officer at Woman Hospital Basti at 7.15 pm on the same day. The injury report of victim is on record in which blood stains are seen on vulva perineum and thigh and her hymen was torn in midline. She was also bleeding. The victim had to be examined by administering general anesthesia and lateral vaginal laceration near left fornix was seen bleeding. The victim was hospitalized and later discharged on 13.12.2002.

18. PW-1, who is the first informant and PW-2, who is the victim have deposed in court. PW-1 in her statement has elaborately explained that once victim having home she immediately informed her mother about the crime got a written report scribed from an unknown person in an office having blue flag. She has denied the suggestion that on account of enmity between accused appellant and PW-3 she has falsely implicated the accused appellant or to receive compensation.

19. PW-2 has also been examined by the Presiding Officer found that the victim is mature and sensible and her statement can be relied upon. She has clearly stated that while returning from the school she had to cross the house of accused appellant and when she reached the house of the accused appellant he grabbed her and brought her inside the Ghaari and raped her. She has stated that the accused appellant had covered her mouth so that she may not shout and after committing rape the accused appellant left her. She was bleeding and immediately informed it to her mother. She has deposed that she did not know the accused appellant from before and his name was disclosed to her by her mother at the police station. She has also stated that other students returning with her were ten paces ahead of her and that nobody could see her being grabbed by the accused appellant.

20. Although on behalf of accused appellant it is argued that he has been falsely implicated on account of political rivalry between him and PW-3, but the Court below has found such defence to be wholly baseless in view of the evidence adduced by the victim and her mother. Having considered the injury report, the statement of doctor and the fact that victim was admitted to a hospital for nearly four days on account of injuries on her private part, we are in agreement with the conclusion drawn by the court below that the guilt of accused appellant of committing rape is clearly established. The statement of victim has been found credible and reliable by the court below and she has specifically identified the accused appellant and has supported the prosecution version.

21. Plea of rivalry between PW-3 and the accused appellant is pressed in order to submit that written report was scribed by PW-3, who had falsely implicated the accused appellant. This explanation does not appear to be convincing since it is apparent from the evidence that house of the accused appellant fell on the way of the victim returning from her school to her house. She has clearly identified the place of occurrence and it remains undisputed that the house of accused appellant situates there. The accused appellant has also been identified by the victim. The medical report clearly supports the ocular testimony. In such circumstances, merely because written report was scribed by the PW-3, the evidentiary value of prosecution case would not suffer. The injury report, etc. are

otherwise, clearly proved and duly exhibited by the prosecution. In that view of the matter, we find no infirmity in the judgment and order of the court below holding the accused appellant guilty of the offence under Section 376 IPC beyond reasonable doubt.

22. This takes us to the next aspect of the present appeal which is with regard to the conviction of accused appellant under Section 3(2)(v) of the SC/ST Act. Section 3(2)(v) of the SC/ST Act reads as under:-

"(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;"

23. In order to establish an offence under Section 3(2)(v) SC/ST Act, the prosecution is required to prove that the offence is committed on the ground that such person is a member of scheduled caste or scheduled tribe.

24. In Dinesh @ Buddha Vs. State of Rajasthan, (2006) 3 SCC 771, the above provision fell for consideration before the Supreme Court, wherein the Court observed as under:-

"At this juncture it is necessary to take note of Section 3 of the Atrocities Act. As the Preamble to the Act provides 'the Act has been enacted to prevent the commission of offences of atrocities against the members of the Scheduled Castes and Scheduled Tribes. The expression 'atrocities' is defined in Section 2 of the Atrocities Act to mean an offence punishable under Section 3. The said provision so far relevant reads as follows:

"3(2)(v): Punishments for offences of atrocities-

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, -

xxx xxx xxx

(v) commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;

xxx xxx xxx"

Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) has no application. Had Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine."

25. The aforesaid provision has again been considered by the Supreme Court in Ramdas and others Vs. State of Maharashtra, 2006(8) SC 635, wherein the Court observed as under:-

"At the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The mere fact that the victim

happened to be a girl belonging to a scheduled caste does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the Pardhi community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a scheduled caste community. The conviction of the appellants under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside."

26. In Asharfi Vs. State of U.P., (2018) 1 SCC 742, the Supreme Court again observed as under:-

"The evidence and materials on record do not show that the appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW-3 Phoola Devi belonged to Scheduled Caste community. In the absence of evidence proving intention of the appellant in committing the offence upon PW-3-Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the appellant under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained."

27. In Khuman Singh Vs. State of Madhya Pradesh, Criminal Appeal No. 1283 of 2019, decided on 27.8.2019 also the Supreme Court held as under:-

"As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar"-Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable."

28. In Patan Jamal Vali Vs. State of Andhra Pradesh, AIR 2021 Supreme Court 2190, the provision was again considered exclusively so as to determine the scope of Section 3(2)(v) of SC/ST Act after taking note of earlier judgment on the issue. The Supreme Court observed as under in paragraph 55:-

"55.....A true reading of Section 3(2)(v) would entail that conviction under this provision can be sustained as long as caste identity is one of the grounds for the occurrence of the offence."

29. A Division Bench of this Court in Dharmendra Vs. State of U.P., 2011 Cr.L.J. 204 also had an occasion to consider Section 3(2)(v) of SC/ST Act, wherein this Court observed as under:-

"It is apparent from the above provision that Section 3 (2) (v) SC/ST Act shall apply only if the offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more is committed by a person of upper

caste against a person of scheduled caste or scheduled tribe on the ground that such person is a member of scheduled caste or scheduled tribe. It is not sufficient that if the accused belongs to upper caste and the victim belongs to scheduled caste. It is also necessary to prove that the offence was committed on the ground of the victim being of scheduled caste. No such allegation has been made in the FIR that the offence was committed because of victim belonged to scheduled caste nor there is any such evidence of record. Thus the conviction of appellant under Section 3 (2) (v) SC/St Act cannot be sustained."

30. When we examine the facts of the case in light of the law settled on the point we find that the only evidence available on record is that the victim belongs to scheduled caste while accused appellant is from Kurmi Community (OBC). PW-1 has stated so in her deposition, relevant portion whereof is extracted hereinafter:-

''मै जाति के चमार तथा मुल्जिम जाति के कुर्मी है। गरीब तथा चमार जाति का होने के कारण मुल्जिम ने घटना किया।''

31. There is nothing on record to show that the accused appellant knew the caste of the deceased or that the offence of rape was committed on the ground that victim is a member of scheduled caste or due to victim's caste identity. The victim herein is 11-12 year old minor girl who was alone and grabbed by the accused appellant. At the time when the victim was grabbed by the accused appellant there was none else available. The evidence otherwise does not show that the victim was known to accused appellant from before or that the accused appellant was aware of the caste of victim and was a ground for the crime.

32. PW-2 in fact has stated that she did not known even the name of accused appellant and his name has been disclosed to her at the police station by her mother. The prosecution has not brought on record any evidence which may demonstrate that the minor victim was raped on the ground of her being a scheduled caste. Merely because minor victim is a scheduled caste would not attract the offence under Section 3(2)(v) of the SC/ST Act. In light of the deliberations held above, we have no hesitation in coming to the conclusion that the prosecution has failed to establish existence of necessary ingredients to attract commissioning of offence under Section 3(2)(v) of the SC/ST Act against the accused appellant.

33. We further find that the prosecution while putting incriminating material collected against the accused appellant during the course of trial has not confronted him with regard to the charge levelled under Section 3(2)(v) of the SC/ST Act. The statement under Section 313 Cr.P.C. has been carefully examined by us in which there is no reference of offence committed upon the victim on the ground that she belongs to scheduled caste or on account of her caste identity. Unless the accused appellant is confronted on such accusation the right of the accused appellant to submit his defence is clearly breached and, therefore, we are of the view that the accused appellant otherwise cannot be convicted under Section 3(2(v) of SC/ST Act.

34. For the above reasons, we set aside the judgment and order of the court below dated 21.5.2004 convicting the accused appellant under Section 3(2(v) of the SC/ST Act.

35. This takes us to the last question which is with regard to the punishment to be imposed upon the accused appellant. The charge against the accused appellant is of committing offence under Section 376 IPC upon a minor 12 year girl who was returning from her school. The charge against the accused appellant is extremely serious. The accused appellant was a person of nearly 45 years of age on the date of commissioning of the offence and, therefore, he was expected to be aware of his actions and its consequences.

36. Learned counsel for the accused appellant submits that the maximum punishment under Section 376 IPC ought not to exceed above 10 years in the facts of the case.

37. Learned AGA on the other hand submits that the punishment of life is appropriate in the facts of the case.

38. Considering the fact that minor victim was only 11-12 year of age at the time of commissioning of the offence, we are of the view that the accused appellant does not deserve any leniency and sentence of ten years would clearly be inadequate. However, in the facts of the case we find that the accused appellant has already suffered incarceration with remission of more than 25 years. In our view, this would be sufficient punishment for the accused appellant who otherwise by now would be a person of 65-70 years and has spent major part of his life in imprisonment. In such circumstances, we substitute the punishment for life awarded to the accused appellant under section 376 IPC with the sentence already undergone by the appellant. The fine is reduced to Rs. 10,000/- and on its failure to pay the accused appellant shall undergo further imprisonment of three months.

39. This Criminal Appeal, accordingly, is partly allowed.

40. A copy of this order shall be communicated to the accused appellant in Jail through Chief Judicial Magistrate/Jail Superintendent concerned, forthwith.

41. The accused appellant shall be released from Jail, forthwith, unless he is wanted in any other case, subject to compliance of Section 437A Cr.P.C.

(2022) 9 ILRA 1559
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Crl. Appeal No. 6073 of 2016
with
Crl. Appl. No. 6611 of 2016

Smt. Kushma Devi ...Appellant
Versus
The State of U.P. ...Opp. Party

Counsel for the Appellant:
Ms. Archna Singh Jadaun, Sri Noor Mohammad, Sri Mayank Rastogi

Counsel for the Respondents:
G.A.

A. Criminal Law - Evidence Act, 1872 - Section 32 - Dying Declaration - A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise, provided the indication is positive and definite - Typically, such statements are made verbally before the person's death and then documented by a magistrate, doctor, or police officer - When it is recorded, no oath is necessary nor is the presence of a

magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. - There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording - what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case - what is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind (Para 13)

B. Criminal Law - Indian Penal Code, 1860 - Exception 4 to Sections 300 & 304 (Part I) - Offence would be punishable under Section 304 (Part-I) IPC because the burn injuries were caused to the deceased by appellant with the intention to cause such bodily injuries as were likely to cause death - case falls under the Exceptions 4 of Section 300 IPC - conviction of the appellant under Section 302 IPC converted into conviction under Section 304 (Part-I) of IPC (Para 17, 21)

Partly Allowed. (E-5)

List of Cases cited:

1. Khokan @ Khokhan Vishwas Vs St. of Chhattisgarh 2021 0 Supreme (SC) 73

2. State of Uttar Pradesh Vs Subhash @ Pappu 2022 0 Supreme (SC) 260

3. Tuka Ram & ors. Vs St. of Mah. [(2011) 4 SCC 250]

4. BN Kavadakar & anr. Vs St. of Karn.[1994 Supp (1) 304]

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

1. By way of these appeals the two accused who have filed the appeals out of them the appellant of Criminal Appeal No.6611 of 2016 namely Rajesh Kumar breathed his last during pendency of this appeal therefore qua him the appeal is abated.

2. The sole surviving appellant Smt. Kushma Devi who is incarcerated since 17.3.2012 has preferred this appeal against the judgement and order dated 03.10.2016, passed by learned Additional Sessions Judge/ Fast Track Court No.1, Aligarh in Session Trail No. 164 of 2013 (State of UP vs. Rajesh Kumar and Others), arising out of Case Crime No. 102 of 2012, under Sections 498-A, 304B, 302/34 Indian Penal Code, 1860 (in short "I.P.C.'), Police Station- Harduaganj, District Aligarh, whereby the appellant- Smt. Kushma Devi was convicted and sentenced for the offence under Section 302/34 I.P.C. for life imprisonment with fine of Rs.20,000/- and in default of payment of fine, further imprisonment for three months.

3. Brief facts of the case giving rise to this appeal are that a written report was submitted by complainant Raj Kumar Singh (father of the deceased) at police station Harduaganj, District Aligarh with the averments that marriage of his daughter Manoj Kumari was solemnized with accused- Rajesh Kumar three years ago. He had given dowry as per his capacity. After marriage accused- Rajesh Kumar and his family members demand motorcycle and Rs.1,00,000/- (Rupees one lakh) as additional dowry and used to compel his daughter to bring the aforesaid articles. It is further averred that on 16.03.2012, appellant- Rajesh Kumar and his family members had murdered his daughter by

pouring kerosene oil on her and setting her ablaze.

4. On the basis of above written report, a Case Crime No.102 of 2012 was registered at Police Station Harduaganj, under Sections 498-A, 304-B, 302/34 I.P.C.. Investigation was taken up by Investigating Officer, who visited the spot, prepared the site plan and recorded the statement of witnesses. Inquest report was prepared and post-mortem of the dead body was conduced and its report was also prepared by doctor. After completion of investigation, I.O. submitted the charge sheet against accused- Rajesh Kumar who was the husband and Smt. Kushma Devi, who is the mother-in-law of the deceased. As the case against accused Rajesh Kumar and Smt. Kushma Devi was exclusively triable by the court of session the case was committed to the court of session for trial by the Magistrate, hence, trial took place against accused- Rajesh Kumar and Smt. Kushma Devi.

5. Learned Sessions Court framed the charges against accused- Rajesh Kumar and Smt. Kushma Devi under Section 498-A, 304-B and 302/34 I.P.C. Charges were read over to the accused, who denied the charges and claimed to be tried.

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

1.	Raj Kumar	P.W.-1
2.	Prem Pal Singh	P.W.-2
3.	Ram Veer Singh	P.W.-3
4.	Sunita	P.W.-4
5.	Dr. Sanjay Kumar Singhal	P.W.-5
6.	Kapoor Chand	P.W.-6
7.	Gyan Kumar Singh	P.W.-7
8.	K.L. Verma	P.W.-8
9.	D.P. Singh	P.W.-9
10	Dr. Vimal Kumar Gupta	P.W.-10

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

1.	FIR	Ex.ka-3
2.	Written report	Ex.ka-1
3.	Dying Declaration	Ex. ka-11
4.	Post-mortem report	Ex.ka-2
5.	Panchayatnama	Ex.ka-6
6.	Charge sheet Mool	Ex.ka-5
7.	Site plan with index	Ex.ka-13

8. After completion of prosecution evidence, the statement of accused were recorded under Section 313 of Criminal Procedure Code (Cr.P.C.), in which they denied their involvement in the crime and told that false evidence was led against them. The accused examined D.W-1 Chol Singh in defence.

9. We have heard Shri Noor Mohd. for the sole surviving appellant. It is further submitted by Shri Noor Mohd. that dying declaration should not have been acted upon by the Court below. It is further submitted that death of the deceased was

due to septicaemia and therefore the punishment be converted from 302 to 304 Part-I in view of the recent decisions of Apex Court in **Khokan @ Khokhan Vishwas Vs. State of Chhattisgarh 2021 0 Supreme (SC) 73** and in **State of Uttar Pradesh Vs. Subhash Alias Pappu 2022 0 Supreme (SC) 260** cited by learned counsel for the appellant.

10. Learned A.G.A. for the State has taken objection to the submissions of learned counsel for the accused-appellant and submitted that death of deceased had taken place within 7 years of her marriage. The dying declaration has been proved by ocular version of P.W.9 and P.W.10 and the statement of the deceased and therefore there is no question of not believing the same and upholding the conviction. The incident occurred on 17.3.2012 and the death occurred on 21.3.2012 (which is admitted position of fact).

11. Having gone through the factual data it cannot be said that dying declaration cannot be acted upon. The dying declaration categorically mentions that there was some altercation with the husband when the deceased was going for taking her bath in the morning at that time her husband namely Rajesh Kumar, who died, during the pendency of this appeal poured kerosene on her and it was her mother-in-law set her ablaze. They were alleging that she had illicit relation with somebody. The medical evidence and the post-mortem report goes to show that the death occurred on 21.3.2012, the evidence of P.W.5 shows as follows :-

"मृतका के मृत्यु का सही कारण जलना (हीट बर्न) ही था। मृत्यु मृतका का एक कारण जलने से हुई सेप्टीसीमिया भी था सेप्टीसीमिया दौरान इलाज जो इन्फेक्शन होता है उससे होता है।"

12. The death was caused due to septicaemia. In the cross-examination, the Dr. has accepted the fact that due to burn injuries some patients are infected.

13. The judgement relied upon by the learned trial Judge in the case of **Laxman Vs. State of Maharashtra 2003(1) JIC 30 SCC** cannot be found fault with.

A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind.

14. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant coupled with overt act of her son who was also convicted but has passed away.

15. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

16. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.C. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

17. On overall scrutiny of the facts and circumstances of the case coupled with the opinion of the medical officer and considering the principle laid down by the Hon'ble Apex Court in the case of ***Tuka Ram and others vs. State of Maharashtra [(2011) 4 SCC 250]*** and in the case of ***BN Kavadakar and another vs. State of Karnataka [1994 Supp (1) 304]***, we are of the considered opinion that the offence would be punishable under Section 304 (Part-I) IPC because the burn injuries were caused to the deceased by appellant with the intention to cause such bodily injuries as were likely to cause death and, therefore, the instant case falls under the Exceptions 4 of Section 300 IPC.

18. In the case on hand, after perusal of dying declaration of the deceased, it is not revealed as to why the appellant had poured the kerosene oil on the deceased and set her ablaze. Moreover, it is stated by the deceased in dying declaration that fire was also put out by the mother-in-law herself, hence, there is no dispute to the fact that fire was put out by the present appellant- Smt. Kushma Devi.

19. And therefore even before us Shri Noor Mohd. has based his submission on the judgements of the Apex Court that the punishment be converted to be one under Section 304 part-I of I.P.C. and not Section 302 I.P.C. as deceased died out of septicaemial death.

20. In this case from perusing the dying declaration it is proved that there was altercation and some exchange of words between husband and wife which gave rise to the incident, however it cannot be said that the case would fall within 304 part-II of I.P.C. the finding of fact in paragraph 31 which is reproduced as follows is also perused by us :

"उपरोक्त के पश्चात जहां तक मृतका के पति राजेश कुमार व सास श्रीमती कुसुमा देवी का प्रश्न है तो उनके विरुद्ध मृत्युपूर्व बयान में स्पष्ट रूप से यह कहा गया है कि .....सास सुबह में क्लेश कर रही थी, मैं नहाने जा रही थी। राजेश ने मिट्टी का तेल मेरे ऊपर डाला, कुसुमा मेरी सास ने माचिस से आग लगाई, जिससे मैं जल गई अर्थात मृतका के मृत्यु पूर्व बयान में पति राजेश द्वारा मिट्टी का तेल डालने व सास श्रीमती कुसुमा देवी द्वारा माचिस से आग लगाने के स्पष्ट कथन किए गए हैं । जहां तक अभियुक्ता कु0 रूबी का प्रश्न है, तो उसके संबंध में मृत्यु पूर्व बयान में मृतका ने मात्र यह कहा है कि .....ननद ने सास से कहा कि बहू ससुर में गलत संबंध हैं अर्थात अपने इस बयान में मृतका ने स्वयं के ऊपर मिट्टी का तेल डालने या उसके बाद माचिस से आग लगाने में अभियुक्ता कु0 रूबी की कोई भूमिका या सहभागिता नहीं बताई है। उद्धृत बयान से यह भी स्पष्ट नहीं है कि रूबी ने बहू ससुर में गलत संबंध होने की बात कब कही थी, जिससे मिट्टी का तेल डालकर आग लगाने व उसके परिणाम स्वरुप मृतका की मृत्यु होने संबंधी आरोप, मात्र पति राजेश कुमार व सास श्रीमती कुसुमा देवी के विरुद्ध ही साबित होते हैं अर्थात अभियुक्ता कु0 रूबी के विरुद्ध मृतिका को मिट्टी का तेल डालकर जला डालने संबंधी आरोपों की बाबत कोई विश्वसनीय साक्ष्य प्रस्तुत नहीं हुआ है, जिससे अभियुक्तगण राजेश कुमार, श्रीमती कुसुमा देवी के विरुद्ध मृतका की उसके ऊपर मिट्टी का तेल डालकर आग लगाकर साशय हत्या किए जाने व मृतका का उत्पीड़न किए जाने के आरोप युक्तियुक्त संदेह से परे साबित है । अभियुक्ता कु0 रूबी की किसी प्रकार की कोई भूमिका मृतका को जलाए जाने या उसे प्रताड़ित किए जाने में साबित नहीं होती है, जिससे कु0 रूबी के विरुद्ध धारा 302, 498ए भा0दं0सं0 के आरोप भी युक्तियुक्त संदेह से परे साबित नहीं होते हैं।"

21. In view of the aforesaid discussion, we are of the view that appeal has to be partly allowed. The conviction of the appellant under Section 302 IPC is converted into conviction under Section 304 (Part-I) of IPC as per the decision of Apex Court in **Khokhan (supra)** is concerned and the appellant is sentenced to undergo ten years of rigorous imprisonment with remissions and fine of Rs.20,000/- is reduced to Rs.5,000/-. In case of default of payment of fine, the appellant- Smt. Kushma Devi shall further undergo simple imprisonment for three months after the incarceration period of ten years with remission is over.

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

23. Record be sent to trial court immediately.

Suo Moto Correction

While going through the judgment we find that there is an error, in the third line of the order dated 12.09.2022 in place of Criminal Appeal No.6611 of 2016 it should be read as Criminal Appeal No.6073 of 2016, in place of namely Rajesh Kumar it should be read as namely Kushma Devi, in place of his it should be read as her in line three and four of first paragraph and in first line of paragraph second in place of Smt. Kushma Devi it should be read as Rajesh Kumar and in eighth line of paragraph 21 in place of Smt. Kushma Devi it should be read as Rajesh Kumar.

The order is corrected accordingly.

Order Date :- 14.9.2022

(2022) 9 ILRA 1565
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA , J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 1262 of 2012
Connected With
Criminal Appeal No. 1684 of 2011
And
Criminal Appeal No. 1741 of 2011
And
Criminal Appeal No. 1945 of 2011
And
Criminal Appeal No. 2636 of 2011

Pohpee @ Pohap Singh ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Arun Kumar Vishwakarma, Sri Manoj Kumar Pandey, Sri Uttar Kumar Goswami

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

A. Criminal Law - Criminal Procedure Code, 1973-Section 374(2) - Indian Penal Code,1860- Section 364-A-Challenge to-Conviction- In the present case, there is a clear and categorical evidence of the kidnappee when he was going to his sister's house, he was kidnapped by the accused persons and thereafter, rest of the appellants also joined them and participated in his kidnapping and confinement-The kidnappee was confined there for about two months-He was also made to write a letter to his father for ransom of Rs. 1,50,000/-. The version of PW 1, is supported by other witnesses- All the witnesses have been subjected to cross-examination, but there is no major contradiction or infirmity in the evidence of the witnesses- After his release, PW 1 has even pointed out the alleged house, where he was kept in confinement-There is evidence on record, which unmistakeably establishes that PW 1 was kidnapped by the accused-appellants and was kept in confinement for two months-The evidence on record fulfills all the ingredients of Section 365 of IPC-The evidence on record clearly makes out a case of kidnapping as punishable u/s 365 of IPC. Accordingly, the conviction of appellants recorded by the trial court under Section 364-A of IPC should be altered and modified to one under Section 365 of IPC only.(Para 81 to 97)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Shaik Ahmed Vs St. of Telangana (2021) 9 SCC 59

2. Deshraj Vs St. of U.P. (2019) 107 ACC 176

3. Mahesh V St. of U.P. CRLA No. 3647 of 2005

4. Ashwani Dubey V St. of U.P. CRLA No. 7740 of 2006

5. Shaik Ahmed Vs St. of Telangana (2021) 9 SCC 59

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. These five appeals are directed against the judgment and orders dated 26.2.2011, 28.2.2011 and 1.4.2011, passed by Additional Sessions Judge (Court No.6), Mathura in Sessions Trial No. 115 of 2007 (State Vs. Pooran Singh, Padam Singh and Rahees) and Sessions Trial No.286 of 2007 (State Vs. Ramesh @ Chhote and Pohpee). All the five accused have been held guilty of kidnapping for ransom under Section 364-A IPC and have been sentenced to life imprisonment alongwith fine of Rs.10,000/- each, and to undergo further rigorous imprisonment of two years in the event of default of payment of fine.

2. Facts, as emerge from record of these connected appeals are that a written report was made by the first informant Mohar Singh (Ext. Ka-1) on 10.11.2016 stating that he is an original resident of Village Chaumuha, Police Station Vrindavan, District Mathura. The brother-in-law of his sister namely Pohpee, son of Mahaur Singh, wanted informant's land to be sold. Upon the informant's refusal to sell his land accused Pohpee threatened him that he would kidnap his son and murder him. On 21.10.2006 the informant's son Satish had gone to Chaumuha Bazar but did not return till late in the evening which made the informant suspicious. The informant (PW-1) made attempts to trace out his son. He is alleged to have been informed by Ashok Kumar (PW-3) that from the vicinity of tea shop of Govind, Pohpee alongwith another person took his son on motorcycle towards Chhata. On enquiry the informant came to know that Pohpee and Narayan Singh had taken his son to Naugaon, Police Station Chhata and have handed over his son to Rahees son of Yaseen, resident of Police Station Narsena, District Bulandshahar; Pooran Singh son of Karan Singh, resident of Garhi Parsoti, Police Station Surir, District Mathura and Padam son of Kunwar Pal, who may kill his son. The informant disclosed that he was trying to locate his son so far, and after coming to know of the true facts he has come to police station for lodging his report. Same be registered and legal action be taken in the matter.

3. On the basis of aforesaid written report Police Constable Peetam Singh (PW-4) entered the substance of written report in the general diary. He thereafter prepared the Check FIR, which was registered as Case Crime No.493 of 2006, under Section 364 IPC, at police outpost Jait, Police Station Vrindavan, District Mathura (Ext. Ka-2). Perusal of same will show that it was registered at 15.25 pm on 10.11.2006.

4. Incidentally, just five minutes after the lodging of aforesaid FIR, the police of Police Station Narsena, District Bulandshahar carried out a search/encounter at Unchagaon within the limits of P.S. Narsena in which the victim Satish (PW-2) was recovered, allegedly from four accused namely Padam Singh son of Kunwar Pal; Rahees son of Yaseen; Pooran Singh son of Karan Singh and Narayan Singh son of Udal Singh. 4 country-made pistols of 315 bore were recovered from this person. 12 live cartridges and four empties of aforesaid bore.

5. A memo of recovery of four country-made pistols of 315 bore (Tamanchas); 12 live cartridges and four empty cartridges and recovery of victim Satish came to be drawn by Harish Chandra Joshi (PW-6), the then SHO of Police Station Narsena. The recovery memo records that on 10.11.2006 the Station House Officer of Police Station Narsena, District Bulandshahar received information that some criminals were hiding in the house of one Sabuddin alongwith an kidnapped boy of 12-13 years of Mathura in Village Unchagaon. This information was recorded in the GD of Police Station Narsena at 2.00 pm, whereafter the police party raided the house of Sabuddin at around 2.30 pm on 10.11.2006. The police party on the pointing out of police informer reached the house of Sabuddin and warned all four criminals to surrender, since they were surrounded by police or else they would be killed. The four criminals are alleged to have started firing from inside the house on the police party, but ultimately they were over powered and arrested at 3.30 pm on 10.11.2006. From the custody of these criminals a child of 12 years was recovered, who disclosed his identity as Satish, resident of Village Chaumuha, Police Station Vrindavan, District Mathura. The kidnapped child informed that he had been kidnapped for ransom from Chaumuha Bazar at Mathura. The arrested accused persons disclosed their names as Padam Singh son of Kunwar Pal, resident of Garhi Parsoti, Police Station Surir, District Mathura, who had a 315 bore Tamancha and on opening the barrel it transpired that a fresh shot had been fired from it, as smell of gunpowder was present. Three live cartridges of 315 bore were also recovered. The second criminal arrested disclosed his name as Rahees son of Yaseen, resident of Jigni, Police Station Narsena, District Bulandshahar from whom also a country-made pistol of 315 bore was recovered and a shot had also been fired from it since there was smell of gunpowder. Three live cartridges were also recovered from him. Similarly, from accused Pooran Singh and Narayan Singh also country-made pistols of 315 bore each were recovered alongwith three live cartridges each and on opening of barrel it transpired that a shot had been fired from both the guns as smell of gunpowder was present. It is recorded in the recovery memo that all four accused disclosed that they had kidnapped the 12 year old child alongwith co-accused Pohpee and Chhote, resident of Police Station Farah, District Mathura for ransom of Rs.10 lacs on 21.10.2006 at about 5.00 pm and they were in constant touch on phone with Govind for receiving the ransom in a day or so.

6. During the course of investigation of Case Crime No.493 of 2006, statement of informant was recorded by Investigating Officer wherein he disclosed about ransom. Consequently the offence complained of was altered to Section 364-A IPC from Section 364 IPC. Upon conclusion of investigation two chargesheets were submitted in the matter i.e. Ext. Ka-6 on 18.12.2006 against Narayan, Rahees, Pooran Singh and Padam Singh, whereafter a subsequent chargesheet was submitted on 23.2.2007 against Chhote @ Pooran and Pohap Singh. In the chargesheet 19 witnesses were proposed to be adduced by the prosecution to prove the charge levelled under Section 364-A IPC against aforesaid accused.

7. After submission of chargesheets, the concerned Magistrate took cognizance upon same. Since the case was triable by

the court of sessions, the concerned Magistrate, accordingly, committed the case to the court of Sessions. On the basis of aforementioned two chargesheets, two separate sessions trial came to be registered i.e. Sessions Trial No.115 of 2007 (State Vs. Narayan and others) and Sessions Trial No.286 of 2007 (State Vs. Chhote and another). The Sessions Judge framed separate charges under Section 364-A IPC against each of the accused, who claimed the same and pleaded innocence. Resultantly trial procedure commenced.

8. The prosecution in order to establish the charge framed under Section 364-A IPC adduced PW-1 Mohar Singh (informant); PW-2 Satish (victim); PW-3 Ashok Kumar (witness of last scene); PW-4 Head Constable Peetam Singh; PW-5 S.I. Harendra Kumar Gautam, who had investigated Case Crime No.493 of 2006; PW-6 Harish Chandra Joshi, Station House Officer, Police Station Narsena, District Bulandshahar, who supervised the alleged encounter leading to the recovery of victim as well as arrest of the four accused.

9. On behalf of the defence, DW-1 Mohan Lal (brother of PW-1); DW-2 Smt. Anjum wife of Sabuddin and DW-3 Sabir (neighbour of Sabuddin) were adduced in proof of the innocence of accused.

10. PW-1 Mohar Singh (first informant) in his sworn testimony has stated that on 21.10.2006 his son Satish aged about 12 years had gone to purchase Crackers on the eve of Diwali but did not return home. He came to the market and made inquiries and was informed by Ashok Kumar (PW-3) that he had seen Satish purchasing Crackers with Pohpee whereafter he was taken on a motorcycle towards Chhata. Another unknown person with Pohpee was also present who was driving the motorcycle. The informant claims to have made all efforts to trace out his son but in vein. After some days PW-1 claims to have received a call on the STD Booth of Nanak, allegedly of his kidnapped son but while speaking to him PW-1 could gather that it is not the voice of his son and insead somebody else was on call. PW-1 was asked on phone to arrange a sum of Rs.10 lacs within four days or else his son would not return. PW-1 also stated that Pohpee is the Devar of his sister and has been coming to his house often. PW-1 disclosed that he owns certain land within 500 metres of the highway, in respect of which there was a proposal from Pohpee to have the land purchased at Rs.25 lacs per bigha. Pohpee, however, later offered rate of Rs.20 lacs per bigha only on which PW-1 refused to sell his land. Pohpee is alleged to have threatened PW-1 that if he does not sell his land his son would be kidnapped and murdered. It is asserted by PW-1 in his statement that precisely for this reason his son has been kidnapped.

11. PW-1 has also disclosed that his son has been recovered from the possession of Rahees, Pooran, Padam and Narayan. However, PW-1 after seeing the accused persons in the court failed to recognize/identify them. PW-1 also stated that he had lodged a report at police outpost Jait of Police Station Vrindavan a day prior to his son being recovered. It is also stated that the said report was got lodged through a resident of different village, who is not known to him. The report was written on his instructions. After seeing the written report (Ext. Ka-1) PW-1 stated that it is the same report. He has also stated that after his son was recovered he was given in his Supurdagi by the police personnels of Police Station Narsena, District Bulandshahar.

12. PW-1 was also cross-examined. This witness in his cross-examination has stated that he has seen Pohpee on the date of incident at about 1.00 pm but had not spoken to him. He returned from his field at about 4.00 pm and by 6.00 pm he came to know that his son is missing. According to this witness he immediately did not go to the police station but only after a week. He claims to have lodged a report on the 8th day of his son's disappearance. He also claims to have been informed by Ashok Kumar (PW-3) that Pohpee was accompanied by Chhote. He has also stated that he had gone a day before Diwali for lodging a report, which was duly registered, and it is on the second day of his report that he came to know about recovery of his son. He also claims to have received information about the recovery of his son from a person close to Pohpee but he does not remember his name.

13. PW-1 in his cross-examination has also asserted that he was informed by the aforesaid person that his son was with a gang and that he may contact them. He claims to have received a phone from the gang at Nanak's PCO. However, he feigned ignorance about the name of Nanak's father. The telephone call received was for arranging Rs. 10 lacs as ransom if he wanted his son back. This phone call is stated to have been received four days after lodging the report. PW-1 in his cross-examination has admitted that there was no subsequent call received by him for ransom. He claims to have gathered knowledge about 9-10 days after lodging of his report that his son has been recovered. PW-1 claims to have gone to Police Station Narsena with his brother. He also claims to have informed the police about involvement of Chhote and does not know the reason for exclusion of his name in the FIR. He has also claimed ignorance about any dispute between Pooran, father of Chhote, and his brother-in-law Hari Singh. He has also denied the allegation that he has enmity with the accused persons and that is why he has falsely implicated the accused persons.

14. PW-1 was cross-examined by the counsel for other accused namely Padam, Pooran and Rahees. In his cross-examination he claims to have returned with his son after three days of his recovery. He has further stated that only one police report was made by him after about 20 days of the incident of kidnapping. The only written report by him is alleged to have been written by some police personnel at Police Outpost Jait. In the report he claims to have implicated Pohpee and Chhote and has specifically asserted of having not disclosed the names of other accused. In his subsequent cross-examination PW-1 has stated of having received a telephone call after 20 days of his son's disappearance for ransom and to have informed about it to the SHO concerned. He alleged that a boy came from the STD Booth situate just after two houses from his house. On reaching the PCO PW-1 claims to have again got a call and he spoke to his son. He claimed ignorance about the identity of other persons present with his son. He has categorically stated that after 20 days of his son's disappearance he has lodged the report and prior to it no report was made to SSP, Police Chowki or the area Police Station.

15. PW-1 was again recalled for cross-examination and has stated that a person from Pohpee came at around 12 noon and he had gone to the police station at 7 pm. He claims to have come to know

about Padam Singh and Rahees only after he reached Narsena. He has also denied the suggestion that false statement is being given by him and that the accused persons met him at the Police Station Narsena.

16. The victim Satish was also adduced as PW-2, who claims to be aged about 13 years. The trial court has clearly noticed in its order that the witness understands the concept of statement on oath and fully understands what is good or bad for him. PW-2 has thus been found fully mature to testify before the court.

17. PW-2 was stated that he had gone to get fire crackers at Ramleela ground, where Pohpee met him. He has identified Pohpee in court, who lured into accompanying him for buying fire crackers. PW-2 claims that he was then taken to a liquor shop where he met Chhote. These two persons then took the victim on a motorcycle. His eyes were covered. The victim claims to have been taken to Naugaon where four other persons met him and were calling each other with the names of Narayan Singh, Rahees, Pooran and Padam. PW-2 was then taken to Bulandshahar on a motorcycle where they stayed for 12 days, and thereafter he was taken to Unchagaon. PW-2 has stated that these four accused persons got a call made from him to his father on STD booth. PW-2 has also identified Rahees and Pohpee in the court.

18. PW-2 was firstly cross-examined on behalf of Chhote and Pohpee. In his cross-examination he has stated that he was taken to the liquor shop and then at about 5.00 pm he was taken on a motorcycle by Pohpee and another person with his eyes covered. He claims to have gone on bike to an undisclosed place. PW-2 then claims to have met the other four accused namely Raess, Narayan, Pooran and Padam and these persons got a phone call made from Unchagaon on the 13th day of his kidnapping. PW-2 has also admitted about existence of a dispute between his father and accused Pohpee.

19. On behalf of remaining accused also PW-2 was cross-examined on behalf of other accused also. In his first cross-examination this witness had disclosed that he stayed in the same house for 12 days, whereafter he was taken to Unchagaon. The accused stayed in the same room and PW-2 was taken out also by these four persons. PW-2 claims to have spoken to his father on phone once. PW-2 has also stated that he was sleeping on the roof top when police found him. The time of such event was stated to be 12.00-1.00 pm. The four accused persons are stated to have fled on seeing the police and were arrested on the ground floor. He has also stated that neither any shot was fired by the police nor these four accused persons had fired any shot at police and that all the four accused persons were unarmed. He claims to have met his father 13 days after the telephone call was made. He also stated that his eyes were not kept covered in the Village Unchagaon and he used to freely move in the village. He has, however, stated that he was initially beaten by these four persons but not thereafter.

20. PW-2 was again re-examined in which he has re-affirmed that none of four accused persons had fired on the police on the date he was recovered by the police. He has also stated that written report was scribed at the Police Station Narsena. He claims that his father narrated facts which were scribed by the Police Inspector. PW-2 has denied the suggestion that he was not

kidnapped and that FIR has been falsely lodged.

21. PW-3 Ashok Kumar claims to have seen Pohap Singh taking Satish (PW-2) on a motorcycle. He also claims to have disclosed PW-1 about this fact at around 8.00 pm on 21.10.2006. In his cross-examination he has stated that he did not recognize the other person, who was driving the motorcycle. He has denied the suggestion that he did not know Narayan or that he was making a false deposition.

22. PW-4 Head Constable Peetam Singh claims to have made endorsement of written report in the GD and scribed the check FIR in his own handwriting. In his cross-examination he has clearly stated that police report was lodged after 20 days of the alleged disappearance of victim i.e. PW-2. The informant (PW-1) is stated to have intimated PW-4 that after gathering information about his son's disappearance the written report came to be lodged. PW-4 has clearly stated that no report was lodged with the local police prior to 10.11.2006 regarding kidnapping of PW-2. It is admitted that at the time when PW-1 came for lodging the report his brother was also with him. He has denied the suggestion that FIR is ante-timed.

23. S.I. Harendra Kumar Gautam, who deposed as PW-5, has stated that the written report was given by PW-1 at Police Station Chowki whereafter investigation was carried out by him. He also stated that after PW-1 informed him about demand of ransom of Rs.10 lacs the investigation was altered to Section 364-A IPC in place of Section 364 IPC. He has admitted that Satish was recovered from the accused persons during encounter within the limits of Police Station Narsena. PW-5 also claims to have gone to Narsena, where the statement of informant and PW-2 were recorded alongwith others. All the accused persons were present at the police station and the victim was also medically examined. He claims to have submitted a chargesheet after concluding the investigation, which has been proved by him.

24. In the cross-examination PW-5 has disclosed that check FIR was received by him for investigation. He claims to have received information on mobile that the victim alongwith accused persons have been apprehended and are at Police Station Narsena. He claims to have gone to Police Station Narsena on 11.11.2006 and returned thereafter on 13.11.2006. He has clearly stated that apart from the written report received on 10.11.2006 no prior intimation was received either at Jait or Vrindavan and no missing report was recorded either. He has stated that the name of person who demanded ransom of Rs.10 lacs has not been disclosed by PW-1 to him, nor during the course of investigation he could ascertain as to which of the accused had demanded ransom of Rs.10 lacs. He, however, admitted that disclosure about demand of ransom was made by PW-1. He has stated that during investigation a site plan has been drawn of the place from-where the accused persons were arrested and victim was recovered. However, he has not seen any mark of firing at the site of the encounter. He has denied the suggestion that FIR has been lodged after recovery of the victim. He has also stated that there was no independent witness to the recovery of victim.

25. Statement has also been recorded of Sri Harish Chandra Joshi (PW-6), who was the SHO of Police Station Narsena and

lead the police party which recovered the victim and arrested the four accused. He has proved the memo of recovery of four country-made pistols; 12 live cartridges and four empties as also the recovery of victim. He has disclosed that none of the independent witness came forward to testify the aforesaid recovery. He has supported the prosecution version about the criminals' firing on the police party and the criminals being arrested thereafter on valiant act of bravery by the police party. In his cross-examination PW-6 has stated that after arresting all the accused he returned at the police station at 6.10 pm and the arrested persons were produced before the Magistrate on the next day. The kidnapped child was alleged to be given in the Supurdagi of Investigating Officer from Police Station Vrindavan, but the Supurdagi memo has not been produced in court. PW-6 has further stated in the cross-examination that the victim was kidnapped from Mathura and he was not aware about the time of lodging of the FIR. While supporting the prosecution story PW-6 has admitted that he had not arrayed Sabuddin or his family members as an accused. PW-6 has further stated that PW-2 had informed him about his kidnapping for ransom but had not informed about demand of Rs.10 lacs, which was accordingly not mentioned in the recovery memo. He has also admitted that there was no independent witness to the recovery nor he was made aware about which of the criminals had demanded the ransom. A suggestion has also made to PW-6 that the accused persons have been falsely implicated on the instigation of Devi Charan, which was denied by him.

26 . After the prosecution evidence was over, statements of accused were recorded under Section 313 Cr.P.C. All the adverse circumstances were disclosed to the accused. They, however, denied the same. They have pleaded innocence. Accused Pooran Singh stated that he had gone alongwith Padam Singh to search for the groom for his daughter and was falsely implicated due to enmity by Devi Charan. Similar stand has also been taken by Padam Singh.

27. On behalf of accused defence witnesses have also been produced. DW-1 is the brother of PW-1 Mohan Lal, who has stated that about a year back there was a dispute between PW-1 and Pohap Singh on account of which Pohap Singh has been implicated. He has denied the fact that PW-2 was kidnapped by Pohap Singh or Ramesh. He claims to be living with his brother Mohar Singh. He has further admitted in the cross-examination that differences between Pohap Singh and Mohar Singh had developed in respect of sale of agricultural land and after the transaction failed, the accused Pohap Singh alongwith others tried to recover ransom by kidnapping PW-2. He has also stated that kidnapping of PW-2 was made only for ransom.

28. DW-2 is Smt. Anjum wife of Sabuddin, who has denied recovery of PW-2 from her house. She also denied that any firing took place between the police and the alleged kidnapper. She has stated that she has only one house and none of the criminals ever stayed with the victim in her house nor were arrested from there. She has completely and categorically denied the prosecution story about kidnapping and recovery of victim from her house.

29. DW-3 Sabir is the neighbour of Sabuddin, who too has denied any incident in which four accused persons were

apprehended in an encounter as also the recovery of the victim.

30. The trial court on the basis of above evidence came to the conclusion that PW-2 was kidnapped for ransom by Pohap Singh alongwith other four co-conspirators but convicted all the five accused and sentenced them for life imprisonment under Section 364-A IPC alongwith fine.

31 . On behalf of appellants it has been urged that the prosecution case is full of inconsistency and the witnesses are wholly unreliable. It is submitted that the charge of kidnapping for ransom has not been proved beyond reasonable doubt, in view of the following facts:-

(i). That the alleged kidnapping of PW-2 took place on 21st October, 2006 while written report was submitted after 20 days. It is urged that the conduct of PW-1 in not lodging any missing report or non-lodging of an FIR for 20 days is against the natural conduct of a father whose son has been kidnapped and the prosecution has failed to explain such conduct/inaction of the father. The aforesaid creates a doubt much less a reasonable doubt in the prosecution case.

(ii). It is argued that apart from Pohpee and Chhote none of the other accused had previously met or known PW-1 and it is difficult to explain as to how name of Rahees, Pooran and Padam could be disclosed in the FIR alongwith their parentage and address, when the victim himself had not been recovered nor these persons had been apprehended before the lodging of the FIR. It is then sought to be urged that the entire prosecution case is fallacious, inasmuch as the FIR itself has been lodged after the victim was recovered. The FIR is ante-timed and for such reason the entire prosecution story is rendered unreliable.

(iii). It is then contented that demand of ransom has not been proved, inasmuch as neither the exact date and time of telephone call has been specified nor any call detail record (CDR) produced to support the alleged demand of ransom. It is also urged that even the telephone number on which the call for ransom was received has been specified nor the telephone number of the caller has been disclosed. As such the entire prosecution story regarding demand of ransom is unreliable.

(iv). Questioning the case of prosecution regarding demand of ransom, it is urged by counsel for appellants that the PCO owner Nanak has not been produced in evidence nor even his identity has been established.

(v). There are material contradictions in the statement of PW-1 vis-a-vis PW-2 regarding the date and time of demand of ransom, which renders the prosecution story wholly unreliable.

(vi). It is also highlighted that as per prosecution story only one call was made for arranging funds without specifying the date, time or place for the ransom to be delivered, which exposes the falsity in the prosecution case.

(vii). The prosecution case of encounter at Sabuddin's house or firing etc. is not supported by any independent witness and PW-2, the victim himself, which renders the prosecution story highly improbable.

(viii). The FIR has been sent to Magistrate after four days for which no

explanation has come forward, which clearly supports the appellants' contention that FIR itself is ante-timed.

(ix). The house of Sabuddin is in the midst of market and the fact that no independent witness adduced to prove the alleged encounter and the statement of PW-2 being at variance with the prosecution story, the entire prosecution case is rendered wholly doubtful, particularly as neither anyone had sustained any injury nor any signs of gunshot were found on the spot from where the victim is alleged to have been recovered.

(x). It is submitted then that the story set up by PW-1 that he lodged the police report earlier is contrary to the evidence on record and is otherwise self-contradictory, which renders the entire prosecution version of the alleged occurrence unworthy of trust.

32. To the contrary, it is alleged on behalf of the respondents that the first information report was registered initially under section 364 IPC at Police Station Vrindavan, District Mathura. Thereafter it was converted under section 364-A IPC on the basis of the statement of the victim. The ocular testimony of PW-1 and PW-2 were recorded by the trial court and kidnapping for ransom has been proved. PW-3 is the witness of last scene and has stated that victim was taken away by accused Pohpee on his motorcycle. The GD entry of the first information report has been proved by PW-4. PW-6 is the Station House Officer of P.S. Narsena, District Bulandshahar, who conducted the raid at the house of Sabuddin and recovered the victim (PW-2) and arrested the accused persons from the spot. Case under Section 307 IPC and Section 25 of the Arms Act was also registered and the trial against them is pending. The offence under Section 364-A IPC is clearly made out against accused on the basis of evidence available on record as there was demand of ransom made through telephone. The ingredients of Section 364-A IPC are clearly established against the accused. DW-1 Mohan Lal has himself stated that victim was kidnapped by the accused for ransom.

33. It is further submitted on behalf of respondents that PW-1 has given the explanation for lodging the first information report at the belated stage. PW-3 is not a tutored witness. Non-recording of the statement of the owner of the PCO and non-collection of the Call Detail may be deficiency in investigation but deficiency in investigation is by itself insufficient to dislodge the conviction awarded by court below. The alleged deficiency does not demolish the case of the prosecution, since there is ocular testimony available on record regarding ransom. The Supurdaginama in writing is not necessary component and not the requirement of law, since the victim was handed over to his father, who is natural guardian. Non-production of the victim before the Magistrate concerned for recording his statement under Section 164 Cr.P.C., after his recovery can be said to be an irregularity but certainly not an illegality. The recovery cannot be said to doubtful just because evidence of independent witness has not been recorded, who was present at the spot.

34. In alternate, it is also submitted on behalf of respondents that If the Court finds that the case of prosecution under Section 364-A IPC is not made out as per the testimonies of the witnesses and in absence of any other material available on record, in

such a situation, the prosecution has successfully made out a case against the appellants under Section 365 IPC. The charge against the appellants can be altered in the appeal by the appellate court, irrespective of the fact that the trial court failed to make any alternate charge against them under Section 365 IPC. From the contents of the framing of charge order dated 08.06.2007 it is evident that it is in two parts, one relates to the kidnapping of the victim by the appellants and the another is demand of ransom. Thus, the charge under Section 365 IPC is inherent in the order dated 8.6.2007. Reliance placed upon Section 464 Cr.P.C. by the appellants, which deals with the effect of omission to frame or absence or error in charge is misconceived. The case of prosecution shall not fall on this ground. Lastly, it is submitted that this Court in exercise of appellate jurisdiction can sentence the accused appellants, accordingly.

35. It is in the above factual scenario and the rival contentions advanced that this Court has to determine whether the offence of kidnapping for ransom has been proved against the accused appellants or not? The Court is also required to consider the alternate submission of learned AGA that in case the charge under Section 364-A is not established against accused appellants they can certainly be convicted for an offence under Section 365 IPC i.e. for kidnapping simplicitor.

36. We have heard Sri Rajeev Lochan Shukla alongwith Sri Subhash Chandra Raghav for appellants Padam Singh and Rahees (Criminal Appeal No. 1945 & 2636 of 2011); Sri Uttar Kumar Goswami, learned Amicus Curiae for the appellant Pohpee (Jail Appeal No. 1262 of 2012); Sri S.S. Rajput for the appellant Pooran Singh (Criminal Appeal No. 1648 of 2011), Sri Rajeev Goswami for appellant Ramesh @ Chhote (Criminal Appeal No. 1741 of 2011) and Sri S. A. Murtaza & Sri Arunendra Singh, the learned AGA for the State.

Analysis on Facts

37. The only charge framed against all the five accused appellants is of kidnapping for ransom i.e. under Section 364-A IPC. Section 364-A IPC, as it exists after its amendment, is reproduced hereinafter:-

"364-A. Kidnapping for ransom, etc.--Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

38. Learned counsel for the parties are at ad idem on the necessary ingredients required to be proved for an offence under Section 364-A IPC as has been expressly held by the Supreme Court in the case of Shaik Ahmed Vs. State of Telangana, (2021) 9 SCC 59. After referring to Section 364-A IPC the Court observed as under in paragraphs 12 to 14 of the judgment in Shaik Ahmed (supra):-

"12. We may now look into section 364A to find out as to what

ingredients the Section itself contemplate for the offence. When we paraphrase Section 364A following is deciphered:-

(i) "Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction"

(ii) "and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt,

(iii) or causes hurt or death to such person in order to compel the Government or any foreign State or international inter- governmental organisation or any other person to do or abstain from doing any act or to pay a ransom"

(iv) "shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

The first essential condition as incorporated in Section 364-A is "whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction". The second condition begins with conjunction "and". The second condition has also two parts i.e. (a) threatens to cause death or hurt to such person or (b) by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt. Either part of above condition, if fulfilled, shall fulfill the second condition for offence. The third condition begins with the word "or" i.e. or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom. Third condition begins with the word "or causes hurt or death to such person in order to compel the Government or any foreign state to do or abstain from doing any act or to pay a ransom". Section 364-A contains a heading "kidnapping for ransom, etc." The kidnapping by a person to demand ransom is fully covered by Section 364-A.

13. We have noticed that after the first condition the second condition is joined by conjunction "and", thus, whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person.

14. The use of conjunction "and" has its purpose and object. Section 364A uses the word "or" nine times and the whole section contains only one conjunction "and", which joins the first and second condition. Thus, for covering an offence under Section 364A, apart from fulfillment of first condition, the second condition i.e. "and threatens to cause death or hurt to such person" also needs to be proved in case the case is not covered by subsequent clauses joined by "or"."

39. After noticing the previous judgments on the issue the Court delineated it's views as under in paragraph 20 of the report in Shaik Ahmed (supra):-

"20. Thus, applying the above principle of interpretation on Conditions (i) and (ii) of Section 364-A which is added with conjunction "and", we are of the view that Condition (ii) has also to be fulfilled before ingredients of Section 364-A are found to be established. Section 364-A also indicates that in case the condition "and threatens to cause death or hurt to such person" is not proved, there are other

classes which begins with word "or", those conditions, if proved, the offence will be established. The second condition, thus, as noted above is divided in two parts- (a) and threatens to cause death or hurt to such person or (b) by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt."

40. Having noticed the earlier judgments operating in the field the Supreme Court authoritatively crystallized the necessary ingredients, which are required to be proved by the prosecution for bringing home a charge under Section 364-A IPC, in Shaik Ahmed (supra), in following words:-

"33. After noticing the statutory provision of Section 364-A and the law laid down by this Court in the above noted cases, we conclude that the essential ingredients to convict an accused under Section 364-A which are required to be proved by prosecution are as follows:

(i) Kidnapping or abduction of any person or keeping a person in detention after such kidnapping or abduction; and

(ii) threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt or;

(iii) causes hurt or death to such person in order to compel the Government or any foreign State or any Governmental organization or any other person to do or abstain from doing any act or to pay a ransom.

Thus, after establishing first condition, one more condition has to be fulfilled since after first condition, word used is "and". Thus, in addition to first condition either condition (ii) or (iii) has to be proved, failing which conviction under Section 364-A cannot be sustained.

34. The second condition which is "and threatens to cause a death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt" is relevant for consideration in this case since appellant has confined his submission only regarding non- fulfillment of this condition. We may also notice that the appellant has filed grounds of appeal before the High Court in which following was stated in Grounds 6 and 7:

"6. The learned Judge failed to see that PW-2 stated that he was treated well and as such there was no threat to cause death or hurt.

7. The learned Judge should have seen that PW-1 did not state that the accused threatened to cause death or hurt to his son.""

41. It is in the above legal backdrop that the facts of the present case needs to be analyzed in order to answer the question:- as to whether the charge of kidnapping for ransom has been proved by the prosecution beyond reasonable doubt against the appellants in the facts of the present case?

42. On behalf of prosecution the charge of kidnapping for ransom has been attempted to be proved essentially by relying upon the oral testimony of informant (PW-1), the victim (PW-2) and Ashok Kumar (PW-3), who has seen the victim being taken on a motorcycle by accused Pohpee alongwith another. As per the FIR allegation the victim was kidnapped for ransom by Pohpee, since the

informant had refused to sell his land on his suggestion. According to PW-1 the price of land was initially agreed upon at Rs.25 lacs per bigha but he was only offered Rs.20 lacs per bigha, and when he refused to sell his land he received threat from Pohpee about his son being kidnapped and killed.

43. In the aforesaid backdrop the first issue that requires examination in the facts of the present case is the credibility and reliability of PW-1 about the incident so as to determine the culpability of accused appellants in the commission of the alleged offence.

44. The FIR clearly states that the son of PW-1 was kidnapped by Pohpee at around 5.00 pm on 21.10.2006. PW-1 in his statement has also admitted that he received information from PW-3 on the same day i.e. 21.10.2006 about the fact that his son has been kidnapped by Pohpee together with another person.

45. In the event of PW-2 having been kidnapped on 21.10.2006 and it was made known to PW-1 that his son has been kidnapped by Pohpee, who is the brother-in-law of his real sister, the first and foremost conduct expected of the father of a kidnapped son would be to report the disappearance of the son to the police, particularly when he is aware as to who has taken his son. It may also be noticed that there was no demand for ransom received by PW-1 and, therefore, intimation to police otherwise would not have harmed his son. The fact that police is not informed by PW-1 about the kidnapping of his son for 20 days from the date of incident despite being aware of the person who had kidnapped him raises a serious doubt regarding the conduct of PW-1.

46. The Statement of PW-1 is found to be inconsistent on the point relating to the lodging of police report in the matter. PW-1 in his examination-in-chief has stated that he lodged a report of the incident at Police Chowki Jait a day prior to the recovery of his son. This report is alleged to have been made through a person of another village who was not known to him. Upon being shown the written report (Ext. Ka-1), PW-1 has stated it to be that report only.

47. The written report (Ext. Ka-1) is dated 10.11.2006 which incidentally is the date of recovery of victim. The statement of PW-1 that written report of the incident was made a day prior to recovery of his son is thus found to be false. His statement that report was lodged through a person of another village, was not known to him, otherwise creates genuine and strong suspicion. It would be difficult to accept the statement of father of a kidnapped son to have made a police report through a person not even known to him.

48. In his cross-examination, PW-1 has stated that he had gone to police station a week after kidnapping of his son and had lodged a report at the police station. No such report exists on record. PW-4 and PW-5, who are the police officials connected with the investigation of the case have specifically stated that apart from the written report dated 10.11.2006 no prior report/missing report/FIR was lodged in respect of the incident by PW-1 or anyone else on his instructions. Resultantly, the statement of PW-1 about making a police report on the 8th day of kidnapping of his son is thus found to be incorrect.

49. PW-1 in his cross-examination has also stated that he again went to police station a day prior to Diwali and he came to

know about recovery of his son the day next of making the (second) report. This stand is again contrary to the evidence available on record. This stand is otherwise self-contradictory, inasmuch as, PW-1 has admitted in his cross-examination that only one report was lodged in respect of the incident and that to after 20 days. The report was written at Police Chowki Jait in the presence of Sub Inspector and he had only disclosed the name of Pohpee and Chhote whereas in the FIR name of Chhote is not shown as an accused and the names of other accused namely Narayan Singh, Rahees, Pooran, Padam are recorded.

50. Statement of PW-1 with regard to the time and contents of police report is neither consistent nor tallies with the evidence available on record.

51. There is absolutely no explanation furnished by the prosecution for the delay of 20 days in lodging the FIR itself. Such conduct of PW-1 otherwise is questionable, since it would be expected that a prompt report would be lodged by a father with regard to kidnapping of his 12 year old son.

52. The only explanation given in the FIR for the delay is that PW-1 was trying to search out his son and only when he gathered the true facts that the FIR was lodged. This explanation cannot by any stretch of imagination be said to be satisfactory so as to explain the inordinate delay in lodging of FIR.

53. The Sessions Court while considering the issue of delayed lodging of FIR has accepted the version of PW-1 that he and his family members were trying to search the victim. It has also been observed that in view of the ransom call received the welfare of victim was uppermost in the minds of PW-1. This conclusion does not appear to be sound in view of the evidence available on record, inasmuch as, PW-1 was informed on the date of disappearance of his son itself that he was taken by Pohpee @ Pohap Singh. The receiving of ransom call is of a week later. There is no reason why the FIR was not lodged promptly when the identity of accused was known to the first informant and threat of ransom was also not received, by then. The trial court therefore has not appreciated the argument with regard to delayed lodging of FIR in correct perspective.

54. It is worth reiterating that the prosecution has failed to explain the inconsistencies in the statement of PW-1 when he stated that he firstly wanted to lodge a report in the matter, a day prior to Diwali, and such report was lodged. This statement of PW-1 is not substantiated from the evidence on record, inasmuch as no report prior to 10.11.2006 has been brought on record. Rather it is the specific case of prosecution witnesses i.e. PW-4 Peetam Singh and PW-5 Harendra Kumar Gautam that no report prior to 10.11.2006 was received at the police station about kidnapping of PW-2 nor even a missing report was lodged in that regard. PW-1 has also stated in his cross-examination that he had lodged a police report at Police Chowki Jait of Police Station Vrindavan, a day prior to recovery of his son. This statement is again not substantiated as the only written report is dated 10.11.2006. It is also stated that he does not remember the name of person through whom he got the report registered at Police Chowki Jait. As per him the only written report is Ext. Ka-1, which is dated 10.11.2006, whereas the witness claims it having been submitted a day prior to recovery, which is 9.11.2006.

These inconsistencies have been plainly overlooked by the trial court.

55. The statement of PW-1 is also relevant in order to substantiate the allegation with regard to demand of ransom. He has stated in his examination-in-chief that few days after kidnapping of his son he was informed by Nanak that a call for him was received on his PCO and he was asked to arrange ransom amount of Rs. 10 lacs or else he would not get his son.

56. It is worth noticing that in spite of receiving a ransom call by PW-1 only few days after kidnapping of his son the disclosure in this regard is clearly missing in the written report which forms the basis of the FIR. In the event a ransom call was already received, the reasonable conduct of PW-1 was to mention it in the FIR. The FIR is not the encyclopedia of the prosecution case but it must disclose the basic prosecution case. This aspect of the matter has been overlooked by the court of Sessions.

57. PW-1 also claims to have come to know about kidnapping of his son from a person close to Pohpee who asked him to contact the gang having custody of his son. This person is neither produced in evidence nor he is identified by PW-1.

58. PW-1 has stated that phone call for ransom was received four days after lodging the first report with the police. There is no earlier report of PW-1 on record, as is alleged by him, and his statement about getting a call four days thereafter renders the time of receiving alleged ransom call absolutely vague and indefinite.

59. In view of the discussions made above we have no doubt to hold that PW-1 Mohar Singh is neither a credible nor a reliable witness. Resultantly, his testimony is not worthy of reliance. The court below has not examined the issue of reliability of PW-1 in light of the inconsistencies noticed on his part and has taken his testimony on its face value without subjecting it to proper scrutiny, which renders the judgment of court below open to challenge on the ground of non-application of mind.

60. In order to bring home the charge under Section 364-A IPC, it must be established that the accused have kidnapped or abducted any person and have kept such person in detention and threat to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or cause hurt or death to such person in order to compel any person or abstain him from doing any act or to pay a ransom.

61. In Shaik Ahmed (supra), the Supreme Court has clearly held that all the ingredients constituting an offence of kidnapping for ransom must be satisfied by the prosecution by leading cogent evidence before the charge under Section 364A IPC could be established against an accused.

62. One of the ingredients to establish the offence under Section 364-A IPC is the demand for ransom. On this aspect, we find that the statement of witnesses is not consistent for the following reasons:-

(i) First and foremost, it is to be noticed that when the FIR was lodged on 10.11.2006 at 3.25 pm, there was no disclosure by the informant to the police that his son had been kidnapped for ransom. As per statement of PW-1, the demand for ransom had already been made

from him, but this fact was not disclosed in the FIR.

(ii) In the statement of PW-1 and PW-2, there is neither any specific date or time disclosed about the making or receiving of ransom call. At one stage, PW-1 has stated that after few days of the disappearance of his son he received a call at Nanak's STD booth alleging it to be his son, but PW-1 was sure that the voice on the phone was not of his son. PW-1 claims to have been instructed on phone call to arrange Rs. 10 Lacs within four days or else he would not seen his son. In this part of the statement PW-1 has neither specified the date of receipt of the phone call, nor has he given the telephone number on which such call was received. The prosecution has also not produced any call detail report in that regard.

63. In his cross-examination, PW-1 has stated that a telephone call was received at Nanak's PCO situate close to his house. However, PW-1 has shown ignorance about the name of the father of PCO owner. Even the telephone number on which such ransom call was received is not disclosed. Thus there is material contradiction in the statement of PW-1 about the time of receiving of ransom call.

64. Interestingly, no date, time or place is alleged to have been disclosed to PW-1 for ransom to be delivered. No subsequent call was otherwise received for delivering the ransom. It is difficult to conceive that demand for ransom would be made without specifying the manner in which such ransom is to be delivered. In view of the entire and coupled with the fact that no call detail record was produced nor such disclosure was made in the FIR the prosecution has failed to establish the demand of ransom for release of victim.

65. We may hasten to add that the statement of PW-1 with regard to demand of ransom is otherwise inconsistent as he has given two distinct details in his statement about receipt of ransom call which renders his testimony otherwise unworthy of trust.

66. So far as the statement of PW-2 is concerned, he has stated that the accused persons got a call made to his father but he has not referred to any demand of ransom. The telephonic talk referring to demand for ransom by PW-2 was allegedly made seven days after his kidnapping while he claims to have met his father 13 days after making of the ransom call which is not the time disclosed by PW-1 for receiving the ransom call. PW-3, who is the other witness of fact, has stated nothing about the demand of ransom.

67. The statement of DW-1 that the victim was kidnapped for ransom is not based upon any personal knowledge on part of DW-1 but is at best an inference based upon the information received from PW-1 by him. Such statement being barred upon hearsay, therefore, cannot be treated as evidence to establish the demand of ransom.

68. We have already observed while analysing the statement of PW-1 that his testimony about lodging of police report is contradictory and is otherwise not as per the record. The only report lodged by PW-1 is on 10.11.2006 and his statement that ransom call was received four days after lodging of report is wholly unbelievable.

69. The victim was recovered on the date of lodging of the report itself and it

cannot be conceived as to why and how a call for ransom would be made four days after the recovery of the victim.

70. Statement of PW-1 that he received information about recovery of his son nearly 9-10 days after lodgement of report is also contrary to records. PW-1 in later part of his cross-examination has disclosed that the ransom call was received after 20 days of disappearance of his son. It is alleged that the ransom call was received the day next to the lodging of the report. Both the statements are inconsistent with the available record, inasmuch as PW-2 he was recovered 20 days after his kidnapping and after his recovery making a call for ransom does not make any sense.

71. From the above discussion it is apparent that neither the call for ransom was disclosed to the police at the time of lodging of FIR, nor the allegation of receipt of ransom call has been substantiated by furnishing details with regard to receiving of such demand of ransom. Statement of PW-1 is not consistent on this score so as to render his testimony reliable. In such circumstances, we find that the prosecution has failed to establish the demand for ransom. It may be reiterated that neither any call detail report has been furnished, nor any specific date and time of receiving of telephone call for ransom has been specified. Moreover, even the phone number on which such call is said to have been received has not been disclosed.

72. In view of the discussions made above, we have no hesitation in discarding the prosecution case that demand of ransom was the motive behind kidnapping of PW-2. The court below has erred in taking a contrary opinion, on facts, since the evidence regarding demand of ransom have not been correctly evaluated and renders the conviction open to challenge on such grounds.

73. Since all the ingredients constituting an offence of kidnapping for ransom are required to be established, which includes first and foremost the demand of ransom, the failure on part of prosecution to prove the demand of ransom leads to an inescapable conclusion that the charge of kidnapping for ransom could not be established by the prosecution beyond reasonable doubt against any of the accused appellants. Thus the conviction and sentence of accused appellants under Section 364-A IPC is render

74. At this juncture, it would be worthwhile to refer to the alternate submission advanced by learned AGA that charge under Section 365 IPC is made out against the accused appellants.

75. Record reveals that the solitary charge levelled against the accused appellants is of kidnapping for ransom. No alternate charge for kidnapping has been specifically framed against the accused. In such circumstances, first and foremost, it has to be seen as to whether the charge of kidnapping, in the alternate, pressed against the accused appellants could be considered when such a charge has otherwise not been specifically framed against them. Based upon the discussion on this aspect we have to determine as to whether such alternate charge is made out against any or all of the accused appellants in the matter or not.

76. The charge levelled against all the accused appellants is as under:-

"यह कि दिनांक 21.10.06 को समय करीब 5 बजे शाम वादी मुकदमा श्री मौहर सिंह

निवासी चौमुहा थाना बृन्दावन जिला मथुरा के लड़के सतीश जिसकी उम्र 12 वर्ष थी, को जब वह चौमुहा बाजार गया हुआ था तो तुम लोगों ने अन्य अभियुक्त छोटे तथा पोहपी के साथ मिलकर अपहृत करके उसको अवैध रूप से निरूद्ध रखे रहे तथा इन लोगों द्वारा दस लाख रूपये फिरौती की रकम मांगा गया और उसे जान से मारने की धमकी दी। इसप्रकार तुम लोगों द्वारा ऐसा अपराध किया गया जो धारा 364ए भा0द0सं0 के अन्तर्गत दंडनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।"

77. The above charge is in two parts. The first part is with regard to kidnapping of PW-2 on 21.10.2006 at 5.00 pm and illegal confining him. The second part of the charge is with regard to demand of ransom of Rs. 10 lacs and threat to life extended to the victim. Even if the second part of the charge with regard to demand of ransom is excluded, yet the charge with regard to abduction and kidnapping of the victim on 21.10.2006 at 5.00 pm from Chaumuha Bazar and detaining him unlawfully survives. On the basis of above the charge of kidnapping in terms of Section 365 IPC is implicit in the charge framed against accused and therefore there exists no impediment in examining the guilt of the accused under Section 365 IPC.

78. Law on the alteration of charge otherwise is specific and what needs to be examined is as to whether the accused was confronted with the charge levelled against him, so that he may put up his defence, and that no prejudice is caused to the accused on account of non-framing of such charge and his right of defence is not infringed in any manner.

79. The charge under Section 364A IPC implicitly includes the charge of kidnapping in addition to demand of ransom and threat to life. Even if the charge of ransom is not established, yet the charge of kidnapping can be tried.

80. In Shaik Ahmed (supra) also the Supreme Court proceeded to convict the appellant under Section 363 IPC after holding that the offence under Section 364-A IPC is not made out. Para 42 of the judgment, which is relevant for the controversy in hand, is reproduced herein under:-

"42. The Second condition having not been proved to be established, we find substance in the submission of the learned Counsel for the appellant that conviction of the appellant is unsustainable under Section 364A IPC. We, thus, set aside the conviction of the appellant under Section 364A. However, from the evidence on record regarding kidnapping, it is proved that accused had kidnapped the victim for ransom, demand of ransom was also proved. Even though offence under Section 364A has not been proved beyond reasonable doubt but the offence of kidnapping has been fully established to which effect the learned Sessions Judge has recorded a categorical finding in paragraphs 19 and 20. The offence of kidnapping having been proved, the appellant deserves to be convicted under Section 363. Section 363 provides for punishment which is imprisonment of either description for a term which may extend to seven years and shall also be liable to fine."

81. In Deshraj Vs. State of U.P., 2019 (107) ACC 176 also a Division Bench of this Court was confronted with a similar factual scenario where charge under Section 364-A IPC was not established yet the charge under Section 365 IPC was made out. The Division Bench proceeded

to convict the appellants under Section 365 IPC by holding as under in para 27 to 30 of the report, which are extracted hereinafter:-

"27. The next question, which arises for consideration, is that whether the conviction of the accused-appellants can be altered to u/s 365 of IPC. It is clear from the record that the incident in question, has taken place in the year 1987. Record shows that at the commencement of the trial on 29.07.2004, accused persons were charged under Sections 365 and 368 of IPC and thereafter the prosecution has led its entire evidence and the accused persons were examined under Section 313 of Cr.P.C. It was only thereafter that the charges were amended and in place of Sections 365 and 368 of IPC, the accused persons were charged under Sections 364-A and 368 of IPC by the trial court vide order dated 09.06.2009. The record further depicts that when the amended charges under Sections 364-A and 368 of IPC were framed, it was submitted on behalf of the accused persons that they do not want to cross-examine the witnesses and an endorsement to this effect was made on the order sheet dated 09.06.2009 of the record of trial court. So far as this pure question of law is concerned whether the conviction of an accused can be altered from Section 364-A of IPC to one u/s 365 IPC, there are certain decisions of this Court wherein it has been held that such conversion in conviction is permissible under law. In Mahesh V State of UP Criminal Appeal No. 3647 of 2005 decided on 16.08.2016, this Court found that there was no evidence of ransom and the prosecution has failed to establish the essential ingredients of such demand as required under Section 364A of IPC. On the other hand, the offence alleged and proved against the appellants squarely falls within the ambit and purview of Section 365 of IPC. Accordingly, the conviction of appellants recorded by the trial court u/s 364A of IPC was altered and modified to one under Section 365 of IPC only. Similarly, in the case of Ashwani Dubey V State of UP Criminal APPEAL No. 7740 of 2006 decided on 10.08.2016, on the facts of similar nature, this Court taking similar view, has altered the conviction from Section 364-A of IPC to one u/s 365 of IPC. Thus, it is clear that if the ingredient of ransom is not proved but the evidence establishes the ingredients of sec 365 IPC, the conviction can be altered from Section 364-A of IPC to one u/s 365 IPC. Though, in those cases the issue of "ex-post facto laws" was not involved, but in view of the peculiar facts of the present case particularly, considering that the appellants have faced trial for the offence u/s 365/368 IPC and the charge was altered only after the evidence was led, the appellants cannot be given benefit of the alleged error in charge and if the evidence on record establishs charge u/s 365 IPC, they can still be convicted for the same.

28. Now it is to be considered whether the evidence on record satisfies the ingredients of Section 365 of IPC. The provisions of Section 365 of IPC reads as under:

"Kidnapping or abducting with intent secretly and wrongfully to confine person.

365. Kidnapping or abducting with intent secretly and wrongfully to confine person.--Whoever kidnaps or abducts any person with intent to cause that

person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

29. In the present case, there is a clear and categorical evidence of the kidnappee Aadeep Kumar that on 15.11.1987 when he was going to his sister's house, he was kidnapped by Anand Kumar alias Chhote, Ravendra Singh, Anand Kumar alias Chhote and thereafter, rest of the appellants also joined them and participated in his kidnapping and confinement. The kidnappee was taken to the house of accused-appellant Kalyan and was confined there for about two months. He was also made to write a letter to his father for ransom of Rs. 1,50,000/-. The version of PW 1, Aadeep Kumar is supported by other witnesses. All the witnesses have been subjected to cross-examination, but there is no major contradiction or infirmity in the evidence of the witnesses. After his release, PW 1 has even pointed out the alleged house, where he was kept in confinement. There is overwhelming evidence on record, which unmistakeably establishes that on 15.11.87, PW 1 Aadeep Kumar was kidnapped by the accused-appellants and was kept in confinement for two months. The evidence on record fulfills all the ingredients of Section 365 of IPC. In view of peculiar facts and circumstances of the case, there does not appear any hurdle in alteration of conviction of the appellants from Section 364-A of IPC to one u/s 365 IPC. A perusal of the provisions of Sections 364-A and 365 of IPC indicates that the mischief punishable u/s 365 IPC is a less aggravated form of the offence punishable u/s 364-A IPC. As stated earlier, the offence punishable under Section 365 of IPC is of same nature and specie and it prescribed less punishment than that of Section 364-A of IPC. As the entire prosecution evidence was led on the charges under Sections 365 and 368 of IPC, thus, no prejudice would be caused to the accused-appellants if their conviction is altered to under Section 365 of IPC. In view of all these facts and evidence on record, the alteration of conviction of the appellants from Section 364-A of IPC to Section 365 of IPC would not result into any prejudice to the accused-appellants. Learned counsel for the accused-appellants could also not dispute the above stated position of law. The evidence on record clearly makes out a case of kidnapping as punishable u/s 365 of IPC. Accordingly, we are of the firm opinion that the conviction of appellants recorded by the trial court under Section 364-A of IPC should be altered and modified to one under Section 365 of IPC only.

30. The conviction and sentence awarded by the learned trial court stands modified accordingly. As per the dictum contained in Section 365 IPC, the offence is punishable with imprisonment of either description for a term which may extend to seven years, coupled with fine."

82. The evidence available on record in the form of statement of PW-1, PW-2 and PW-3 fully supports the prosecution case that the victim was kidnapped on 21.10.2006 at 5.00 pm by Pohpee, who is said to have taken the victim on a motorcycle with co-accused Ramesh @ Chhote.

83. As already noticed above, Pohpee is known to PW-1, PW-2 and PW-3 from before and has been specifically named as being the person who had kidnapped the victim. The statement of PW-1, PW-2 and PW-3 are inconsistent on that score.

Specific reason has also been assigned for kidnapping the victim by Pohpee Singh. PW-2 who is the victim and whose testimony is clear, categorical and consistent on material aspects has stated that he was kidnapped by Pohpee alongwith another person.

84. So far as the other person alongwith Pohpee is concerned, his identity has not been disclosed in the FIR. The FIR mentions the name of Narayan as being the person kidnapping PW-2 with Pohpee but PW-1 in his statement has taken the name of Chhote instead of Narayan.

85. The identity of Chhote has not been established, inasmuch as he has not been identified by any of the prosecution witnesses during the course of trial. Pohpee, however, is known to the prosecution witnesses from before being a close relative and has been identified as being the kidnapper of PW-2. In such circumstances, the charge under Section 365 IPC for kidnapping the minor victim can only be said to be made out against Pohpee and no one else.

86. The prosecution case refers to the kidnapping of PW-2 on 21.10.2006 at 5.00 pm from Chaumuha Bazar and although the prosecution case is that custody of victim was transferred to other accused appellants (except Pohpee and Chhote) but such charge has not been specifically framed against the other accused vide framing of charge order. No specific detail is disclosed about the date, time and place regarding transfer of custody of PW-2 in the charge framed against other accused, specifically when it is the admitted case of the prosecution that PW-2 was kidnapped on 21.10.2006 only by Pohpee and Chhote.

87. There is another aspect with regard to complicity of other accused which needs to be noticed at this stage. This is with regard to the identity of Rahees, Narayan Singh, Pooran and Padam. None of the aforesaid accused were known to the prosecution witnesses from before. None of them have been identified by the prosecution during the course of trial, except Rahees who has been identified by PW-2 in the witness box.

88. PW-5 Harendra Kumar Guatam, who is the Investigating Officer has clearly admitted in his cross-examination that identity of accused persons was not protected and no process for identification of accused persons was ensured. No identification parade was carried out. In such circumstances, identity of accused persons (except Pohpee) in commissioning of the alleged offence has also to be ascertained.

89. So far as Chhote @ Ramesh is concerned, his name has not been mentioned in the first information report. The allegation in the FIR is that Pohpee Singh alongwith Narayan Singh S/o Udal have taken away the victim on a motorcycle. The trial of Narayan Singh has already been segregated and he is not one of the accused appellant in the present case.

90. PW-1 in his statement has stated that he did not know Pooran from before and has seen him for the first time at Police Station Narsena after he was arrested and the victim was recovered. Pooran has not been identified in the witness box by PW-1. PW-2 in his statement has stated that the other person alongwith Pohpee, who had kidnapped him was named Chhote as he was so called by Pohpee. However, in the witness box PW-2 only identified Rahees

and Pohpee. PW-2 has, therefore, not recognized Ramesh @ Chhote as being the victim. PW-3 has also not identified Ramesh @ Chhote as being the person driving the motorcycle on which the victim was taken by Pohpee Singh. In such circumstances, although Chhote has been implicated as the person who had kidnapped PW-2 alongwith Pohpee Singh, but neither Chhote has been identified by any of the witnesses, nor his role in kidnapping the victim is established.

91. So far as the other accused persons namely; Rahees S/o Yaseen, Pooran Singh s/o Karan Singh and Padam S/o Kunwar Pal are concerned, their names have figured for the first time in the recovery memo and the first information report. PW-1 in his cross-examination has stated that he had disclosed the names of Pohpee and Chhote alone at the time of lodging of FIR and not the names of other persons namely; Rahees, Pooran and Padam. These persons have also not been identified, inasmuch as, neither their identity was protected nor any test identification parade was done to ascertain their identity. PW-2 in his statement although has identified Rahees in Court but not much reliance can be placed on it since the trial had continued for long and the accused persons were regularly produced in Court without their identity being protected. The possibility of PW-2 having come to know of the identity of Rahees during the trial cannot be ruled out. In such circumstances, none of the other accused persons can be held liable for the offence under Section 365 IPC, inasmuch as their implication is not established by the prosecution beyond reasonable doubt. No specific charge has been framed as to on what date the victim was transferred in their custody, either. In the absence of any specific charge levelled against these persons, it would not be safe to hold them liable for kidnapping PW-2.

92. On the conspectus of the facts as noted above, we have no hesitation to conclude that the charge of kidnapping of the victim i.e. PW-2 Satish for ransom is not made out against any of the accused. Conclusion drawn by Court below against the accused regarding commission of an offence of kidnapping for ransom therefore cannot be sustained and is, therefore, liable to be set aside by this Court.

93. However, from the discussion made above the charge of kidnapping under Section 365 IPC is clearly made out against accused Pohpee @ Pohap Singh. Consequently, the conviction and sentence awarded by court below to accused Pohpee @ Pohap Singh is liable to be modified by this Court.

94. Resultantly the appeals filed by Pooran Singh, Ramesh @ Chhote, Padam Singh and Rahees succeed. They are liable to be allowed. Accordingly, the impugned judgment and orders dated 26.2.2011/28.2.2011 and 1.4.2011; passed by Additional Sessions Judge, Court No. 6 Mathura in Sessions Trial No. 115 of 2007 (State Vs. Pooran Singh, Padam Singh and Rahees) and Sessions Trial No. 286 of 2007 (State Vs. Ramesh @ Chhote and Pohpee) whereby they have been convicted for the offence of kidnapping for ransom and awarding them life imprisonment alongwith fine is set aside, except for accused Pohpee @ Pohap Singh.

95. Since the charge of kidnapping punishable under Section 365 IPC is made out against Pohpee @ Pohap Singh, the impugned judgment and order dated

26.2.2011 and 28.2.2011 passed by court below, in so far as it relates to accused Pohpee @ Pohap Singh, is liable to be modified. Accordingly, the same is modified. Accused Pohpee @ Pohap Singh shall stand convicted under Section 365 IPC. He shall accordingly undergo simple imprisonment of seven years alongwith fine of Rs. 10,000/-. In case of default he shall undergo simple imprisonment for a period of three months. However, in case accused Pohpee @ Pohap Singh has already undergone the sentence and has also deposited the fine, he shall be released forthwith, unless he is wanted in any other case.

96. All the other accused i.e. Pooran Singh, Ramesh @ Chhote, Padam Singh and Rahees, however, shall be set at liberty forthwith, unless, they are wanted in any other case, subject to their executing a bond in terms of Section 437-A Cr.P.C.

97. Criminal Appeal Nos. 1684 of 2011, 1741 of 2011, 1945 of 2011 and 2636 of 2011 are allowed; whereas Jail Appeal No. 1262 of 2012 is partly allowed.

(2022) 9 ILRA 1588
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 2175 of 2016

Prempal & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Anup Ghosh, Sri Arun Kumar Mishra, Sri Ghan Shyam Das, Sri Om Prakash Chaube, Sri Pradeep Kumar Mishra, Sri Pratap Ghosh, Sri Rajendra Kumar Dubey, SriSantosh Kumar Pandey, Sri Shravan Kumar Mishra, Sri Vinay Saran (Sr. Adv.)

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Law - Criminal Procedure Code,1973-Section 374(2) - Indian Penal Code,1860-Sections 364-A, 120-B, 368-Kidnapping-injury marks found on the body of victim which may suggest he was tied or chained but all prosecution witnesses failed to prove the case beyond reasonable doubt as they are inconsistent and contradictory-no independent witnesses- no CDR on record to demonstrate that the mobile instrument of the abductee was used by the accused-assuming that victim was abducted and was detained, but who incarcerated him and for what purpose is a matter and in what manner the incident occurred has to proved by the prosecution-Thus, accused entitled for benefit of doubt.(Para 1 to 37)

The appeal is allowed. (E-6)

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. This appeal is against the judgment and order dated 04.03.2016 passed by the Special Judge (Dacoity Affected Areas)/Additional Sessions Judge, Court No.3, Farrukhabad in S.S.T. No.37 of 2015 (arising out of case crime no.553 of 2014, P.S. Kayamganj, district Farrukhabad) connected with (i) S.T. No.135 of 2015 (arising out of Case Crime No.562 of 2014, P.S. Kayamganj, district Farrukhabad); (ii) S.T. 136 of 2015 (arising out of Case Crime No.563 of 2014, P.S. Kayamganj, district Farrukhabad); and (iii) S.T. No.137

of 2015 (arising out of Case Crime No.565 of 2014, P.S. Kayamganj, district Farrukhabad), whereby the appellants Prem Pal, Sipahi Lal and Omveer have been convicted under Sections 364-A/120-B and 368 IPC in connection with Case Crime No.553 of 2015 (supra) and, in addition to above, Prem Pal and Omveer have also been convicted under Section 25 of the Arms Act in connection with Case Crime Nos.563 of 2014 and 565 of 2014 (supra), respectively. Sipahi Lal, Prem Pal and Omveer have been sentenced as follows:- Imprisonment for life as well as fine of Rs.20,000/- to each of the three, coupled with a default sentence of two years, under Section 364-A read with Section 120-B IPC; and 7 years R.I. as well as fine of Rs.10,000/- to each of the three, coupled with a sentence of two years, under Section 368 IPC. Whereas, Prem Pal and Omveer have also been sentenced to imprisonment of three years R.I. as well as fine of Rs.5,000/-, coupled with a sentence of two years each, under Section 25 of the Arms Act. All sentences to run concurrently. As all these appellants were in jail during the course of trial, it was observed that the time spent in jail by the appellants shall be counted/adjusted against the sentence awarded.

2. In S.S.T. No.37 of 2015, seven persons, namely, Sipahi Lal (appellant no.2), Prem Pal (appellant no.1), Omveer (appellant no.3), Ramu alias Raju, Ram Kishore, Smt. Malti and Smt. Santoshi were tried in connection with Case Crime No.553 of 2014 (supra). Out of those seven persons, four, namely, Ramu alias Raju, Ram Kishore, Smt. Malti and Smt. Santoshi, were acquitted. Whereas, in S.T. No.135 of 2014, arising out of Case Crime No.562 of 2014 (supra), four persons, namely, Prem Pal (appellant no.1), Ram Kishore, Ramu alias Raju and Omveer (appellant no.3) were tried. All four were acquitted. This appeal, therefore, is confined to the judgment and order of conviction of the appellants to the extent indicated above in S.T. No.37 of 2015, arising out of Case Crime No.553 of 2014 (supra); S.T. No.136 of 2015, arising out of Case Crime No.563 of 2014 (supra); and S.T. No.137 of 2015, arising out of Case Crime No.565 of 2014(supra).

INTRODUCTORY FACTS

3. On 12.12.2014, at 12.30 hours, Chheda Khan (PW-1) submitted a written missing report (Ex. Ka-1) alleging that in the night of 11/12.12.2014 his son Salman and Kunwarpal son of Siyaram, at about 2 am, had gone to village Amaliya Mukeri on their tractor but they did not return. (Note: Kunwarpal is real brother of Prempal-appellant no.1). A GD entry of the missing report was made vide Report No.27 (Ex. Ka-2), at P.S. Kayamganj, district Farrukhabad. On 15.12.2014 information was given by PW-1 that his son (Salman) and Kunwarpal appear to have been abducted. Consequently, vide GD Entry No.45, at 17.45 hours, the missing report was converted into Case Crime No.553 of 2014 under Section 364 IPC. On 16.12.2014, investigating officer (I.O.) Meghnath Singh - PW-6 recorded the statement of Chheda Khan (PW-1) and on his instructions prepared a site plan (Ex. Ka-6) of the place from where the two missing persons were allegedly abducted. The I.O. also recorded the statement of Rajeev (not examined) and Subhash Chandra (not examined) and went to village Amaliya Mukeri where he recorded statement of Master Janmajay Singh (not examined) and his son Dhananjay Singh (not examined) and also enquired from

Prempal (the appellant no.1) and obtained his phone number. On 21.12.2014, the I.O. with his fellow Sub-Inspector, Ravindra Kumar (not examined) and Constables Awadhesh Kumar (not examined), Sunil Kumar (not examined) and Shadab (not examined) left the police station in a private vehicle with government issued weapons to investigate the case in respect whereof entry was made in the general diary vide Report No.20, at 10.35 hours (morning). When the police party reached industrial area Papri, they met Chheda Khan (PW-1) and Rajesh Kumar son of Agya Ram (not examined). These two witnesses informed the police party that they have been required to arrange for ransom amount of twenty lacs (ten lacs each for release of Salman and Kunwarpal). They also informed the police party that they suspect Prempal (appellant no.1) and his family members of cheating them. Apart from that they also informed the police party that they are poor persons and are not in a position to arrange the ransom money. On getting this information, PW-6 (I.O.) contacted Brijesh Kumar Yadav (PW-7) i.e. incharge SWAT. The SWAT team headed by PW-7 arrived and a plan was hatched to trap/arrest the abductors. As per the plan, two wads of plain papers, with currency notes of Rs.1,000/- denomination at the top and at the bottom, were prepared so as to pass off as two bundles of notes of Rs.1 lac each. After preparing these wads of notes they were handed over to Chheda Khan (PW-1) and Rajesh Kumar to proceed to the designated spot to trap the abductors. According to the prosecution case, the police team along with SWAT lied in ambush awaiting arrival of ransom money collector; after 10-15 minutes, a person arrived there, took the two wads of notes from Chheda Khan (PW-1) and started to count them; on being satisfied that that person had arrived to collect the ransom money, the team, lying in ambush, emerged and arrested that man with two wads of notes; on interrogation, that person disclosed his name as Sipahi Lal (appellant no.2); on further probe, it was found that Samsung mobile instrument IMEI No.356126054535450 used by Salman for no.9616681877, which was on surveillance, had been used by Sipahi Lal's No.8853359413 and from that number, on 15.12.2014, call of 174 seconds was made on No.9026053760 at 18:27:59. When Sipahi Lal was interrogated in respect of No.9026053760, he informed that Prempal has used this number to call him (Sipahi Lal). The team thought that as Salman's mobile had been missing since the date of his abduction, the abduction must have been planned by Prempal and, therefore, he got his brother Kunwarwal abducted to mask the entire operation. On further interrogation, Sipahi Lal told the police team that Prempal had planned the abduction of Salman along with his brother Kunwarpal, Ram Kishore, Ram Kishore's wife Santoshi and his mother Malti along with Raju and Omveer because Salman's father (Chheda Khan) had sold his land for Rs.22,00,000/- and therefore, they thought, he would be having enough money. Sipahi Lal confessed that he had to pay off his tractor's instalments therefore, he also participated in the plan. As a part of that plan, in the night of 11/12.12.2014, Kunwarpal drove the tractor to Salman's house to fetch him from his house thereafter he was abducted and kept blind folded. According to prosecution case, after getting information from Sipahi Lal that Salman, in furtherance of that plan, is being detained in the sugarcane field of Prempal, the police team including SWAT team proceeded to the spot on separate vehicles along with PW-1 and Rajesh Kumar (not

examined). There, in a police action, after facing resistance in the shape of firing at the police party, the police team with the help of SWAT team apprehended Prempal (appellant no.1), Jitendra (who was later found juvenile and his trial was separated), Omveer (appellant no.3) and Kunwarpal (who was later found juvenile and his trial was separated). Whereas, three persons, namely, Raju (acquitted by the trial court), Ram Kishore (acquitted by the trial court) and Sarjeet (found juvenile) were successful in escaping from the spot. The arrested accused led the team to the spot where Salman was detained. The spot was in the shape of a ditch, about 10 feet deep, and was covered with leaves etc. When leaves etc were removed, Salman son of Chheda Khan was found tied in a chain. In connection with this entire operation six memorandums were prepared on 21.12.2014 namely, Ex. Ka-7 to Ex. Ka-12. These memorandums reflected seizure of various articles from the spot such as chain, mattress, notes, etc including (a) country made pistols/ cartridge from Prem Pal (appellant no.1), Jitendra and Omveer (appellant no.3); (b) Samsung mobile, alleged to be of Salman, from Jitendra; and (c) a ransom letter, making a demand of Rs.10,00,000/- for release of Salman and Kunwarpal, from Omveer (appellant no.3).

4. On the basis of the aforesaid police action and recoveries, on 21.12.2014, at 19.30 pm, four separate cases were registered at P.S. Kayamganj, namely, Case Crime No.562 of 2014 under Section 307 IPC; Case Crime No.563 of 2014 under Section 25/27 of the Arms Act; Case Crime No.564 of 2014 under Section 25/27 of the Arms Act; and Case Crime No.565 of 2014 under Section 25/27 of the Arms Act. GD entry with regard to the registration of Case Crime Nos.562 of 2014 to 565 of 2014 was made by constable Prakash Narayan Pushkar (PW-5), vide report No.34, at 19.30 hours (Ex. Ka-5) of which Chik FIR was also prepared by him (Ex. Ka-4).

5. At this stage, it be clarified that though, as per the chik FIR (Ex. Ka-4), Case Crime Nos.562 of 2014 to 565 of 2014 were registered against seven persons in total, namely, Prempal, Jitendra, Omveer, Ram Kishore, Raju, Sarjeet and Kunwarpal but since co-accused Jitendra, Sarjeet and Kunwarpal were found juvenile their cases were separated.

6. After investigation, the investigating officer submitted charge sheets in the following manner:-

(i) In respect of Case Crime No.553 of 2014, the investigating officer submitted two charge sheets: (a) charge sheet dated 22.01.2015 (Ex. Ka-17) against Sipahi Lal (appellant no.2), Prempal (appellant no.1), Omveer (appellant no.3), Ramu, Ram Kishore, Malti, Jitendra, Kunwarpal and Sarjeet; and (b) charge sheet dated 30.05.2015 (Ex. Ka-18) against Smt. Santoshi. Both charge sheets were submitted under Section 364-A/368/120-B IPC

Note:- In Case Crime No.553 of 2014, on the basis of said two charge sheets, Special Sessions Trial No.37 of 2015 was instituted in which only Sipahi Lal (appellant no.2); Prempal (appellant no.1); and Omveer (appellant no.3) have been convicted whereas, Ramu @ Raju, Ram Kishore, Smt. Malti and Smt. Santoshi were acquitted. In so far as the accused Jitendra, Kunwarpal and Sarjeet are concerned, they being juvenile, the inquiry against them was separated.

(ii) In respect of Case Crime No.562 of 2014 charge sheet dated

22.01.2015 (Ex. Ka-21) was submitted against Prempal (appellant no.1), Ram Kishore, Ramu alias Raju and Omveer (appellant no.3) giving rise to S.T. No.135 of 2015, under Sections 147, 148,149, 307 IPC.

Note:- Kunwarpal, Jitendra and Sarjeet, who were also implicated in this case, upon being found juvenile were deleted from the charge sheet and their matter was referred to the Juvenile Justice Board for enquiry. It be noted that in this case all the accused persons have been acquitted by the trial court. And there is no appeal against the order of acquittal.

(iii) In respect of Case Crime No.563 of 2014, charge sheet dated 22.01.2015 (Ex. Ka-24) was submitted against Prempal (appellant no.1), under Section 25/27 of the Arms Act, giving rise to S.T. No.136 of 2015.

Note:- In this case Prempal (appellant no.1) has been convicted under Section 25 of the Arms Act.

(iv) In respect of Case Crime No.565 of 2014, charge sheet dated 22.11.2015 (Ex. Ka-27) was submitted against Omveer (appellant no.3), under Section 25/27 of the Arms Act, giving rise to S.T. No.137 of 2015.

Note:- In this case Omveer (appellant no.3) has been convicted under Section 25 of the Act by the order of the trial court.

7. On the basis of the material placed in the police reports/ charge sheets, the trial court famed charges accordingly. On denial of the charges and claim for trial by the accused, trial commenced. By order of the trial court dated 15.12.2015, the aforesaid four sessions trial were consolidated. S.T. No.37 of 2015 was made the leading sessions trial in which the evidence was laid by the prosecution.

PROSECUTION EVIDENCE

8. The prosecution in support of its case apart from the documentary evidence which we shall refer to at the appropriate stage, examined 10 witnesses. Their testimony, in brief, is as follows:-

9. **PW-1- Chheda Khan - the informant of Case Crime No.553 of 2014 - father of abductee Salman**. PW-1 stated that he and his son Salman worked as labourers to earn their livelihood; that accused Kunwarpal and Prempal are real brothers, they used to visit PW-1's village in connection with transportation of sand/mud on their tractor trolley. In respect of the incident, PW-1 stated that it was winter night; Prempal and Kunwarpal contacted his son (Salman) and told him that sand has to be unloaded at a particular place; that in connection therewith, Prempal and Kunwarpal came and took his son to unload sand at village Amaliya Mukeri. His son (Salman) did not return that night. Despite hectic search, when his son could not be found, PW-1 gave a missing report (Ex. Ka-1). Fifth day thereafter, Prempal contacted PW-1 to inform PW-1 that his son has been abducted and if Rs.10,00,000/- is paid, his son would be released. On getting this information, PW-1 told Prempal that he does not have the money. After stating as above, PW-1 reverted to the date when his son did not return that night. He stated that when his son did not return that night, he visited village Amaliya Mukeri. There, he noticed the tractor trolley, which was

owned by Kunwarpal, standing in the field of Raghunandan; that day, he searched for his son at village Amaliya Mukeri and also visited the house of Janmejay Singh Master from where he learnt that Salman after unloading the sand/mud had left at about 2 am in the night. PW-1 stated that thereafter, he went to Pradhan Narendra Singh who confirmed the information given by Janmejay. There, he also met Prempal (appellant no.1), brother of Kunwarpal, who joined PW-1 in his search for the two missing persons. Only when PW-1 failed in his endeavour, written report was submitted.

In respect of the police action leading to recovery of the abductee, PW-1 stated that 9 days after the incident, while he was with co-villager Rajesh (not examined), he met the police at village Papri industrial area. He informed the police that for release of his son and Kunwarpal a demand of Rs.10,00,000/- each has been raised. On that information, the police team prepared two wads of notes. Each wad had 98 plain cut papers and two notes of Rs. 1000/- denomination, one on the top and the other at the bottom of the wad. The police personnel thereafter parked their vehicles to lie in ambush. After some time, Sipahi Lal came from Mangaliyapur to collect the ransom money. The police arrested him. On his arrest, he told the police that since PW-1 had sold his land for Rs.22,00,000/-, to extract the money, Salman was abducted. Sipahi Lal told the police team that he can get Salman recovered. PW-1 stated that the police team took Sipahi Lal with them in the vehicle along with the cash. Sipahi Lal led the team to the spot and pointed towards the field of Prempal. The police surrounded the place. There was exchange of gunshots. Six persons were arrested. Immediately thereafter, he clarified that only four persons were arrested. Rest three had escaped from the spot. The persons arrested were Prempal, Jitendra, Omveer and Kunwarpal. PW-1 stated that he knew all four of them from before. Those arrested informed that three persons who escaped were Raju, Ram Kishore and Sarjeet. PW-1 stated that from the arrested accused, country made pistol, etc was recovered and from the pocket of the trouser worn by Omveer, a parcha (i.e. ransom letter) was recovered in which the ransom demand of Rs.10,00,000/- for release of Salman and Kunwarpal was mentioned. At this stage, PW-1 was shown the memorandum/papers prepared by the police. He identified his signatures thereon and stated that they were all prepared at the spot. PW-1 stated that he had got information to hand over the ransom money at a nursery between village Papri and village Bhagaliyapur and it was at that place where the police had arrested Sipahi Lal. At this stage, the witness was also shown the recovery memo of the ransom letter, the recovery memo of the mobile phone, recovery memo of the wads of notes and recovery memo of clothes etc. The witness identified his signatures present on those recovery memos and stated that they were prepared at the spot. The witness also stated that his son Salman was recovered from a ditch at the spot. The wads of notes that were sealed at the time of recovery were opened before the court. There were two wads of notes each having 98 plain papers with one currency note of rupee 1,000/- at the top and the other of the same denomination at the bottom. The genuine currency notes were marked material Ex.-1 to material Ex.4 and the plain paper placed in those wads of notes were marked as material Ex. 5 to 200. Another sealed bundle containing a black colour samsung mobile was opened which

was identified as that of Salman. The same was made material Ex.-201. A third bundle was opened which contained a ransom letter which was marked material Ex.202. Material Ex.-202 read as follows:-

"सलमान को अगर छुड़ाना चाहते है तो दस लाख रूपये लेकर पपडी के खुर्द के पास लेकर आ जाना कुँवरपाल के घर वालो को भी बता देना दस लाख रूपये लेकर आ जाये नहीं तो दोनो को मार दिया जायेगा। पुलिस को भी बताओगे तो भी मार दिये जायेंगे। रूपये आज 12 व 1 बजे के बीच पहुँचाने है। 21.12.2014 को पहुँचाने है। तुम्हारा शुभ चिन्तक"

The envelops containing the wads of note were also exhibited and were marked material Ex.203 to 205. Another sealed bag (potli) was opened which contained Tirpal (canopy), tiffin box, bottle, rope, chain etc including Angauchha, Tala, quilt and mattress. Those were made material exhibits 206 to 222.

PW-1 stated that **Salman was tied with a chain which was locked and was blind folded with cotton plugged in his ears.**

During cross examination, PW-1 stated that neither he nor his son Salman owns a tractor; they do not mine sand or have Theka relating thereto. On the date of the incident, Kunwarpal had come to his house to take Salman. He took Salman from the house at 1 am. Salman used to work as a labourer. **In respect of his financial condition, PW-1 stated that he did not sell any property; he does not own a bank account; he just has two thousand rupees.**

In respect of the time of the operation leading to recovery of Salman, PW-1 stated as follows:-

"जिस दिन मेरा लड़का बरामद हुआ उस दिन पुलिस रात्रि में आठ बजे हमे मिली थी। उस रात्रि आठ बजे मैं लड़के को तलाश में जा रहा था। उस आठ बजे तक हमे यह नहीं मालुम था कि मेरा लड़का कहा है। जिस समय रात्रि में पुलिस आठ बजे हमे मिली थी उस समय मेरे साथ राजेश था। उस दिन तारीख बीस थी। लड़के के गायब होने की रिपोर्ट मैने बारह तारीख को की थी।"

As to when PW-1 was interrogated by the I.O, PW-1 stated as follows:-

"बारह तारीख को दरोगा जी ने हमसे थाने में पूँछताँछ की थी। मेरा दरोगा जी ने ब्यान चौदह, पन्द्रह, सोलह, सत्रह व अठ्ठारह तारीख को ब्यान लिये थे।

In respect of ransom demand, PW-1 stated as follows:-

"हमे तीन बार फिरौती की चिट्ठी प्रेमपाल ने दी थी। एक चिट्ठी पन्द्रह तारीख को शाम को दी थी दूसरी चिट्ठी सत्रह की सुबह को तीसरी चिट्ठी उन्नीस को शाम को दी थी। चिट्ठीयों में लिखा था "सलमान व कुँवरपाल दोनो को घर वाले काली नदी सकिसा के पास बदमाश शाम को सात बजे पॉच–पॉच लाख रूपये करले। नहीं दोगे तो जान से मार दिये जायेंगे।" प्रेमपाल के साथ तलाशने अपने पुत्र को सकिसा काली नदी पर किया गया था। तारीख हमे याद नहीं वह चिट्ठीयॉ हमने प्रेमपाल को वापस कर दी थी।

After stating as above, PW-1 stated as follows:-

"मैने दरोगा जी को प्रेमपाल के द्वारा चिट्ठी देने वाली बात बतायी थी। प्रेमपाल के पास से ही तीनो चिट्ठीयॉ बरामद हुयी थी। जिस दिन पकड़ा था उसी दिन पुलिस ने चिट्ठियॉ ली थी। प्रेमपाल को दिनांक उन्नीस की शाम को पकड़ा था। उसी से चिट्ठियॉ व मोबाइल बरामद हुये थे।

Thereafter, in respect of recovery of his son, PW-1 stated as follows:-

"मेरा बच्चा बीस तारीख को सुबह पॉच बजे मिला था। जब मेरा बच्चा मिला था तब राजू मौजूद था। राजू व मैं बच्चे को खोजने के लिये गये थे। राजू मेरे साथ था। राजू से पुलिस ने पूँछताँछ की थी तथा ब्यान लिये थे।

At this stage, the witness was given a suggestion that his son was never abducted and the entire prosecution story has been developed in collusion with the police. The witness denied those suggestions.

To extract the reason for false implication, when cross examined, PW-1 stated that in his village, Asharam was once elected as Pradhan. At the time of the incident, Asharam's nephew was the Pradhan. He was very influential and had links with politicians and officers. The police personnel often visited his house. On further probe, PW-1 feigned ignorance as to whether Asharam supported Ajeet Kateriya in the last assembly election. He also feigned ignorance as to whether Asharam was a supporter of Samajwadi party. PW-1, however, admitted that Asharam and his son Rajesh Gangwar were very helpful and Rajesh Gangwar is also a witness in this case.

In respect of the conduct of PW-1 when his son went missing, PW-1 stated that he went to search for his son in the morning at 5 am and during search, when he reached Bhaisa Tiraha, he noticed that the tractor was parked in the sugarcane field of Raghunandan Gangwar. He stated that the police had arrived at the spot, near the tractor, at 8 am and they took away the tractor to the police station. The relevant extract of his statement in this regard is as follows:-

"तिराहे से ट्रैक्टर पुलिस थाने ले गये थे हमको भी पुलिस थाने ले गये थे। पुलिस ट्रैक्टर के पास सुबह आठ बजे आ गयी थी। पुलिस वाले पॉच थे। पुलिस वाले सरकारी जीप से आये थे। पुलिस को सूचना चौकीदार ने दी थी। चौकीदारी गॉव में चर्चा होने के बाद मौके पर पहुँचा गया हम रोने धोने लगे इसी दौरान उसने पुलिस को फोन कर दिया। ट्रैक्टर थाने में प्रेमपाल चलाकर ले गया था। थाने करीब 12 बजे पहुँच गये थे। आठ बजे से 12 बजे तक पुलिस मौके पर रही तथा इधर उधर गन्ने के खेत व सरसो के खेत तलाश करती रही।"

At this stage, the witness again reiterated that his son was recovered on date 20.12.2014. He stated that at the time of the recovery from the spot a canopy (Tirpal) was recovered. When questioned about the colour and dimensions of the Tirpal recovered, PW-1 stated as follows:-

"तिरपाल किस रंग का था हमे नहीं मालुम। तिरपाल कितना लम्बा और कितना चौड़ा था हमें नहीं मालुम। टिफिन भी बरामद हुआ था टिफिन स्टील का था। टिफिन तीन डिब्बे वाला था कि चार डिब्बे वाला था हमे नहीं मालुम खुद कहा कि टिफिन पर नाम लिखा था और उसके साथ गद्दा व खादी 2 लंगोट एक अंगोछा एक बोतल पानी की तथा और हथियार बारह बोर 315 बोर का कट्टा वा देशी बन्दूक तथा मेरा लड़का बरामद हुये थे।"

"अंगोछा का रंग हमको मालुम नहीं है। सूती कपड़े वाला टेरीकाट का था मालुम नहीं। बोतल प्लास्टिक की थी रंग याद नहीं बोतल एक लीटर की थी। गद्दे के रंग का ध्यान नहीं गद्दे पर कवर चढ़ा था हमे ध्यान नहीं है। रजाई किस रंग की थी ध्यान नहीं रजाई का कवर चढ़ा हुआ था व किस रंग का था ध्यान नहीं।"

In respect of the place where the memorandums of recovery were prepared, PW-1 stated that the recovery memorandums were prepared at the spot and not at the police station and it took about 4 hours in its preparation. On further questioning as to how much time was spent in preparation of the papers, the witness stated that he does not exactly remember

the time but when they had left the spot, the night had set in. He further stated that at that time, with him, Rajesh Gangwar was there. They arrived at their house by about 11 am. When questioned as to how many persons were there when the recovery was made and the place where the wads of notes were arranged, PW-1 stated as follows:-

"जिस दिन मेरे लड़के को थाने पर बरामदगी हुयी उस दिन गॉव के बीस बाइस लोग गये थे। नोटो की गड्डी मैने अपने घर पर तैयार की थी राजेश भी साथ गये थे। नोटो की गड्डियॉ तैयार करने की सलाह राजेश ने दी थी। नोटो की दो गड्डी बनायी थी। गड्डी लेकर घर से शाम को सात बजे चले थे। मोटर साईकिल एक ही थी उसी पर हम व राजेश थे। मोटर साईकिल राजेश की थी। नोटों की गड्डियॉ लेकर हम लोग पपडी व मगलियापुर के बीच बाग में पहुॅचे थे।"

After narrating as above, on being questioned as to how the trap was laid to recover the victim, PW-1 stated as follows:-

"बाग में रात्रि के नौ बजे पहुंच गये थे। उस समय अॅधेरी रात थी। घर से टार्च लेकर नहीं गये थे मोबाइल फोन थे। मोबाइल मेरे व राजेश के पास था। मोबाइल से हमने पुलिस को फोन करके बुलाया था। पुलिस के आने के बाद हमने पुलिस वालों को नोटों की गड्डियॉ दिखायी थी। पुलिस वाले करीब आठ लोग थे।

During cross examination, on 20.01.2016, to a question whether Prempal was there when PW-1's son was taken from home, PW-1 stated that Prempal had arrived in the night but was not driving the tractor. He was lying in the tractor. When his son left that night, before leaving he had informed PW-1 that Kunwarpal is waiting outside and is calling him. His son told PW-1 that he is going to Amaliya Mukeri and would return in half an hour. PW-1 stated that he waited till 5 am in the morning and then when his son did not return, he went to search for him.

In respect of how the police was called on the date of the recovery, PW-1 stated that he had called the police on phone and they arrived within 20 minutes.

In respect of the spot where the ransom money had to be paid, PW-1 stated that it was a nursery kind of Bagh (grove) measuring four bigha which had no access to a chakroad.

In respect of the time when the accused arrived for taking the ransom money, PW-1 stated as follows:-

"उस बाग में फिरौती की रकम लेने के लिये बदमाश करीब 10 बजे आये थे। बदमाश दो थे या तीन थे अॅधेरे की वजह से हम नहीं देख पाये थे।"

In respect of light condition at the time of operation, PW-1 stated as follows:-

"उस समय काफी अॅधेरा था एक दूसरे के चेहरे दिखायी नहीं देते थे। वाहनों के पास पुलिस वाले लिखा पढ़ी करते रहे और मुझे अपने घर लड़का बरामद होने की खबर देने के लिये भेज दिया था। मैं जब गॉव पहुॅचा था तब उजाला हो गया था।"

After stating as above, PW-1 stated that the I.O. had called him on telephone to come to the police station with 10-20 villagers and at the police station he recognized the accused and his signatures were also obtained on the papers. The statement to that effect is extracted below:-

"थाने से दरोगा जी ने फोन किया था कि गॉव के दस बीस लोग आ जाओ। मैं थाने दो

बजे दस बीस लोगों को लेकर पहुंच गया था। थाने में पहुंचने पर दिन के उजाले में मैंने वहॉ मौजूद सभी बदमाशों के चेहरे देखे तथा उन्हें पहचाना था और वहीं पर थाने में ही मेरे हस्ताक्षर करवाये गये थे। गवाह ने फर्द बरामदगी चिट्ठी बरामदगी नोटों की गड्डी बरामद एक अंगौछा व दुपट्टा आदि व बरामदगी अप्हृत बरामदगी मोबाइल सैमसन की फर्दो को देखकर कहा कि यह ही प्रपत्र है जिन पर पुलिस थाने में मेरे हस्ताक्षर करवाये गये थे तथा राजेश कुमार को भी हस्ताक्षर करवाये गये थे।"

At this stage, to show that there were political reasons for the implication of accused persons, questions were put to PW-1, upon which, PW-1 stated as follows:-

"मुल्जिमान लोधी जाति के हैं। यहॉ के भाजपा सांसद मुकेश राजपूत भी लोधी जाति के हैं। यह सभी मुल्जिमान भारतीय जनता पार्टी के समर्थक हैं।

At this stage, PW-1 denied the suggestions: that at Kayamganj one Kallu Yadav, who is a member of Samajwati party, has large scale mining operation and since the accused were also in the same business therefore, they have been falsely implicated by wielding influence; and that there was no abduction or recovery.

10. **PW-2- Salman- abductee/victim.** PW-2 stated that the incident is of 12.12.2014; to unload sand, Prempal (appellant no.1) had called PW-2; to fetch him from his house, Prempal sent his brother Kunwarpal; whereafter, he went on the tractor of Kunwarpal to village Amaliya Mukeri to drop sand at the house of Janmejay Master; after unloading the sand, on the way return, near the Tiraha, Kunwarpal stopped the tractor; there, one person arrived; that person hit him with a butt; upon which, PW-2 scuffled with him; then, 6-7 armed men came and pulled him down from the tractor; thereafter, PW-2 was tied with a chain and taken to the sugarcane field of Prempal; PW-2 was kept there and used to be assaulted and threatened by saying that if he raises his voice, he will be killed. PW-2 stated that he was detained by Prempal, Kunwarpal, Ram Kishore, Ramu alias Raju, Sipahi Lal, Omveer, Jitendra and Sarjeet. PW-2 used to be fed by Prempal's mother and wife, namely, Malti and Santoshi, respectively. PW-2 stated that he was abducted for ransom. In his presence, Prempal wrote the letter demanding ransom. He stated that he remained in the custody of the accused for about 9 days. Thereafter, police arrived. There was exchange of fire between police and the accused. Police arrested Omveer, Prempal, Kunwarpal, Jitendra, Sipahi Lal and Raju at the spot. He identified the accused in the court and stated that the I.O. prepared the papers in his presence. He also stated that at that time his father Chheda Khan and village Pradhan's son Rajesh were there. After stating as above, PW-2 stated that the accused Jitendra had snatched his mobile phone and the same was seized at the time when he was recovered. The mobile was unsealed from a bundle. The witness identified the mobile and the same was marked as material exhibit.

During cross examination, PW-2 stated that he is a poor person and is a student of B.Sc final year, which he is doing from a private college. In respect of going to the institution for his course, PW-2 stated that he leaves for his college by noon and returns by 5 pm. But he was not regularly going to the college. When questioned as to when he last went to the college, PW-2 stated that he does not remember. When questioned about his roll number, PW-2 stated that he does not remember. Thereafter, PW-2 stated that he has passed B.Sc final.

In respect of financial status, PW-2 stated that his father has four bigha land;

his elder brother is in service and an engineer, who stays separate. His mother is receiving old age pension. At this stage, the witness stated that he does not work as a labourer but goes outside to work. Then, he clarified that he was not working outside since before the incident. PW-2 stated that he does not have any mining Theka.

In respect of the incident in which he was abducted, PW-2 stated that the night was dark. There was mist/fog. He did not have a torch. As soon as the tractor had stopped, miscreants had arrived and one of them had hit him on the head with butt. After he fell, he was blind folded. His blind fold was opened only when his father arrived. The relevant extract of his statement to that effect is extracted below:-

"घटना वाली रात अँधेरी थी कोहरा गिर रहा था। कोहरे में आदमी को चार पॉच फिट की दूर से पहचाना जा सकता था। मेरे पास टार्च नहीं थी। ट्रैक्टर रूकने के तुरन्त बाद बदमाश आ गये थे। बदमाशों ने मेरे सिर में बट मारकर गिरा दिया था। गिराने के बाद हमारी ऑखों में पट्टी बॉध दी थी। पट्टी मेरी ऑख की तब खुली जब मेरे पापा आ गये। पट्टी बॉधकर बदमाश मुझे घसीटते हुये ले गये थे बाद में मोटर साईकिल से ले गये थे। बदमाश कौन मौटर साईकिल चला रहा था क्यों कि मेरी ऑख पर पट्टी बॅधी हुयी थी। कानों में रूई नहीं लगायी थी ऑख व कान पर पट्टी बॉधी थी। पट्टी लाल व सफेद रंग की थी। यह पट्टी सिपाही लाल ने बॉधी थी।"

After stating as above, the witness stated that he did not know Raju from before and only when Raju was arrested by the police, he came to know that he was Raju. He stated that the police got him examined for the injuries on his body.

In respect of the date and time when he received injuries, PW-2 stated as follows:-

"मुझे मेरे पापा मिलने से पहले बदमाशों ने मुझे चार दिन पहले मारा पीटा था।"

In respect of the place and time when the memorandums were prepared, PW-2 stated as follows:-

"लिखा पढ़ी प्रेमपाल के खेत में हुयी थी। यह लिखा पढ़ी सुबह 8–9 बजे के करीब हुयी थी।"

During cross examination at the instance of accused Malti Devi and Santoshi Devi, who have been acquitted by the trial court, PW-2 stated as follows:-

"मुझे पट्टी बॉधकर रक्खा गया था किसी से मिलने जुलने बातचीत करने नहीं दिया जाता था। पट्टी बॅधी होने के कारण नहीं देख पाता था कौन आता है कौन जाता है।"

On 22.01.2016 when PW-2 was further cross examined in respect of the time taken by him to unload sand at Janmejay's place in the night when he was abducted, PW-2 stated as follows:-

"अमलैया मुकेरी में बालू जनवेद गंगवार के घर में बालू डाली थी। पहले जाने में दस मिनट का समय लगा था। बालू पलटने में तीन मिनट का समय लगा था। प्रेसर वाली ट्राली थी और आटो मैटिक सिस्टम से वह टाली उलट जाती है। टाली से बालू उतारने में किसी मजदूर की जरूरत नहीं पड़ती है। मैने बालू नहीं उतारी थी बालू आटो मैटिक सिस्टम से स्वयं ही नीचे गिरा दी गयी थी।"

After stating as above, the witness stated that Kunwarpal used to pay him rupee 100 per trolley and this deal with him continued for last one year. The relevant statement in this regard is extracted below:-

"कुॅवरपाल एक दो ट्राली पर हमे 100 रूपये प्रति ट्राली की दर से पैसा देता था। हमारा

इसके साथ बालू पर कमीशन का कार्य चलता था। लगभग एक वर्ष से कमीशन का कार्य उसके साथ चल रहा था। क्षेत्र व आस पास के लोगो को बालू की आवश्यकता होती थी तब हम इनको फोन करके बालू मॅगवा देते थे। जब हमसे कोई बालू मंगवाने के लिये बताता था तभी हम उनसे फोन से बालू लाने के लिये कहते थे। पहले बालू मैं अपने यहॉ पर मॅगवाता था फिर जहॉ बालू पहुॅचानी होती थी वहॉ पर हम ट्रैक्टर के साथ जाकर के बालू पहुॅचाते थे। बालू किसके यहॉ पहुॅचानी है। किससे पैसा लेने है। सारी जिम्मेदारी मेरी होती थी। मैं फोन से प्रेमपाल कुॅवरपाल को केवल यह बताया था कि एक ट्राली व दो ट्राली बालू मेरे यहॉ पहुॅचा दो और बालू कहॉ पहुॅचानी है उसकी जानकारी मुझे रहती थी और अपने यहॉ बालू आने पर जहॉ बालू पहुॅचानी होती थी हम बालू को पहुॅचवा देते थे। घटना वाले दिन हमसे फोन से अपने घर बालू मॅगवायी थी और जब यह बालू लेकर आ गये तब मैने प्रेमपाल से कहा कि बालू अमलैया मुकेरी जनमेजय मास्टर के यहॉ ले चलो। उस दिन वह अकेला था।''

When questioned in respect of political reasons for the implication of accused, and about his relationship with Agya Ram, Rajesh and Kallu Yadav, PW-2 stated as follows:-

''मै अपने गॉव के आज्ञाराम प्रधान को जानते है और उनके लड़के राजेश गंगवार को भी जानते है। आज्ञाराम पहले प्रधान रह चुके है। घटना के समय उनका भतीजा प्रधान था। आज्ञाराम प्रधान के यहॉ अक्सर पुलिस वाले व अन्य अधिकारी कर्मचारी आते रहते है। बाहर के नेता आते है वह इनके यहॉ आते जाते रहते है। कल्लू यादव समाजवादी पार्टी के नेता को हम जानते नहीं है। उनका नाम हमने सुना है। हमें नहीं मालुम कि आज्ञाराम प्रधान व उनके भतीजों का कल्लू यादव के यहॉ आना जाना है। हमे यह नहीं मालुम कि उनका कायम गंज में तमाम कारोबार है और उनके पास तमाम ट्रैक्टर व जे0सी0बी0 मीशन है। हमें यह भी नहीं पता कि वह बालू मिट्टी का कार्य करते है। हमे यह पता है कि राजेश्वर यादव फर्रूखाबाद से लोकसभा का चुनाव लड़े थे परन्तु हमे यह नहीं मालुम कि कल्लू यादव व राजेश्वर एक दूसरे के रिश्तेदार है। राजेश्वर वर्तमान में विधायक अलीगंज क्षेत्र से हैं भारतीय जनता पार्टी से लोकसभा का चुनाव मुकेश राजपूत लड़े थे। हमे यह नहीं मालुम कि मुकेश राजपूत लोधी जाति के है। यह मालुम है कि मुकेश राजपूत भी किसान है और अभियुक्तगण भी किसान जाति के है। हमे यह नहीं मालुम कि मुल्जिमान भारतीय जनता पार्टी के समर्थक है। हमें नहीं मालुम कि मुल्जिमान व कल्लू यादव बालू का धन्धा करते हो। हमे नहीं मालुम कि मुल्जिमान कल्लू यादव के बालू के धन्धे में बाधा पहुंचाते हो। इस लिये कल्लू यादव इनसे रंजिश मानते हो। आज्ञाराम व उनके लड़के राजेश ने हमारी इस मुकदमें में बहुत सहायता की है और बराबर साथ रहे है।''

In respect of the place where PW-2 was detained, PW-2 stated as follows:-

''बदमाशों ने हमें गन्ने के खेत में जमीन पर डाल दिया था। उन्होंने हमें ओढ़ने के लिये रजाई दी थी। जब पुलिस पहुंची तब मेरे हाथ बंधे हुये थे तथा पैर भी बंधे हुये थे। ऑखो पर पट्टी बंधी हुयी थी। जब पुलिस पहुॅची तब पुलिस ने मेरे हाथ पैर खोले ऑखों की पट्टी खोली और मुझे मुक्त कराने के बाद गाड़ी में बिठाया और गाड़ी से हमे तुरन्त थाने पहुॅचाया थाने जब पहुॅचे थे तब सबेरा हो गया था। थाने में मेरे पिता जी व गॉव वाले पहुॅचे थे। गवाह राजेश गंगवार भी थाने पहुॅचे थे। थाने में मेरे पिता जी व गवाह राजेश से कुछ कागजों पर पुलिस वालों ने हस्ताक्षर करवाये थे।''

PW-2 concluded his deposition by denying suggestions: that there were business transactions between the accused and him and that he had not given proper accounts to the accused; that because of the business dispute with the accused, he started his independent business under the protection of Kallu Yadav; that the accused were creating hindrances in the illegal mining conducted by Kallu Yadav therefore, Kallu Yadav in collusion with his father and the local police got the accused implicated falsely in the case.

11. **PW-3- Udaiveer Singh- the person who prepared GD entry of the**

missing report. PW-3 stated that he was posted at P.S. Kayamganj on 12.12.2014 when Chheda Khan had submitted a written missing report at the police station which was entered at 12.30 hours vide GD Entry No.27. The carbon copy of the GD entry was marked Ex. Ka-2.

During cross examination, PW-3 stated that to lodge the missing report, Chheda Khan had come alone. Investigation was assigned to S.I. Meghnath Singh. He stated that he is not aware whether the photograph of the missing person was published. He stated that ordinarily the information of the FIR is given on R.T. set to higher officers but whether information of the missing report was given or not he does not remember.

12. **PW-4- Dr. Rajeev Kumar.** He stated that on 22.12.2014 he was posted at C.H.C. Kayamganj as Medical Officer. That day, he examined Salman son of Chheda Khan for his injuries at 10.30 am. He stated that following injuries were noticed:-

1. Multiple abrasion plus contusion on right wrist;

2. Multiple abrasion plus contusion on left wrist;

3. Multiple abrasion plus contusion on right ankle; and

4. Multiple abrasion plus contusion on left ankle.

PW-4 stated that all of the above injuries were from a hard object; simple in nature. Some of the injuries were a week old and some were a day old.

During cross examination, PW-4 stated that in injury no.1 some injuries were a week old and some were not. Similarly, the same position is for injuries 2, 3 and 4. He stated that these kind of injuries can be caused by tightly tying hand and foot with rope made out of a coconut husk. Such marks can also be a result of being tied by plastic or jute made rope including a chain. PW-4 specifically stated that these injuries were not caused on account of beating a person.

13. **PW-5- Constable Prakash Narayan Pushkar.** He stated that on 21.12.2014 he was posted as clerk at P.S. Kayamganj. That day, S.I. Meghnath Singh had submitted report on the basis of which Case Crime Nos.562 of 2014 to 565 of 2014 were registered. He proved the Chik FIR of those cases, which was marked Ex. Ka-4. He also proved GD entry of the said written report, which was marked Ex. Ka-5.

During cross examination, PW-5 stated that he made the GD entry at 19.30 hours. He stated that Case Crime Nos.562 of 2014 to 565 of 2014 were registered in the presence of S.I. Meghnath Singh who returned to the police station at 19.30 hours. He could not tell as to how many other police personnel were there with him. He stated that he was only given the fard baramdagi, a sealed bundle of articles seized and the custody of accused and the abductee. He stated that he is not in a position to disclose as to when articles seized were deposited in the Malkhana. He denied the suggestion that the entire police action was bogus and fabricated.

14. **PW-6- Meghnath Singh (investigation officer of Case Crime No.553 of 2014).** He stated that on 12.12.2014, Chheda Khan gave a missing report at 12.30 hours at P.S. Kayamganj. On 15.12.2014, the case was converted to

Case Crime No.553 of 2014 under Section 364 IPC. Whereafter, the investigation of the case was assigned to him. On 16.12.2014, he recorded the statement of Chheda Khan and inspected the spot with the informant and prepared site plan (Ex. Ka-6). He visited village Amaliya Mukeri and recorded statement of Master Janmejay Singh as well as his son Dhananjay Singh and also interrogated Prempal (appellant no.1) and obtained his mobile number. **On 21.12.2014, vide GD Entry No.20, he left police station at 10.35 hours in a private vehicle with a team of police officers. While they were on their way, they met Chheda Khan and Rajesh Kumar at Industrial Area Papri**. There, they informed him that for release of Salman and Kunwarpal a ransom demand of Rs.10,00,000/- has been raised upon them. The informant also informed the police team that he suspected Prempal and his family of cheating the informant. PW-6 stated that on getting above information he contacted SWAT team S.I. Brijesh Kumar and called them for assistance. The SWAT team arrived and with their help a plan was prepared for apprehending the culprits. In furtherance of that plan, two wads of notes were prepared. Each wad contained 98 cut plain paper with currency note of 1,000/- denomination on top and at the bottom. Thereafter, they visited the specified place where a person came and took those wads of notes from Chheda Khan. **As soon as he started counting the notes, on being satisfied that the said person had come to collect ransom money, the team arrested him at about 1 pm.** When that man was searched, two wads of currency notes were recovered from him. On inquiry, that person disclosed his name as Sipahi Lal (the appellant no.2). When the mobile number of Sipahi Lal was matched with mobile number of Salman (the abductee) it was noticed that on 15.12.2014 a call of 174 seconds at time 18:27:59 hours was exchanged. When informant was asked about the mobile number, he told him that Prempal had called him from that mobile. As Salman's mobile was missing, the team was satisfied that Prempal was involved in the abduction and he showed abduction of Kunwarpal to hoodwink others. When Sipahi Lal was formally interrogated, he confessed that abduction was planned because Salman's father (Chheda Khan) had sold his land for Rs.22 lacs and therefore it was thought that he is a rich person. PW-6 stated that Sipahi Lal disclosed to the team that he can lead the police team to recover Salman. PW-6 stated that on information received from Sipahi Lal the police team after parking the vehicles at a distance from the spot, went on foot to the sugarcane field of Prempal. When the police team claimed that they have surrounded the accused and the accused must surrender, no response came. Thereafter, the police team was divided into three parts and they started combing operations. At that stage, three shots were fired at the police team. The police team escaped by providence and returned fire. In that operation, by about 2 pm, four persons were arrested, namely, Kunwarpal; Prempal (appellant no.1), from whose possession one country made pistol with two live cartridges and one empty cartridge was recovered; Jitendra, from whose possession one country made pistol with an empty cartridge stuck in its barrel, two live cartridges and one Samsung mobile instrument, which was claimed to be of Salman, was recovered; and Omveer (appellant no.3), from whose possession one country made pistol with one live cartridge stuck in its barrel and two live cartridges and a piece of paper bearing a demand of Rs.10,00,000/- for release of

Salman and Kunwarpal was recovered. From the spot, quilt, mattress, Tirpal, tiffin box etc were recovered. Three accused, namely, Raju, Ram Kishore and Sarjeet escaped from the spot. When those arrested accused were interrogated, they led them to the place where Salman was detained. It was noticed that Salman was kept in a 10 feet deep ditch which was covered with leaves. When leaves were removed, it was noticed that Salman was tied with a chain. Chheda Khan, who was there with the team, identified Salman. Salman was taken out of the ditch and his chains were untied/unlocked. Salman narrated the story to the police team. The entire operation was recorded in a memorandum, which has been exhibited. The recovered articles were also exhibited. PW-6 stated that he recorded the statement of the victim as well as the accused on 21.12.2014 and on 23.12.2014 after recording the clarificatory statement of Chheda Khan, he arrested Malti Devi. He stated that on 19.01.2015, he arrested the accused Ram Kishore and Sarjeet. On the basis of School Transfer Certificate (T.C.), Sarjeet was found juvenile. Similarly, accused Kunwarpal and Jitendra were found juvenile as per their T.C. On 22.01.2015, he arrested Santoshi. Charge sheet was thereafter submitted against Sipahi Lal, Prempal, Omveer, Raju, Ram Kishore, Malit, Jitendra, Kunwarpal and Sarjeet, whereas investigation against Santoshi was pending. The charge sheet was exhibited as Ex. Ka-17.

During cross examination, PW-6 stated that on the basis of orders of Circle Officer, Kayamganj, the investigation of case was handed over to A.K. Singh Parihar. He admitted that parcha No.15 dated 22.01.2015 was written in his handwriting. He denied the suggestion that the charge sheet was submitted by him without the consent of the then investigating officer. PW-6 stated that the investigation of this case was assigned to him on 15.12.2014. **He recorded the statement of Chheda Khan on 16.12.2014. Chheda Khan had not disclosed to him the name of Raju. On 12, 13 and 14.12.2014, no investigation took place. On 17, 18, 19 and 20.12.2014, there was no investigation in the case and that on those dates statement of Chheda Khan was not recorded. PW-6 specifically stated that the abductee was not recovered on 20.12.2014. He denied the suggestion that the abductee was recovered on 20.12.2014 and that the entire police action of 21.12.2014 is bogus and false. PW-6 stated that the abductee was recovered at 2 pm day time on 21.12.2014.** He stated that the accused who escaped from the spot were not recognized by him but their names were told to him by the accused who were arrested. He stated that on 21.12.2014, statement of Chheda Khan was not recorded, rather, statement of the abductee was recorded. When the abductee was recovered, neither there was a cloth stuffed in his mouth nor there were ear plugs, though he was chained. **In respect of the colour of the chain in which the abductee was tied, PW-6 stated that the colour of the chain was black. At this stage, the witness was confronted with the colour of the chain produced in court, which was of white colour though rusted at places.**

On further cross examination, PW-6 denied the suggestion that Salman was recovered between 8-9 am on 21.12.2014. PW-6 rather categorically stated that he was recovered at 2 pm. On being questioned as to who brought the wads of notes, PW-6 stated that these

papers, of which wads were prepared, were brought by constable Awadhesh Kumar and the wads were also prepared by him. He denied the suggestion that the wads of notes were brought by Chheda Khan. At this stage, **PW-6 was questioned in respect of Chheda Khan being a witness of the abduction of Salman and Kunwarpal. In response to this question, PW-6 stated that Chheda Khan was not a witness of the abduction though he had prepared site plan at his instance. He stated that when he prepared the site plan, tractor/trolley was not at the spot. But, it was shown in the site plan as its position was disclosed to him by the informant. He admitted that the tractor trolley was not noticed at the spot and that no possession of such tractor trolley was taken by him. He stated that the owner of tractor trolley was Prempal though he had not seen the papers of that tractor trolley. He also stated that on 16.12.2014 apart from making the site plan he had recorded the statement of Chheda Khan as also of Dhananjay and Janmejay Singh. He admitted that when the statement of Chheda Khan was recorded on 16.12.2014, the informant was not aware that his son had been abducted. He stated that between 16.12.2014 and 20.12.2014 no investigation took place in the case.**

In respect of use of private vehicles in the operation on 21.12.2014, PW-6 states that probably it was a Xylo vehicle. When questioned about the owner and registration number of that vehicle, PW-6 stated that he is not aware as to who was the owner and what was its registration number. PW-6 stated that there was no private driver of that vehicle though it was being driven by one Awadhesh. He also stated that he had not paid rent for that vehicle. When questioned as to whether fuel was filled in the vehicle, PW-6 stated that he got Rs.400/- worth fuel filled but that expense was not noted in the case diary.

In respect of the time when Chheda Khan met him on 21.12.2014, PW-6 stated that Chheda Khan (the informant) met him between 11.30 and 11.45 hours. Both Chheda Khan and Rajesh were together and they met the police team at industrial area Papri, 6-7 km from police station, when the police team was going in a private vehicle. On being questioned whether the arrest memo of Sipahi Lal was prepared, PW-6 stated that he did not prepare an arrest memo of Sipahi Lal though he prepared a recovery memo.

On being questioned as to when SWAT team came in contact with him, PW-6 stated that the SWAT team was contacted at about 11.30 hours. They were called through phone. At that time, SWAT team was at Fatehgarh. SWAT team arrived at the spot in about half an hour. On being questioned about distance between industrial area Papri and Fatehgarh, PW-6 stated that the distance would be 30-35 kms. When questioned as to the time spent at Papri, PW-6 stated that the team stayed between 11.30 hours to 12.30 hours. During this time, informant Chheda Khan and Rajesh were also with them and the plan was hatched. On being questioned as to who prepared the wads of notes, PW-6 stated that wads of notes were prepared by the team and those wads had plain paper in between two currency notes. In respect of time taken to prepare wads of notes, PW-6 stated that it took hardly 5 minutes. When he was questioned as to from where paper was arranged, PW-6 stated that paper was

brought by Awadhesh. He took 10-15 minutes to get the papers. On being questioned as to who cut the papers, PW-6 stated that papers were already cut. On being questioned as to where the recovery memo of the wads of notes was prepared, PW-6 stated that recovery memo was prepared at the spot from where the abductee was recovered at about 2 pm.

On being questioned about the distance between the place from where Sipahi Lal was arrested and the place where the abductee was recovered, PW-6 stated that the distance must be 7-8 kms. PW-6 admitted that at the spot where Sipahi Lal was arrested neither arrest memo nor seizure memo of wads of notes was prepared. PW-6 stated that from Pipri industrial area to the spot, from where Salman was recovered, Chheda Khan and Rajesh were with the team. They took about 1 hours 10 minutes to reach the spot. With them, SWAT team was also there. On being questioned whether a disclosure statement of Sipahi Lal was separately recorded, PW-6 stated that there was no separate recording of the disclosure statement of Sipahi Lal but his statement was incorporated in the seizure memo.

In respect of the ransom letter allegedly recovered, PW-6 stated that the handwriting of the accused was not compared with the handwriting on the letter. He stated that the ransom letter was not provided to him by the informant. The informant had, however, informed him about the demand for ransom. PW-6 stated that information about the demand of ransom was given at the spot when he met the informant at Pipari. On being questioned as to how he got the information on that day, PW-6 stated that he does not remember whether that information was received on mobile or otherwise.

At this stage, the witness was cross examined in respect of the exchange of gunshots. This part of the statement we do not propose to notice as the accused have already been acquitted of the charge of firing at the police.

In respect of recovery of mobile instrument of Salman from Jitendra, PW-6 stated that he did not verify as to in whose I.D. the mobile was issued. At this stage, the witness stated that **the SIM of that mobile was removed and the other SIM was used by accused Sipahi Lal for using that instrument. He also stated that he did not verify the number of Prempal. He further stated that there was no voice recorded call therefore the voice was not matched**. At this stage, the witness was given suggestions that the abductee was involved in illegal mining and was also charged for illegal mining and was hand in glove with mining mafia. PW-6 stated that he is not aware whether Ram Prakas @ Kallu is involved in illegal mining. He stated that he is not aware whether Ram Prakash alias Kallu has tractor and JCB machine. He, however, admitted that they are members of Samajwadi Party, whereas the accused are of Lodhi caste. He stated that he is not aware that the accused are supporters of BJP party. He denied the suggestion that Ram Prakash alias Kallu, an influential leader in Samajwadi Party, wanted to punish the accused as they were causing disruption in his business and, therefore, got them falsely implicated in collusion with the police. PW-6 also denied the suggestion that operation to recover Salman was bogus. He also denied the suggestion that Salman was never abducted.

15. **PW-7- Brijesh Yadav- Incharge of the SWAT Team**. He stated that on 21.12.2014 he was incharge of the SWAT team. S.I. Meghnath Singh (PW-6), who was posted at P.S. Kayamganj, had called him. PW-7 met him near Pipari Khurd Industrial Area. He stated that with Meghnath Singh, Chheda Khan and Rajesh were there. Chheda Khan informed them that a demand of Rs.10,00,000/- for release of Kunwarpal and Salman has been raised and the abductors have required the payment of ransom money on the way leading to Mangaliyapur. On getting this information, he accompanied the police team with his team members to Papri Khurd. There, S.I. Meghnath Singh told him that he has arranged for two wads of notes including fake paper with currency notes at the top and at the bottom. **When they arrived at the spot, a person came near Chheda Khan and Rajesh. He was handed over those two wads of notes. When that man started counting those notes, the team upon being satisfied that he was there to collect ransom money, arrested him. At that time, it was 1 am in the night. The arrested person disclosed his name as Sipahi Lal. He carried a mobile phone. On that mobile phone a call from mobile instrument having IMEI of Salman's instrument had come. When Sipahi Lal was interrogated, he told that this call was made by Prempal using the instrument of Salman. Sipahi Lal disclosed the entire plan relating to abduction and ransom as also the place where the abductee was kept. PW-7 disclosed about the police action on similar terms as disclosed by PW-6 but was diametrically opposite in respect of the time. PW-7 specifically stated that the four accused persons were apprehended at 2 am in the night.**

During cross examination, PW-7 was specifically asked whether he knows the difference between time am and pm. To this query, PW-7 stated as follows:-

"रात वाले एक बजे को ए0एम0 कहते है दिन वाले एक बजे को पी0एम0 कहते है। इसी प्रकार दो बजे की भी स्थिति होती है।"

On further questioning, PW-7 stated that when S.I. Meghnath Singh had called him, his team's location was in Shamshabad area. Meghnath Singh had called him at 12.15 a.m. On receiving information, he took 15-20 minutes to arrive at the spot where Meghnath Singh was. When specifically queried as to the date of the night, he stated that it was the night of 20/21.12.2014. He stated that he remained with Meghnath Singh till 5-6 am and returned back from Thana Kayamganj to police lines. He stated that he returned back to police lines by 7-8 am on 21.12.2014. PW-7 again reiterated that Sipahi Lal was arrested in the night and at the spot, from where he was arrested, there was no light. The team members, however, had torches. He again reiterated that Sipahi Lal was arrested in the intervening night of 20/21.12.2014 at 1 am and the other accused were arrested in the intervening night of 20/21.12.2014 at 2 am. He stated that the night when the recovery was made was a dark night and nothing was visible without artificial light. He denied the suggestion that no one was arrested that night and that the entire operation is bogus and that he is telling lies. He stated that S.I. Meghnath Singh had prepared 5-6 memos and he does not remember in how many of them his signatures were obtained. He denied the suggestion that Salman was not recovered in the intervening night of 20/21.12.2014.

On being questioned about the vocation of abductee Salman, PW-7 stated that Salman was not engaged in mining but was operating as a commission agent. He feigned ignorance about the rivalry between mining mafias. He stated that he knows Ram Prakash alias Kallu Yadav. He also stated that on the basis of information gathered from this case, he learnt that Salman was working as a commission agent for delivery of sand. He denied the suggestion that Salman was not recovered in police action and that no country made pistol etc was recovered from the accused. He also denied the suggestion that the accused have been implicated to suppress their protest against sand mafias belonging to Yadav caste. On further cross examination, PW-7 stated that when Salman was recovered, he was blind folded.

16. **PW-8- Ashok Kumar Singh**. He stated that on 22.01.2015 he was posted as Prabhari Nirikshak at P.S. Kayamganj. He took over investigation of Case Crime No.553 of 2014 from Meghnath Singh on that day. That day itself, he submitted charge sheet (Ex. Ka-17) against Sipahi Lal, Prempal, Omveer, Ramu, Ram Kishore, Malti, Jitendra, Kunwarpal and Sarjeet.

During cross examination, he denied that CD Parcha No.15 was prepared in the handwriting of S.I. Meghnath Singh. Similarly, the charge sheet was also in the handwriting of Meghnath Singh because he had pain in his hand. He stated that before submission of the charge sheet he had verified the investigation conducted by the earlier investigating officer as papers relating thereto were being sent to him from time to time. He stated that whether any separate memo regarding confessional disclosure of Sipahi Lal was made or not is not there in the case diary. He denied the suggestion that he had not properly perused the case diary and signed the charge sheet prepared by Meghnath Singh.

17. **PW-9- S.I. Harish Chandra Singh**. He stated about recording of statement of Santoshi in connection with Case Crime No.553 of 2014. As Santoshi has been acquitted by the trial court, we do not propose to notice her statement in detail.

18. **PW-10- S.I. Kunwarpal Singh- Investigating Officer of Case Crime Nos.562 of 2014 to 565 of 2014.** He stated that he took over investigation of the above cases on 21.12.2014 while he was posted as Sub-Inspector, Kotwali Kayamganj. He sought to prove the various stages of investigation of those cases as also the submission of charge sheet in those cases.

During cross examination, PW-10 stated that Raju had surrendered in court. The statement of Meghnath Singh was recorded on 25.12.2014. He stated that he could not record the statement of Meghnath Singh because PW-10 was at Chowki Kunwa Khera. He stated that Meghnath Singh could not recognise the faces of those who ran away from the spot. He denied the suggestion that he did not carry out the investigation and submitted charge sheet under direction of higher officers.

On further questioning as to when he took over investigation of the case, PW-10 stated that he does not remember the time. He reiterated that none of the witnesses told him that they could recognise the accused who had escaped from the spot in the darkness of night. **He**

also stated that during the course of investigation he could not find any source of light at the spot. He stated that because there was no source of light at the spot therefore the persons who escaped from the spot could not be identified. He admitted that there was no independent witness of the incident. He stated that he had not verified the spot where Sipahi Lal was arrested. In the site plan prepared by him he had also not shown the spot from where gun shots were fired. **He admitted that information regarding arrest of the accused was not given to their family members. He stated that the torches used in the operation were not seized.** The statement regarding the source of light is as follows:-

"जिस रोशनी के साधन में गिरफ्तारी व बरामदगी की कार्यवाही की गयी है वह टार्च की रोशनी थी टार्चों को कब्जे में नहीं लिया गया कितनी टार्चें थी और किसी थी पता नहीं।

"किसकी टार्च की रोशनी में फर्द लिखी गयी हमें नहीं पता।"

He denied the suggestions that the recovery of Salman, arrest of the accused, recovery of country made pistol etc was fake and bogus and the charge sheet was submitted without a fair investigation.

Statements under section 313 CrPC

19. After closure of the prosecution evidence, the incriminating circumstances appearing therein were put to the accused for recording their statement under Section 313 CrPC. As this appeal is confined only to three accused, namely, Prempal, Sipahi Lal and Omveer, we propose to notice, in brief, the statement of only these three accused.

Statement of Prempal under Section 313 CrPC

20. Prempal denied the incriminating circumstances put to him; claimed that the report is absolutely false; false statements have been given by the witnesses; and that a false charge sheet has been submitted. In respect of question as to why case was instituted against him, he stated that it was due to enmity. In response to question No.14, Prempal stated that he did not plan abduction of Salman and that there was no recovery. The entire story is fabricated.

Statement of Sipahi Lal under Section 313 CrPC

21. Sipahi Lal also denied the incriminating circumstances appearing against him in the prosecution evidence. He claimed that the report was false. Even the medical examination report is false; that there was no fair investigation and false charge sheet was submitted; that he was implicated due to enmity. In response to question No.14, he stated that he belongs to Lodhi caste and is a supporter of Mukesh Rajput. Kallu Yadav of Samajwadi Party had been indulging in illegal mining of which he used to make complaints therefore, he has been falsely implicated.

Statement of Omveer under Section 313 CrPC

22. Omveer also denied the incriminating circumstances appearing against him in the prosecution evidence and claimed that the entire prosecution story is bogus and false; that he has been implicated due to enmity; and that a false charge sheet was submitted. In response to question No.14, Omveer stated that there

was no abduction of Salman; a false recovery has been shown.

TRIAL COURT FINDING

23. The trial court accepted the prosecution evidence and the recovery operation in which the abductee Salman was recovered. As the accused Raju alias Ramu, Ram Kishore, Smt. Malti and Smt. Santoshi were not involved in abduction and were not arrested at the spot in the recovery operation, the benefit of doubt was extended to them. The trial court also acquitted the appellants of the charge of firing at the police but convicted the appellants for offences punishable under Section 364-A read with Section 120-B IPC and Section 368 IPC. In addition to above, Prempal and Omveer were also convicted and sentenced under Section 25 of the Arms Act.

24. We have heard Sri Vinay Saran, learned Senior Counsel, assisted by Sri Pradeep Kumar Mishra and Sri Ghan Shyam Das, for the appellants; and Sri Amit Sinha, learned AGA, for the State.

Submissions on behalf of the appellants

25 . Assailing the judgment and order of the trial court, the learned counsel for the appellants, at the outset, submitted that there is complete variance between the documentary evidence and the oral testimony in respect of the timing of the operation in which the accused were apprehended leading to recovery of the abductee Salman. The documentary evidence (Ex. Ka-4 and Ka-7) would reflect that the entire police action leading to recovery of the abductee Salman was a day time operation conducted on 21.12.2014 reported as a separate case giving rise to Case Crime Nos.562 of 2014, 563 of 2014, 564 of 2014 and 565 of 2014 at 19.30 hours on 21.12.2014, whereas, the oral testimony would suggest that the entire operation was carried out in the intervening night of 20/21.12.2014 and completed by about 2 am in the night regarding which, papers were prepared in the morning of 21.12.2014. This irreconcilable contradiction between the documentary evidence and the oral testimony renders entire operation doubtful and probabilises the defence claim that the prosecution story is bogus and imaginary and the accused appellants were implicated with the help of police on account of political/business rivalry.

26. It was next submitted that the prosecution story in respect of demand of ransom is unacceptable because PW-1 confessed that he and his son (the abductee) used to work as labourers and did not have sufficient means. PW-1 stated that he just had Rs.2,000/- with him. Interestingly, in the confessional disclosure of Sipahi Lal, the demand for ransom was made because PW-1 had recently sold his land for Rs.22 lacs whereas, interestingly, PW-1 stated that he did not sell his land. In such circumstances, there was no occasion to demand ransom from a person who had no means. Moreover, recovery of ransom letter from one of the accused persons clearly shows that the demand was not raised upon the complainant party. Further, the writing on that ransom letter is not proved to be of any of the accused. The entire prosecution story is therefore bogus. Moreover, from the suggestions put to the witnesses examined by the prosecution it could be gathered that the appellants were supporters of BJP, whereas the informant party supported Samajwadi Party and had the backing of leaders of Samajwadi Party and

they implicated the accused by utilising their position.

27. It was submitted that the court below did not test the prosecution testimony and accepted the same as gospel truth despite there being several contradictions and weaknesses. It was urged that even if PW-2 is taken as a person injured but the fact is that he was throughout blind folded therefore, he was not in a position to recognise his abductors, if any. Moreover, once the reason for his confinement is not proved, his testimony cannot be made basis to record conviction under section 364-A read with 120 B IPC. Further, from his testimony it appears that there was some dispute relating to accounts. Hence, the story of demand of ransom money is not proved. In so far as the alleged recovery of mobile instrument is concerned, the same is totally bogus and cannot be accepted when the entire operation leading to recovery appears bogus.

28. It was submitted that the trap laid for recovery of ransom money from Sipahi Lal on the face of it appears bogus and false because how could one arrange for plain papers of the cut size of a note to prepare wads in that short time. Moreover, there is contradiction amongst the prosecution witnesses as to who brought those wads of notes. According to the police witnesses, the wads of notes were arranged by them; whereas, according to the complainant, wads of notes were prepared by him with the help of Rajesh who has not been examined. All these things would suggest that the prosecution story is nothing but false and therefore the appellants are entitled to be acquitted.

Submissions on behalf of the State

29. Sri Amit Sinha, learned AGA, submitted that the key witness of the prosecution story is PW-2 (the abductee). He has been examined for his injuries; multiple abrasion marks plus contusions of different durations were noticed. The doctor had opined that they could be a result of being tied/chained. Such injury marks of different durations cannot be self inflicted and therefore it has been proved beyond reasonable doubt that PW-2 was kept in detention and was chained. Thus, PW-2 falls in the category of an injured witness and his testimony has to be accepted as reliable. Assuming that there was discrepancy in between documentary and oral evidence in respect of the time of recovery operation but the statement of PW-6 is in sync with the documentary evidence therefore, the same is liable to be accepted and has rightly been accepted. Further, various articles were recovered from the place where the abductee was kept and these recovered articles were made material exhibits. They fully corroborate the prosecution story set up by PW-2, which is supported by PW-6. A ransom letter was also recovered from the pocket of one of the accused suggesting that ransom demand was made. Even assuming that PW-1 had not been able to disclose his financial status to meet the kind of ransom demanded from him but that by itself does not falsify the prosecution story with regard to the ransom demand because from the suggestions given to PW-2 it is established that PW-2 was a commission agent and there was a dispute relating to accounts. It could thus be possible that PW-2 was abducted to settle the disputed account. Abduction of a person to raise a demand for any purpose whatsoever would be an offence punishable under Section 364-A IPC and therefore, in any view of the matter, the judgment and order of the trial

court does not call for any interference. He thus prayed that the appeal be dismissed.

ANALYSIS

30. Having noticed the rival submissions and the entire prosecution evidence, before we proceed to evaluate the prosecution evidence in the context of the submissions made, it would be useful to cull out the key features of the prosecution story. The prosecution story has three parts. The first part is in respect of abduction in the night of 11/12.12.2014 of two persons i.e. Salman (PW-2) and Kunwarpal (accused, who was declared juvenile), brother of Prempal (appellant no.1). The second part is in respect of demand of ransom of Rs. 10 lacs for release of Salman. The third part is in respect of police action dated 21.12.2014 resulting in release and recovery of Salman and arrest of the appellants.

31. In so far as the first part (i.e. relating to abduction) is concerned, there are two witnesses, namely, PW-1 (Chheda Khan) and PW-2 (Salman). According to PW-1, his son Salman worked as a labourer. In the night of 11/12.12.2014, Prempal and Kunwarpal contacted the abductee Salman and told him that sand / mud had to be unloaded at a particular place. They, therefore, came and took away Salman in their tractor. Salman thereafter did not return, hence a missing report was lodged. In this part of the story, PW-1 is not consistent. At one part he says that to fetch Salman only Kunwarpal had come and at another part he states that Prempal was also there though lying in the tractor. We fail to understand if Prempal had also been there why this fact was not disclosed in the missing report. Further, from the testimony of PW-1 it is clear that in the morning of the following day, the abandoned tractor was found in a field and Prempal drove the tractor to the police station. Further, it appears from the testimony of PW-1 that Prempal had joined him to search out both Salman and Kunwarpal who were allegedly missing. Interestingly, no statement of Prempal was recorded by the I.O. on the day the missing report was lodged. In fact, there is no investigative step till 15.12.2014, that is, till the case of abduction was registered. All of this would suggest that PW-1 was not sure whether his son had been abducted or he had just gone missing. In any view of the matter, the testimony of PW-1 fails to establish beyond reasonable doubt the presence of Prempal in that tractor in the night of 11/12.12.2014. In so far as PW-2 is concerned, in his examination in chief, he states that Prempal had called for his services and had sent his brother Kunwarpal with the tractor to take him. However, during cross examination, PW-2 takes up an altogether different story. He states that he had a commission deal with Prempal, which is, that PW-2 used to place orders on Prempal for supply of sand/ mud. Once those supply orders were placed by him, loaded tractor used to be sent by Prempal. The unloading of the supply at the specified place was to be PW-2's job with which Prempal had no connection. On those orders when supply was made, PW-2 used to get Rs.100/- per trolley. All of this would suggest that PW-2 used to be in touch with the buyer of sand etc. Once buyer placed order on him, PW-2 used to request Prempal for supply. When supply arrived, the same was taken to the specified place for unloading for which, PW-2 used to get commission on per trolley basis. PW-2, during cross-examination, stated that in the night of the incident, he had called for the tractor trolley with sand. When the

tractor trolley arrived, he directed that it had to be taken to Amalia Mukeri to the house of Janmajay Master. This statement of PW-2 completely falsifies the prosecution story that in the night of the incident, Prempal had called Salman and had sent Kunwarpal to fetch him. Rather, it appears to be a case where PW-2 called for supply of sand. When supply came on a tractor, tractor was taken. When we read the statement of PW-2 in its entirety it appears to be a case that when, after dropping sand, PW-2 was returning on the tractor with Kunwarpal, their tractor was stopped and they were abducted. In light of the statement of PW-2, the prosecution story that PW-2 was taken from home under a plan to abduct him falls to the ground because from his statement it appears that PW-2 had called for the tractor and the supplies.

32. Now, we shall examine as to who abducted Salman (PW-2) in the night while he was returning. According to PW-2, the night was dark and misty, they did not have torches; they were surrounded by miscreants; some one hit PW-2 with a butt and he was caught and blind folded; and that his blind fold was removed when his father arrived. All of this would suggest that since the time he was abducted, he was kept blind folded till he was set free. Thus, there was no occasion for him to see as to who abducted him. In these circumstances, there is no reliable evidence to prove beyond reasonable doubt that it was the appellants who had abducted Salman in the night of 11/12.12.2014. Thus, the first part of the prosecution story is not proved against the appellants.

33. In so far as demand of ransom of 10 lacs is concerned, according to the prosecution story, the ransom demand of Rs. 10 lacs was raised under the belief that PW-1 had sold land worth Rs. 22 lacs therefore, it was thought by the accused that abduction of PW-1's son Salman would result in bumper profit. Interestingly, PW-1 himself claims that he had no money and that he had not sold his land. In such circumstances, ransom demand of the amount indicated is inexplicable. The question that now arises is whether abduction was for ransom or for some other reason. In this regard, we notice from the statement of PW-2, made during cross-examination, that he worked as a commission agent of Prempal. He used to get cut (commission) on every supply order that he placed. From PW-2's statement, it appears, that there existed some account dispute between him and Prempal. This statement of PW-2 creates a wedge between the prosecution story and the evidence led. This should have put the trial court on guard to carefully scrutinise and test the prosecution evidence in respect of demand of ransom. Unfortunately, the trial court made no effort to test the prosecution evidence while evaluating the same. On careful scrutiny of the prosecution evidence, we notice that suspicion with regard to abduction was not expressed in the missing report or in the initial statement of the informant, probably, because PW-1 was well aware of his financial status warranting abduction for ransom. In respect of alleged ransom demand, PW-1 states that Prempal gave him three letters demanding ransom. First was given in the evening of 15th, second was on 17th and the third was on 19th. Interestingly, on 15.12.2014 the informant Chheda Khan (PW-1) gave information to the police expressing suspicion regarding abduction of his son. Notably, on this information, case was not registered under section 364-A IPC though, vide report No.45, at 17.45

hours, the case was registered under section 364 IPC as Case Crime No.553 of 2014, which means that information with regard to demand of ransom was not given to the police. Further, from the statement of PW-6, made during cross examination, we notice that in between 16.12.2014 and 20.12.2014 no investigative step was taken in the case. This would suggest that no information of ransom demand was passed on to the police till 20.12.2014. Admittedly, no ransom letter was given to the I.O. by PW-1. To explain non-production of the ransom letter, PW-1 comes up with a case that the ransom letter was handed over to Prempal, because his brother too, namely, Kunwarpal, was abducted. To lend credence to this explanation a story has been weaved that Prempal was trying to cheat the informant PW-1. We fail to understand that when PW-1 admits his financial condition as that of a labourer, with cash of only Rs.2000/- in his hand, and he also denies selling his land to sit on a pile of cash, where was the occasion to raise a ransom demand from him.

34. In so far as the ransom letter alleged to have been found in the pocket of Omveer being in the handwriting of Prempal is concerned, there is no cogent or reliable evidence that it was in Prempal's writing. No doubt, at one place, PW-2 in his testimony states that Prempal wrote that letter in his presence, but at another place PW-2 states that he was kept blind-folded through out and his blind fold was removed only when he was released in that police action. If PW-2 remained blind folded there was no opportunity for him to notice as to who wrote the letter. In such circumstances, the I.O. ought to have taken the help of an expert to prove that the letter was in the hand writing of one of the accused persons. Notably, the recovery of ransom letter and other incriminating circumstances appearing in the prosecution evidence including the statement of PW-2 have been denied. For all the reasons above, we discard the prosecution story that a ransom demand of Rs. 10 lacs was made upon PW-1 for release of his son Salman.

35. Now, we come to the third limb of the prosecution story, which is, with regard to the police action resulting in release of abductee Salman (PW-2). According to PW-6 (the main I.O.), in connection with the matter, on 16.12.2014 he prepared a site plan of the place where the tractor was left abandoned and from where two persons, namely, Salman and Kunwarpal, went missing. But, in between 16.12.2014 and 20.12.2014, PW-2 took no investigative steps in the case. As per PW-6, on 21.12.2014, after arranging for a private vehicle, vide GD Entry No.20, at 10.35 hrs, he left with his team of officers to investigate the matter. During their course of travel, the team met Chheda Khan between 11.30 to quarter to 12 hrs near industrial area Papri. There, Chheda Khan (PW-1) informed the team members about the ransom demand and with regard to a person coming at a specified place to collect it for release of Salman and the other abductee Kunwarpal. It was then, for the first time, PW-6 was apprised about PW-1's suspicion in respect of the involvement of Prempal. In furtherance whereof, as per the testimony of PW-6, the entire police operation was planned, SWAT team was beckoned and in that police action the accused appellants were arrested and the abductee was got released. In our view, this entire police operation does not inspire confidence for the following reasons:-

(a) PW-1, PW-2 and PW-7, who all had a role to play at different stages of

that police operation, have disclosed that the operation was conducted in the night of 20/21.12.2014, whereas PW-6, and the papers prepared in connection therewith, speaks of it being a day time operation conducted on 21.12.2014. Notably, PW-7 is not a public witness who may lie or be won over. He was the in-charge of the SWAT team. He specifically stated that it was a night operation. Despite gruelling cross-examination on that issue PW-7 stuck to his stand that it was a night operation. Once this is the position, the entire record prepared in connection with that operation comes under suspicion;

(b) Leaving the police station in a private vehicle with the entire police team for investigating a case without any prior paper work in that regard, creates a serious doubt with respect to the genuineness of that operation. Notably, there is no prior paper work such as a GD Entry or report from an informer requiring police team movement towards Papri Industrial area. As per PW-6, while the police team was moving, by chance, they met the informant and his fellow companion Rajesh. At some place it is mentioned that police team was contacted on phone but documentary evidence in that regard is lacking. This creates a strong suspicion with regard to the bona fides of the exercise. This suspicion gets deeper when the prosecution witnesses falter as regards the mode and the manner in which the trap money was arranged/ prepared. Notably, as per his claim, the informant had no money except Rs.2,000/- whereas, according to the informant as well as the police, two wads of notes, carrying 98 plain papers in between two currency notes of Rs.1,000/- denomination, were prepared, which means Rs.4000/- were arranged. Where those plain papers were arranged from and how those papers were cut and how much time it took to prepare those wads of notes, during cross examination, the witnesses contradict each other. PW-1 stated that the wads of notes were arranged by Rajesh. PW-6 stated that it was arranged by police i.e. a constable. Notably, according to PW-6, Sipahi Lal was caught with trap money at about 1.00 pm whereas, Salman was got released from his abductors at 2 pm from a place which was at some distance from the spot from where Sipahi Lal was arrested. It be noted that according to the prosecution evidence the team after preparing the wads of notes proceeded to a grove where Sipahi Lal was caught and, thereafter, proceeded to the sugarcane field of Prempal to free Salman. As per testimony of PW-6, information about demand of ransom was received between 11.30 and 11.45 hrs. Meaning thereby that in a span of about 2 hours 15 minutes the entire operation was planned and executed. In that short time, arranging for cut papers to pass on as notes, thereafter, proceeding to grove, making payment to Sipahi Lal, then arresting him and taking his disclosure, thereafter, proceeding to sugarcane field exchanging gun shots and completing the entire exercise by 2 pm, appears highly improbable, if not impossible. This entire exercise therefore appears bogus more so, when we take into consideration the testimony of PW-1, PW-2 and PW-7 which speaks of the operation being a night time event;

(c) If we take the operation to night hours, as is the case of all the witnesses except PW-6, then it was a winter night, admittedly, a dark night; there was no source of light at the spot or in the vicinity, as is admitted to the prosecution witnesses including PW-10 i.e. the I.O. who investigated that operation. If the

operation was conducted with the help of torch light, there is no mention of use of torch light in the seizure memo. Further, neither there is a seizure memo nor a custody memo of any of the torches used. PW-10, the other investigating officer, admits this position. During his cross examination, PW-10 also admits that S.I. Meghnath Singh, in his statement made during investigation, has not disclosed that he was able to recognise those other accused who had allegedly escaped from the spot. Once this is the position, and from the testimony of prosecution witnesses including PW-2, it appears, PW-2 was kept blind folded, not only the entire operation of search and seizure, resulting in recovery of the abductee, becomes doubtful but even the possibility of abductee being in a position to recognise his abductors also becomes doubtful;

(d) According to PW-1, papers in respect of the operation were prepared at the police station whereas, according to PW-6 he got them prepared at the spot. When we take a conspectus of each of the circumstances/ reasons noticed above, we come to the conclusion that the prosecution has miserably failed to prove the genuineness of the search operation conducted on 21.12.2014 which resulted in the arrest of the accused appellant and release of the abductee.

36. In addition to above, there are other reasons also, which render the entire story of demand of ransom by the accused including recovery of ransom letter from Omveer doubtful. Notably, the ransom letter was recovered from the pocket of Omveer (appellant no.3). Though, PW-1 states that this letter was first shown to him on 15.12.2014 and he handed the letter back to Prempal but, this statement of PW-1 does not inspire our confidence for the reasons that, firstly, if there had been any such letter what was the occasion to return it back, and, secondly, if any such letter had been served upon PW-1 then why information in respect thereof was not given to the I.O. on 15.12.2014. Notably, when abduction was suspected, the missing report was converted into Case Crime No.553 of 2014 under Section 364 IPC and not under Section 364-A IPC. Meaning thereby that there was no ransom demand till then. All of this would suggest that the prosecution story kept changing to suit the operation. The operation was not after recording credible information in the case diary or General Diary. Rather, CD parchas followed the operation. Moreover, the ransom letter is not proved to be in writing of Prempal. It be noted that PW-2 stated that Prempal wrote the ransom letter in his presence. But, he admits that he was kept blind folded throughout the period of his captivity. If it was so, how could he have noticed Prempal writing the ransom letter. All of this when put together would suggest that something is seriously wrong with the prosecution case.

37. No doubt, there were injury marks found on the body of PW-2 which may suggest that he was tied or chained. But that by itself is no guarantee that he was tied or chained by the accused. It goes without saying that the burden is on the prosecution to prove its case beyond doubt. If the prosecution fails to prove beyond doubt that the incident occurred in the manner alleged by the prosecution then the court is left guessing as to in what other manner the incident occurred. Hence, in such a situation, the benefit of doubt would have to go to the accused. Assuming that PW-2 was incarcerated and was detained, but who incarcerated

him and for what purpose is a matter which has to be proved beyond doubt. It could be possible that PW-2 was incarcerated and detained by his business rivals or by political rivals of the accused appellants and his incarceration/detention was used for framing the accused appellants. Notably, PW-2 has admitted during cross examination that he was working as a commission agent in supply of sand. He did not have a mining permit. In such circumstances, his operations might have been illegal. Suggestions have been put to the prosecution witnesses regarding involvement of a mining mafia and regarding making of complaints by the accused appellants against them and with regard to the accused appellants being framed at the instance of that mining mafia. Though, these suggestions do not partake the character of proof but they do help in evaluating the evidence as to rule out possibility of a false implication, particularly, where the prosecution story/evidence does not inspire confidence. Suggestions have not been refuted that police had been on visiting terms with the political rivals of the appellants. The clout of those rivals to use the police machinery cannot be ruled out, particularly, when the prosecution has failed to successfully demonstrate that the recovery operation was conducted on the date and time as reflected by the memorandums in that regard.

38. There is another important aspect, which is, that PW-2 was allegedly abducted in the night of 11/12.12.2014. He admits that night was dark and he was hit by a butt and thereafter 6-7 persons came and took him away on a motorcycle. He stated that he was blind folded. From his testimony it appears that he was kept blind folded throughout and was recovered blind folded. Once this is the position, who abducted him and who was involved may not be known to PW-2. In such circumstances, the possibility of PW-2 being used as a tool to make a case against the accused appellants cannot be ruled out, particularly, when we notice a clear cleavage in the statement of the prosecution witnesses with regard to the time of the search and recovery operation.

39. In so far as the recovery of mobile and country made pistols are concerned, once we doubt the entire search and seizure operation, the alleged recoveries are to be discarded. Moreover, there is no CDR on record to demonstrate that the mobile instrument of the abductee was used by the accused.

40. For all the reasons above, we are of the considered view that this is a case where the prosecution has failed to prove its case beyond reasonable doubt. The appellants are therefore entitled to the benefit of doubt. Consequently, the appeal is **allowed**. The judgment and order of the trial court convicting and sentencing the appellants is liable to be set aside and is hereby set aside. The accused-appellants are acquitted of the charge for which they have been tried and convicted. The appellants are reported to be in jail. They shall be released forthwith unless wanted in any other case, subject to compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court.

41. Let a copy of this order be forwarded to the court below along with the record for information and compliance.

(2022) 9 ILRA 1616
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2022

BEFORE

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

Criminal Appeal No. 3271 of 2020

Dharam Singh ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Upendra Kuma Pushkar, Sri Abhishek Mayank

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Law - Criminal Procedure Code, 1973-Section 374(2) - Indian Penal Code, 1860-Sectionn 302-Challenge to-Conviction- dying declaration could not have been made as she had burn injuries, this is also unacceptable as there were only 60% injuries and she had survived for 9 days-The dying declaration contained the name of the husband, no doubt there is improvement in the second dying declaration but the same is ignored-The husband is a young person of 20 years- One more glaring aspect which has been pointed out that the postmortem report was never placed on record by the prosecution, it appears from the evidence itself it is clear that postmortem was not conducted- it was a case of homicidal death not amounting to murder and the offence is punishable under Section 304 Part I of I.P.C as death occurred after few days the incident occurred. The incident occurred due a fight between husband and deceased which took a ugly turn and the deceased was set ablaze-the death caused by the accused was not premeditated, accused though had knowledge and intention to cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I (Para 1 to 19)

B. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.(Para 16)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. St. of U.P. Vs Ram Sagar Yadav (1985) 1 SCC 552

2. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

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

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

5. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

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

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

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

9. Mohd. Giasuddin Vs St. of A.P. (1977) AIR SC 1926

10. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

11. Tukaram & ors. Vs St. of Mah. (2011) 4 SCC 250

12. B.N. Kavatakar & anr Vs St. of Karn. (1994) SUPP 1 SCC 304

13. Saudan Singh Vs St. of U.P, CRLA No. 308/2022 arising out of SLP (Crl) No. 4633 of 2021

14. Bachan Singh Vs St. of Punj. (1980) AIR SC 898

15. Machhi Singh Vs St. of Punj. (1983) 3 SCC 470

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

1. Heard Abhishek Mayank, learned counsel for the appellant and learned A.G.A for the State and perused the record. Though the matter is listed for hearing application for enlargement on bail we with consent of counsels heard the matter as record is before this Court. It is not disputed that the accused is in jail since 5.12.2009, so heard finally.

2. This appeal challenges the judgment and order dated 27.10.2020 passed by Additional Sessions Judge, Court No.3, Aligarh in Sessions Trial No. 459 of 2010 convicting accused-appellant for commission of offence under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo imprisonment for life with fine of Rs.20,000/- and in default of payment of fine, further to undergo imprisonment for one year.

3. Brief facts as culled out from the record are that on 01.06.2009 sister of complainant Tejpal Singh got married with accused Dharam Singh. He gave sufficeint dowry in the marriage. However, Dharam Singh (husband of the deceased) and her in-laws were not satisfied with the dowry given in the marriage. On 02.11.2009, the complainant received a phone call from his elder sister Urmesh that her sister was burnt alive by her in-laws. On that information, complainant and his father reached the village Sahara Kala where his sister was found in burnt condition but her in-laws were not present at their house. Victim disclosed in front of informant that at 5:00 A.M her husband Dharam Singh, elder brother-in-law (Jeth) Raju and brother-in-law Rambabu tried to burn her to death. Complainant went with his sister who was in being treated in burns ward for medical treatment at Government Hospital, Iglas. On 11.11.2019, during the treatment, Radha died. On the basis of the above complaint, the First Information Report was lodged which culminated into the charge-sheet being laid against the accused-appellant, Dharam Singh under Section 302, 498A and 201 of I.P.C.

4. On being summoned, the accused pleaded not guilty and wanted to be tried. The offence for which accused was charged was triable by the Court of Sessions, hence, the accused-appellant was committed to the Court of Sessions. The learned Sessions Judge framed charge under Section 302 of I.P.C.

5. The Trial started and the prosecution examined 9 witnesses who are as follows:

1	Tejpal Singh	PW1
2	Const. Clerk Indrapal Singh	PW2
3	I.O. Retd. Ghanshyam Singh	PW3
4	A.D.M Finance and Revenue Maharajganj, Rajendra Prasad	PW4
5	Retd. Naib Tehsildar, Iglas Shivendra Kumar Yadav	PW5
6	Pharmacist C.H.C., Iglas Ramesh Chandra	PW6
7	Dr. Govind Prasad	PW7
8	Dr. Rakesh Mohaniya, Agra	PW8
9	Dr. Sri Ram Sharma	PW9

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

1	Tehrir	Ex.Ka.1
2	Copy of Chik F.I.R	Ex.Ka 2
3	G.D	Ex.Ka3
4	Site Plan	Ex.Ka 4
5	Charge-sheet	Ex.Ka 5
6	Statement of deceased Radha	Ex.Ka 6
7	Dying Declaration	Ex.Ka 7
8	Register Report	Ex.Ka 8
9	Certified Copy of P.I. Register	Ex.Ka 9
10	Information letter of S.O. Sadar, Agra	Ex.Ka 10
11	Lavaniya Hospital and Research Center receipt	Ex.Ka 11

7. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellant as mentioned above.

8. The accused is in jail since 05.12.2009. On 23.11.2020, this Court had passed orders directing the State counsel to file counter affidavit, if any, to application for enlargement on bail. Unfortunately, for a period of two years this matter was not listed. It is submitted by learned counsel for the appellant that the judgment of **Criminal Appeal No. 308/2022 (Saudan Singh Vs. State of U.P) arising out of SLP (Crl) No. 4633 of 2021, decided on 25.02.2022** would apply to the facts of this case. We have got the record before this Court. The case would according to the learned counsel would fall under Section 304 (1) I.P.C as the deceased after getting burn injuries died after about a period of 8 days. The dying declaration implicates the husband. The implication is on the husband. The learned Judge as according to the State counsel has rightly considered the judgments of **Bachan Singh Vs. State of Punjab, AIR 1980 SC 898 and Machhi Singh Vs. State of Punjab, (1983) 3 SCC 470** and has sentenced the accused and there is no question of showing any leniency in this matter where the wife has implicated the husband and she had died out of burn injuries. The examination of P.W.-1 and P.W.-2, according to the State counsel who have lodged the F.I.R. The deceased had 60% burn injuries, the deceased was brought in a critical situation to the hospital, the death of the victim has been proved to be due to burn injuries as Dr. Sri Ram Sharma, P.W.-9 has testified an oath and confirmed the same. We are not convinced by the submission of the learned counsel for the appellant that the

husband has been wrongly punished and there are inconsistent dying declaration. The learned Judge while considering the case has not differentiated between Section 300 I.P.C and Section 304 I.P.C. The provisions of Section 300 I.P.C read a follows:-

"300. Murder.--Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

(Secondly) --If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

(Thirdly) --If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

(Fourthly) --If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

9. The submission of the learned counsel for the appellant that the dying declaration could not have been made as she had burn injuries, this is also unacceptable as there were only 60% injuries and she had survived for 9 days. The dying declaration contained the name of the husband, no doubt there is improvement in the second dying declaration but the same is ignored. The Naib Tehsildar has opined his oath and Dr. Govind Prasad also testified the said fact. All these cumulative facts permit us to accept the dying declaration.

10. The prosecution examined Dr. Sri Ram Sharma as P.W-9. The deceased was admitted to Lakhniya Hospital and Research Center, Tajganj, Agra on 10.11.2009 but she was discharged on 11.11.2009, she was referred and also according to the treatment report as Exhibit -11, she breathed her last on 11.11.2009 itself. The incident occurred on 02.11.2009 at 5:00 A.M in the morning. There was a commotion between the husband and wife. She did not name the persons who are in her neighbour and who brought her to the hospital, the husband and her in-laws did not came to the hospital. The husband is a young person of 20 years. One more glaring aspect which has been pointed out by the counsel that the postmortem report was never placed on record by the prosecution, it appears from the evidence itself it is clear that postmortem was not conducted and the accused according to the prosecution were even charged for Section 201, 498A I.P.C but for Section 498A and Section 201 I.P.C the accused has been acquitted.

11. This takes us to the alternative submission whether the offence would be punishable under Section 304 Part I or II or Section 302 of I.P.C.? The question to be answered would be whether there is any intention or knowledge or it was a murder simpliciter?

12. The question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. should be upheld or

the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

***"299. Culpable homicide**: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

13. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

14. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principles laid down by the Apex Court in the Case titled **Tukaram and Ors Vs. State of Maharashtra,** reported in (2011) 4 SCC 250 and in the matter of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that it was a case of homicidal death not amounting to murder and the offence is punishable under Section 304 Part I of I.P.C as death occurred after few days the incident occurred. The incident occurred due a fight between husband and deceased which took a ugly turn and the deceased was set ablaze.

15. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused though had knowledge and

intention to cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

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

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

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

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

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

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

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

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

17. On the basis of the record which is before us we come to a definite conclusion that the death was occurred due to burn injuries caused by the appellant-accused. There was a commotion in the morning though there are two dying declarations, we rely on the first dying declaration as per the judgment of **State of U.P. Vs. Ram Sagar Yadav, (1985) 1 SCC 552** come to final analysis. The question is what would be just punishment for twenty year old person who is in jail since 05.12.2009.

18. Therefore, we convert the sentence of 'life imprisonment' to 10 years' rigorous imprisonment. Unfortunately the fine has been Rs.20,000/- which is reduced to Rs. 10,000/-. If 10 years of incarceration is over, the accused-appellant be set free if not wanted in any other case. However, if fine is not paid, the default sentence will run after the completion of 10 years. We alter the conviction from Section 302 I.P.C. to Section 304(1) I.P.C.

19. Accordingly, the appeal is partly allowed with the modification of the sentence and fine as above.

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

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

22. This Court is thankful to Sri Abhishek Mayank, learned counsel for the appellant who has ably assisted this Court and even argued the main matter. We are also thankful to Sri N.K. Srivastava and Sri Mishra, learned A.G.As for ably assisting us.

(2022) 9 ILRA 1623
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA , J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 3589 of 2005

Nanhey ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Pramod Kumar Pandey (A/C)

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

A. Criminal Law - Criminal Procedure Code,1973-Section 374(2) - Indian Penal Code,1860-Sections 302 r/w Section 34-Culpable homicide-life imprisonment-Sudden fight over dirty water flowing in the drain between neighbours-The statement of PW-1 is specific that it was the accused appellant who inflicted stab wound on the abdomen of the deceased and other injuries caused by Lathi and Danda by two brothers of the appellant-there was no premediation on part of the accused party-The case falls under Exception 4 of Section 300 IPC- therefore, the appellant could at best be punished for culpable homicide not amounting to murder, under Section 304 IPC, and not under Section 302 IPC-Since he has already undergone incarceration of nearly 16 years, even without remission-The appellant is thus convicted under Section 304 IPC and is released on the period of sentence already undergone by him. (Para 1 to 20)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Dhirajbhai Gorakhbhai Nayak Vs St. of Guj. (2003) 9 SCC 322 : 2003 SCC (Cri) 1809

2. Virsa Singh Vs St. of Punj. (1958) AIR SC 465 : 1958 Cri LJ 818

3. St. of U.K. Vs Sachendra Singh Rawat (2022) 4 SCC 227

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Shiv Shanker Prasad, J.)

1. Heard Sri Pramod Kumar Pandey, learned Amicus Curiae for the appellant and Mrs. Archana Singh, learned AGA for the State.

2. This jail appeal is directed against judgment and order dated 22.07.2005, passed by the Additional Sessions Judge/ Special Judge, Budaun in Sessions Trial No. 29 of 2003, State vs. Nanhey whereby the appellant has been convicted under section 302 read with 34 IPC, in Crime No.123/98, Police Station Islamnagar, District Budaun and consequently sentenced to life imprisonment.

3. As per the prosecution version the first informant (PW-1) was cleaning drain

in front of his house during morning when accused appellant Nanhey alongwith his brothers Nanki and Kalicharan objected to the waste water being discharged in their drain. The father of first informant (the deceased) is stated to have told the accused party that dirty water was being discharged in this fashion, from before, on which the accused persons got enraged and started abusing the informant's father. This was objected whereafter the accused appellant Nanhey stabbed the deceased in his abdomen while Nanki and Kalicharan hit him by Lathi and Danda (stick - a blunt object). The incident is said to have occurred at 6.00 am. On raising alarm by the brother-in-law of the informant, who was also present, Mahipal and certain other persons saw the incident and the accused persons fled. On the basis of such written report given by PW-1, the first information report under Section 307 IPC was registered at 7.40 am on 11.5.1998.

4. The injured was taken to the police station whereafter he was referred to the hospital for medical examination. Injury report (Ext. Ka-14) of injured Ram Swaroop has been placed on record. The injured Ram Swaroop remain hospitalized and ultimately died on 15.5.1998. Panchayatnama has also been prepared on 15.5.1998 at 2.10 pm, in which the inquest witnesses opined that death of Ram Swaroop was homicidal. Postmortem of the body came to be conducted by Dr. R.K. Agarwal (PW-5) on 16.5.1998, wherein cause of death was held to be shock and septicemia, as a result of ante-mortem injuries. The investigation continued and ultimately a chargesheet was submitted against the accused appellant Nanhey and co-accused Nanki. Nanki, however, has absconded. Name of other accused Kalicharan was not included as an accused in the chargesheet.

5. Cognizance in the matter was thereafter taken by the concerned Magistrate, who committed the matter to the court of Sessions, by which the offence was triable. Sessions Trial No. 29 of 2003 came to be registered wherein the charges were read out to the accused appellant who denied them and the trial commenced.

6. In order to establish the charge framed against the appellant the prosecution adduced oral and documentary evidence. The documentary evidence consisted of written report of the FIR (Ext. Ka-1); Attachment memo (Ext. Ka-2); FIR (Ext. Ka-4); Postmortem Report (Ext. Ka-6); Injury report of Ram Swaroop (Ext. Ka-14); and Charge-sheet etc. These documents were also proved.

7. The prosecution adduced oral testimony of first informant Krishna Pal (PW-1), who is an eye-witness to the act of crime. PW-2 Munna Lal who happened to be son-in-law of the deceased was examined but he turned hostile. Prosecution has also examined Sushil Kumar (PW-3), who later conducted investigation in the matter. PW-4, Head Constable Raj Kumar Singh has verified that written report (Ext. Ka-1) was incorporated in the General Diary of the Police Station and Check FIR was consequently issued. Dr. R.K. Agarwal (PW-5), who conducted the autopsy has proved the postmortem report (Ext. Ka-6). The doctor opined that cause of death of deceased was septicemia due to ante-mortem injuries. Dr. M.K. Verma, who examined the injured was also adduced as PW-7, for verifying his injury report (Ext. Ka-14). PW-6 K.C. Dixit and PW-8 Mahendra Singh were formal witnesses.

8. On the basis of above evidence adduced by prosecution, during the course of trial, the Court of Sessions held the accused appellant guilty of commissioning offence under Section 302 read with 34 IPC and sentenced him to life imprisonment. Thus aggrieved, the accused appellant preferred the present Jail Appeal in 2005.

9. Sri Pramod Kumar Pandey, learned amicus curiae submits that charge under Section 302 read with 34 IPC is not made out against the accused appellant, inasmuch as, the cause of death has not been established and the allegation that it was on account of the stab wound caused by the appellant that the deceased died is not proved. He also urges that accused appellant has denied the accusations under Section 313 Cr.P.C. and in reply to Question No. 13 explained that deceased was hit by buffalo and he fell on the Plough due to which abdominal injury was caused. It is also argued that defence of the appellant has not been considered in its correct perspective.

10. Counsel for the appellant in the alternative submits that even if the allegations made against the accused appellant are taken on its face value, yet he cannot be convicted of an offence under Section 302 IPC since by virtue of Exception 4 to Section 300 IPC, the act not being on a premeditation and having arisen in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner would not amount to culpable homicide amounting to murder and, therefore, the appellant at best could be sentenced under Section 304 IPC Part 2 or at best Part 1, and that the life sentence awarded under Section 302 IPC is wholly unwarranted in the facts of the case and is unsustainable in law.

11. Learned AGA, Mrs. Archana Singh on the other hand submits that a timely first information report was lodged in the matter under Section 307 IPC and the injured was taken to the hospital by the police. She submits that the injury report is categorical with regard to the abdominal stab wound caused to the deceased on the left side of the abdomen which is consistent with the ocular testimony of eye-witness PW-1 who has seen the accused appellant inflicting stab wound on the abdomen of deceased. It is further submitted that the ocular testimony of PW-1 is reliable and matches with the postmortem report and also the injury report and there is absolutely no reason for any false implication of the accused appellant. In such circumstances, learned counsel submits that the conviction and sentence awarded to the accused appellant is absolutely in accordance with law and the appeal lacks merit.

12. We heard learned counsel for the parties and perused the records of the present appeal and have carefully gone through the evidence brought on record.

13. Records clearly reveal that a timely first information report has been lodged in the matter at 7.40 am on the date of incident i.e. 11.5.1998. The incident itself has taken place at 6.00 in the morning. The allegation in the FIR is that it was a sudden fight which erupted between the parties on account of flowing of dirty water in the drain. The accused appellant and the deceased are otherwise neighbours and closely related to each other. As per FIR allegation the deceased had objected to the abuses, being hurled, when an objection was raised by the accused party over

flowing of dirty water in the drain. It is alleged that the appellant Nanhey caused the first stab injury by knife on the left side abdomen of the deceased, whereafter injuries were also caused by hard and blunt object (Lathi and Danda) by the two brothers of the accused appellant. It is not in dispute that charge-sheet has been filed only against two brother namely Nanhey and Nanki and as Nanki has absconded and the trial has proceeded only against the accused appellant.

14. The statement of PW-1 has been relied upon by the prosecution, who happens to be the son of the deceased and his presence on the spot is not doubted. PW-1 was residing in the same house with the deceased and has categorically stated that the three accused in the matter are the sons of his uncle who live in the neighbourhood. The site plan is part of record which shows that the accused party and the deceased were neighbours. He has clearly stated that a fight erupted at 6.00 in the morning when he was cleaning the drain in front of his house and his father was also present at the spot. The accused party are stated to have hurled abuses and on the deceased objecting to it the accused party caused injuries to the deceased. The statement of PW-1 is specific that it was the accused appellant who inflicted stab wound on the abdomen of the deceased. Although counsel for the appellant has tried to show some minor discrepancy in the statement of PW-1, but we find that on material particulars and aspects his statement is consistent with regard to injuries being caused by knife to the deceased by the accused appellant. We further find that the ocular testimony of PW-1, who happens to be the son of the deceased is consistent with the injury report and the postmortem report both of which have been duly proved by producing the doctor who examined the deceased and the doctor who conducted the postmortem of the deceased. Once the ocular testimony of witnesses is found consistent with the medical evidence available on record and the defence has otherwise not been able to show any inconsistency in the statement of eye-witness PW-1 on material aspects, we are of the view that the incident as has been alleged to have occurred has been proved by the prosecution.

15. So far as the statement of accused under Section 313 Cr.P.C. about a different reason (fall on the Plough) is concerned, the same clearly supports the prosecution statement that an injury was caused to the deceased on the eventful day. No defence witness has otherwise been produced on behalf of the accused appellant to substantiate his defence that the cause of injury was other than what has been alleged and substantiated by prosecution in the matter.

16. So far as the argument advanced by counsel for the appellant with regard to the matter being covered by Exception 4 to Section 300 IPC is concerned, it would be worth noticing the provision itself at the outset. Section 300 IPC defines murder. It also contains various exceptions where the offending act would not amount to murder. Exception 4, which is relied upon on behalf of the appellant, reads as under:-

"Exception 4. --Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

17. The fourth exception takes out the specified act out of the purview of culpable

homicide amounting to murder. Necessary ingredients of Exception 4 are that the offending act is committed without premeditation, in a sudden fight in the heat of passion, upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation to Exception 4 also provides that it is immaterial in such cases as to which party offers the provocation or commits the first assault. When the facts of the present case are viewed in the context of above provision, we find that the prosecution case is specific, inasmuch as, the dispute between the parties erupted suddenly at the time when the son of the deceased was cleaning his drain in front of his house. PW-1, who is the star witness of the prosecution, has clearly admitted that it was during cleaning of drain by him that the accused persons objected to flowing of dirty water in their drain which resulted in sudden fight erupting on the spot. The deceased objected to the protest by accused party by saying that such water was flowing from before on which he was abused and stab injury was caused to him by accused appellant. There is nothing on record to show that there was any premeditation on part of the accused party in inflicting the stab injury which ultimately resulted in septicemia and consequential death. The statement of PW-1 as also the contents of FIR clearly go to show that it was a case of sudden fight in the heat of passion upon a sudden quarrel. It is otherwise on record that after the injuries caused to the deceased he was taken to the hospital where he remained hospitalized and ultimately died after five days due to septicemia and hemorrhage on account of ante-mortem injuries.

18. We may at this stage refer to the judgment of the Supreme Court in State of Uttarakhand v. Sachendra Singh Rawat, (2022) 4 SCC 227 wherein the Court examined Exception 4 to Section 300 IPC and observed as under:

"8. In *Virsa Singh [Virsa Singh v. State of Punjab*, AIR 1958 SC 465 : 1958 Cri LJ 818] , in paras 16 and 17, it was observed and held as under : (AIR p. 468)

"16. ... The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

17. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it

can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact;...."

(emphasis supplied)

9. In *Dhirajbhai Gorakhbhai Nayak [Dhirajbhai Gorakhbhai Nayak v. State of Gujarat*, (2003) 9 SCC 322 : 2003 SCC (Cri) 1809] , on applicability of Exception 4 to Section 300 IPC, it was observed and held in para 11 as under : (SCC pp. 327-28)

"11. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution (sic provocation) not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused : (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case.

For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage"."

10. In *Pulicherla Nagaraju [Pulicherla Nagaraju v. State of A.P.*, (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500] , this Court had an occasion to consider the case of culpable homicide not amounting to murder and the intention to cause death. It was observed and held by this Court that the intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances:

(i) nature of the weapon used;

(ii) whether the weapon was carried by the accused or was picked up from the spot;

(iii) whether the blow is aimed at a vital part of the body;

(iv) the amount of force employed in causing injury;

(v) whether the act was in the course of sudden quarrel or sudden fight or free-for-all fight;

(vi) whether the incident occurs by chance or whether there was any premeditation;

(vii) whether there was any prior enmity or whether the deceased was a stranger;

(viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation;

(ix) whether it was in the heat of passion;

(x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;

(xi) whether the accused dealt a single blow or several blows."

19. In light of the deliberations held, we find that the case at hand clearly falls within Exception 4 of Section 300 IPC and, therefore, the appellant could at best be punished for culpable homicide not amounting to murder, under Section 304 IPC, and not under Section 302 IPC. It is on record that the appellant was in Jail at the time when charges were framed against him in the year 2003. He has been released from Jail only on 26.1.2019 and, therefore, he has already undergone incarceration of nearly 16 years, even without remission. The appellant is thus convicted under Section 304 IPC and is released on the period of sentence already undergone by him. He shall be released from Jail, forthwith, unless he is wanted in any other cases subject to compliance of Section 437A Cr.P.C.

20. This Jail Appeal is thus partly allowed on above terms.

21. Sri Pramod Kumar Pandey, learned Amicus Curiae has assisted the Court in disposal of the present jail appeal and is entitled to his fee quantified at Rs.15,000/- from the High Court Legal Services Authority.

(2022) 9 ILRA 1630
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2022

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE CHANDRA KUMAR RAI, J.

Criminal Appeal No. 3774 of 2011
Connected With
Criminal Appeal No. 4433 of 2011

Amit @ Amit Yadav ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri P.C. Srivasatva, Sri Amit Singh Chauhan, Sri Anil Srivastava, Sri Manish Tandon, Sri Noor Mohammad, Sri Rajesh Yadav, Sri Rajiv Lochan Shukla, Sri V.K. Upadhyay, Sri Thakur Prasad Dubey

Counsel for the Opposite Party:
Govt. Advocate, Sri Jai Shankar Malviya

A. Criminal Law - Criminal Procedure Code,1860 - Sectionn 374(2) - Indian Penal Code,1860-Sections 302/34, 504,506 – Arms Act,1959 - Section 25 - Challenge to-Conviction- In the present case, total 11 prosecution witnesses were examined but from the perusal of the evidence, it is clear that there is no direct evidence against the accused and he is the nephew of the PW-1, who is the informant of the case and he has been falsely implicated in the present case- there was a dispute between PW-1 and the deceased regarding a shop and the alleged incident had taken place at the house of the informant, which also creates doubt about the place of occurrence one of the eye witnesses who is the step mother of the deceased, has not been produced before the trial court and the witnesses of recovery (PW-5 and PW-6) have turned hostile-Once the testimony of the PW-1 was trustworthy and even his testimony was intact in the cross-examination then in such situation we do not find any good ground to make any adverse reference against the prosecution to the effect that even though other witness was available but she was being withheld from the Court- The recovery of the country made pistols and live cartridges, which were testified to be true and the said weapons utilised by the appellants for commission of offence, which was proved by Doctor (PW-3) and Doctor (PW-4), clearly corroborate the same and hence, the argument of recovery is also not tenable, rather the prosecution version is established- The recovery of the weapons on their pointing out, the utilization thereof and the manner of assault by the appellants all stood corroborated with the medical evidence and further fortified by the post-mortem report- The evidence on record also indicates that all the accused had joined together on spot with the common intention of committing murder of the deceased-Held, the trial court had rightly accepted the prosecution version and the same was proved beyond reasonable doubt -The trial court is also fully justified in coming to the conclusion that there was meeting of mind established from the evidence on record-learned trial court committed no error to arrive at the conclusion of convicting the appellants.(Para 1 to 52)

B. It is a trite proposition of law that in criminal trial, it is the quality of evidence which matters and not the quantity. Thus, no malafide could be attributed to prosecution case simply on that premise. Section 134 of Evidence Act does not require any particular number of witnesses to prove any fact. Plurality of witnesses in a criminal trial is not the legislative intent. Therefore, if the testimony of sole witness is found reliable on the touchstone of credibility, accused can be convicted on the basis of said sole testimony.(Para 46)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Gangadhar Behera & ors. Vs St. of Ori.

2. Padamasundara Rao (dead) & ors.. Vs St. of T.N. & ors.. (2002) 3 JT SC 1

3. Vadivelu Thevar Vs St. of Madras

4. Sunil Kundu Vs St. of Jhar. (2013) 4 SCC 422 : (2013) 2 SCC (Cri) 427

5. Anand Ramachandra Chougule Vs Sidarai Laxman Chougala & ors.

6. St. of Raj. Vs N.K.(2000) 5 SCC 30

7. Vishnu Vs St. of Mah. (2006) 1 SCC 283

8. St. (NCT of Delhi) Vs Pankaj Chaudhary

9. Wahid Khan Vs St. of M.P.

10. P. Rajagopal & ors. Etc. Vs St. of T.N.

11. St. of H.P. Vs Raghubir Singh

12. Lallu Manjhi & anr. Vs St. of Jhar.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Both Criminal Appeals are directed against judgment and order dated 03.06.2011 passed by Additional District and Sessions Judge, Court No.6, Moradabad in Sessions Trial No.1171/2007 (Pawan & two others vs. State) connected with Sessions Trial No.1172/2007 (Pawan Yadav & another) whereby, Pawan (appellant in connected Criminal Appeal No.4433 of 2011) and Amit @ Amit Yadav (appellant in leading Criminal Appeal No.3774 of 2011) have been convicted and sentenced under Section 302 read with Section 34 IPC for life imprisonment with fine of Rs.20,000/- each and in default of payment of fine to further undergo imprisonment for a period of three years. They have also been convicted and sentenced under Section 504 IPC to undergo R.I. for six months with fine of Rs.1000/- each and under Section 506 IPC to undergo R.I. for two years with fine of Rs.4000/- each. They have further been convicted and sentenced under Section 25 of Arms Act to undergo three years R.I. with fine of Rs.6000/- each. All the sentences have been ordered to run concurrently.

2. We have heard Sri Rajiv Lochan Shukla, Sri Manish Tandon and Sri Thakur Prasad Dubey, learned counsel for the appellants; Sri A.N. Mulla/Sri G.P. Singh, learned AGA for the State and have perused the record.

3. In an abridged form, prosecution allegations against appellants, as were contained in the written report dated 09.8.2007 (Ext. Ka-1), were that the informant Rajaram submitted a written report on 09.8.2007 alleging therein that on 08.8.2007 at about 11.00 p.m, when he was about to take dinner, his elder son Pawan, real nephew Amit and one more boy armed with country made pistols, entered his house and Pawan abused and threatened him stating that as the complainant had given the shop to Amod (younger son), today he will not let him live. They got the complainant and his wife, namely Hansho Devi, sat down at the Varandah. At that point of time, his son Amod returned to the home after shutting down the shop and all three persons caught him. Pawan fired the first shot while Amit fired the second shot at Amod with intention to kill him due to which he sustained injuries. He had taken his injured son to the hospital from where he was referred to 'Sai Hospital' and while they were leaving for 'Sai Hospital', his son (Amod) succumbed to injuries. The

complainant went to the Police Station Kotwali, Moradabad on 09.8.2007 and submitted the written report, whereupon Case Crime No.1333/2007 under Section 302/504/506 IPC and Case Crime No.1341/2007 under Section 25 of Arms Act, Police Station Kotwali, Moradabad, were registered against the accused persons.

4. The body of the deceased was sent for post-mortem examination, which was conducted by R.P.S. Suman (PW-3) on 08.8.2007, wherein he noticed following injuries:-

"(1) Firearm wound of entry on front of right side of chest 3cm x 2.5cm x chest cavity deep present, 6 cm below the right nipple and 8 cm lateral to mid line, margins of the wound inverted and blackening present around the wound margins.

(2) Firearm wound of entry on back left side of chest 2 cm x 2 cm x abdominal cavity deep present 5 cm below the inferior angle of left scalpha and 15 cm lateral to mid line margins of the wound inverted and blackening present around the wound margins.

(3) Firearm wound of exit on front of abdomen 3 cm below the umbilicus just lateral to mid line on right side. It is 5cm x 4 cm in size and margins of the wound everted. Intestines coming out of the wound."

5. The investigation of the case was conducted and three separate charge sheets were submitted on 31.8.2007 (Ext.Ka-23 & 24) and 23.9.2007 (Ext. Ka-21). Ex. Ka-23 and 24 are the charge sheets submitted by Sunil Kumar Pachauri, SHO, Police Station Kotwali, Moradabad (PW-8) against Pawan Yadav and Amod Yadav under Section 25 of Arms Act, whereas, Ex. Ka-21 is the charge sheet submitted against Pawan, Amod and Subhash under Sections 302/504/506 IPC. After taking cognizance on the charge sheets, case was committed to the Court of Session. Two separate trials were instituted, namely, S.T. No.1172 of 2007, which was against Amit Yadav and Pawan Yadav for offences punishable under Section 25 of Arms Act and S.T. No.1171 of 2007, which was against Pawan, Amit and Subhash for offences punishable under Sections 302/504/506 IPC. In the Memorandum of Charges, there were allegations that on 08.8.2007 at about 11 p.m. Pawan, Amit and Subhash intentionally insulted the complainant by using abusive language and thereby they gave provocation to the complainant and committed an offence punishable under Section 504 IPC; secondly, on the aforesaid date, time and place, they threatened the complainant and in consequence of the threat, they committed the murder of the Amod and thereby, they committed the offence punishable under Section 506 IPC and thirdly, they intentionally committed the murder of Amod and thereby, they committed an offence punishable under Section 302 IPC. Amit Yadav and Pawan Yadav were further charged that on 17.8.2007 at about 7 a.m. they were found in possession of country made pistols (12 bore/315 bore) and live cartridges (12 bore/315 bore) for which they had no valid licence. The accused persons pleaded not guilty and claimed for a trial.

6. During the course of trial, 11 prosecution witnesses were examined, namely, Raja Ram (PW-1/complainant); Nazar Hasan (PW2-Constable, who made GD entry of the written report and prepared Chik FIR); R.P.S. Suman (PW-3-the Doctor, who carried the postmortem); Dr.

P.S. Sharma (PW4- Senior Medical Officer, who conducted the medical examination of the deceased); Ram Autar (PW5-the real maternal uncle of the deceased); Hari Om (PW6-good friend of the deceased); Suresh Chandra (PW-7, Constable, who carried the body of the deceased to the mortuary for autopsy); Sunil Kumar Pachauri (PW-8, the investigating officer, who conducted the investigation of the case and submitted charge sheet); Umesh Kumar Singh (PW9-Sub Inspector, who recovered the country made pistols from the accused); Mahesh Chandra (PW10-Inspector, who also conducted the investigation of the case and submitted charge sheet) and M.S. Chauhan (PW-11-Sub Inspector, who conducted the investigation of the case under Section 25 of Arms Act and submitted charge sheet). After the prosecution evidence was led, the statements of the accused persons were recorded under Section 313 Cr.P.C. The trial court convicted and sentenced the appellants, as noticed above, against which these appeals have been filed.

7. Before we proceed to notice the rival submissions, in order to have a clear understanding of the context in which those submissions have been made, it would be apposite to notice the testimony of the prosecution witnesses. The testimony of the prosecution witnesses, shorn of unnecessary details, is as follows:-

8. Raja Ram (PW-1/complainant) stated in his testimony that the deceased Amod was his son. The accused Pawan is his elder son and another accused Amit is his real nephew. The third accused Subhash is friend of the accused Pawan and Amit. The incident is dated 08.8.2007 at 11 o'clock in the night. At the time of closing of his grocery shop, which is under the house of his residence, around 10-1/2 and quarter to eleven, he was on the upper floor of his house (residence). At that time his wife Hanso Devi was also at home. After five minutes all the three accused persons (present in the Court) came to his residence having Tamanchas (country made pistols) in their hands by way of staircase. In a threatening voice, his son Pawan, who was present in Court, calling him by abusive language (Harami) to sit on one side and if he says a little bit, then his wife would be killed. He was frightened by their threat and being afraid, they sat on one side. Then, after 2-3 minutes Amod (deceased) after closing his shop, came to his house on his way to the staircase. Subhash grabbed his son Amod and Pawan and Amit together shot at his son (Amod) one bullet each. One bullet hit his son Amod's stomach and the second bullet hit his chest. His son Amod fell on the floor and he was bleeding. The PW-1 did not try to nab all the three accused as they had fled threatening at that time. After this incident his wife remained sitting on the spot but he ran outside the house; came on the road and raised noise. They were running forward and he was running after them, then all the accused threatened the local people, if they testify against them, they would also have to face same consequences as Amod (deceased) suffered. No person came forward to help him. Meanwhile, the police patrolling Jeep had reached near his house. He had informed the patrolling policemen about the incident. There was also a police Inspector in the patrolling Gypsy. Then the police men had picked his son, who was in critical condition, in Gypsy vehicle and his son was taken to the District Hospital. The PW-1 also accompanied them to the District Hospital in the same Gypsy. By that time, his relatives had not come and the doctor told in the hospital that the

condition of his son Amod was worrying. Therefore, he took his son Amod to Sai Hospital, Moradabad for treatment in the same Gypsy. After reaching at Sai Hospital, the doctors declared him dead on arrival. After this he wrote the written Tahrir of the incident (Paper No.5/2) in his own handwriting at the Police Station Kotwali, Moradabad (paper torn). On the basis of Tahrir, the case was registered and the carbon copy of the same was received by him. Thereafter the police reached the place where the body of his son was kept. The police had made a Panchayat Nama after seeing the dead body of his son and had sealed the dead body. After sealing the dead body the same was sent to the mortuary for postmortem. The police had narrated the Panchayat Nama to him and got his signatures on the Panchayat Nama. The witness corroborated his signatures on the Panchayat Nama available on the letter. The Inspector had taken his statements. He lodged the FIR wherein he named two persons and another person was unknown. He had written in the FIR that he knows by looks (third person) and not by name. The name of the accused (third person) was told to him by his wife when he was apprehended. On the next date he had told the Inspector that the name of third accused was told by his wife as Subhash, upon which the police arrested the third accused Subhash.

9. The witness stated that the reason for the murder was that his son Pawan lived separately after marriage and he had given him a part of the second floor of that property for the purpose of living, wherein his son Amod (deceased) used to run a grocery shop. This house was a three-storied building and his son Amod (deceased) used to run a grocery shop on the ground floor. He had given the first and second floor of the house to his accused son Pawan for living. Apart from this property, he has another house at Qazi Sarai in the same locality. In ground floor, he used to run a grocery shop at the time of the incident. This house is a four-storied building. In the rest of the floors of this house, he himself used to live alongwith his wife Hanso Devi and two unmarried sons Amod (deceased) and Sagar. The house, in which Amod (deceased) used to run a grocery shop on the ground floor and his accused son Pawan lived in the upper two floors, is also located in Mohalla Qazi Sarai. He had given a shop on rent to the accused son Pawan after his marriage and he had started the work of retail in that shop so that he could take care of his children. His accused son Pawan had closed this rental shop about 5-6 months before the incident. The accused son Pawan used to ask him to give the Amod's shop to him, otherwise there would be serious consequences. He was not in a position to give Amod's grocery shop because his house was also running from the earning of this shop. He had married his daughter in which huge money was spent and his younger son Sagar was living at Mussorie, which also requires expenses. He told his accused son Pawan for not insisting him to take Amod's shop because he had given him a separate grocery shop. Both the houses of Qazi Sarai are in his name. The accused Amit is the son of his elder brother Murari Lal and he is his real nephew. His accused son Pawan had shot at his younger son Amod because he could not find the grocery shop of Amod. The reason for the accused Amit to shoot his son Amod was that Amod and Amit used to work in the business of cassette together in the year 2007. Both have suffered losses in the business of cassette. Amit owed about Rs.40,000/- from his son Amod (deceased)

which Amod could not pay to Amit due to which Amit used to quarrel with his son Amod every day. Due to this enmity, accused Amit alongwith Pawan shot his son Amod. The third accused Subhash was the friend of his accused son Pawan and accused Amit and therefore, he accompanied them to the spot. The witness stated that he had married his accused son Pawan on 19.1.1999. After the marriage, Pawan and his wife Mrs. Rajkumari stayed with him for about two months. At that time his first wife Prabha Devi was dead and till that time, he was not married to his second wife Hanso Devi. All his children are born from the first wife Mrs. Prabha Devi. After two months' of his marriage, his son's wife refused to make Chapati (Roti) for him and started saying that he will live separately with his wife. Thereafter, his son Pawan started living separately and the PW-1 was forced to do his second marriage with Hanso Devi so that arrangements can be made for his cooking. His son Amod had died on the way before reaching Sai Hospital.

10. The witness stated in cross-examination that he has three sons and one daughter, his elder son's name is Pawan and younger son's name is Amod. His daughter's name is Chanchal Rani, who is elder than Amod and the name of his third son is Sagar. Naveen is Hanso Devi's son but not his biological son. Naveen is only 8-9 year's old and stays with him. The witness was married to Hanso Devi about 7 years' ago and he does not remember the day, date, month and year. His accused son Pawan got married in the year 1999. Naveen was one year old when he married Hanso Devi and he borne all the expenses of Naveen. His son Sagar has completed his education and he studied at Mussoorie since Class-I and thereafter, studied at Dehradun. He opens his shop at 06.00 in the morning and closes it at 9 to 10 in the night. Amod also used to open his shop at 06.00 in the morning and used to close it at 9 to 10 in the night. Amod's shop is at a distance of 50 yards from his shop. His son Amod (deceased) had a general provision store. The complainant and his son Amod stayed together and took meals together. The door of his shop is separate from the staircase of his residential house. His son Pawan and nephew Amit used to visit his house sometimes. The relations of his son Pawan and Amod (deceased) were good and there was no dispute between them. He had not partitioned his property in writing. Sachin and Dinesh were his tenants but they were not present at the time of incident. The complainant and his wife were present at the time of incident.

11. The PW-1 admitted in his statement that his son Pawan had no dispute with him prior to this incident nor he demanded any money before this incident. He was sitting after taking meal, when Amit, Subhash and Pawan entered his house and Amod was not present at that time. Pawan abused him and all three accused were armed with country made pistols. He did not raise the alarm due to fear of country made pistols. They did not fire at him and at that very moment, his son Amod (deceased) arrived. Subash wrapped his arms on Amod as soon as he arrived. Pawan and Amit shot him and Subhash held him. The witness was declared hostile for accused Subhash. The occurrence took place on 8.8.2007 at 11 o'clock night and at that time, the electricity was run by inverter in his house and in the same light, he recognised all the three accused persons Pawan, Amit and Subhash properly.

12. PW-2 (Nazar Hasan) stated that on 09.08.2007 he was posted as Clerk/Constable at Police Station Kotwali,

Moradabad. The complainant moved the written complaint registered as Case Crime No.1333/2007 under Sections 302/504/506 IPC (Ext. ka-02). He had made entry of this case in G.D. No.02 on the same day. During the cross-examination, the witness stated that the time of the incident mentioned at 22:45 hours in the Chik FIR (Ext. Ka-02) was overwritten as 11:00 o-clock. by him. He had brought the record of the police station, wherein the time at 22:45 was overwritten as 11:00 on the same day. There are cuttings at many places in Exhibit Ka-01, which was presented before him and the entry of cuttings was made in the G.D. He stated that on the same day, he prepared the Chik FIR No.200/07 concerning C.C.No.1340 & 1341/07 under Section 25 Arms Act (State versus Pawan & Another). He denied the suggestion that the G.D. was not written in the same manner, as it is available, rather number was mentioned later on after writing the G.D. at any other time.

13. PW-3 (R.P.S. Suman) has stated in his testimony that on 09.8.2007 he was deputed at District Hospital, Moradabad and on that day, he was posted at Post Mortem House. Constable Prem Kumar and Suresh Chandra brought the dead body of the deceased (Amod) in sealed condition at about 02.30 p.m. The dead body was perused and the seal of dead body was intact. The seal of dead body was opened and post mortem examination was conducted by him. The deceased was aged about 25 years and the death was presumed to have occurred 12 hours' before. He had examined the dead body externally and stated that the deceased was of average height and built. The following injuries were found on the person of deceased:-

"1. Fire arm wound of entry on front of right side of chest 3 cm X 2.5 cm X chest cavity deep present, 6 cm below the right nipple and 8 cm lateral to mid line, margins of the wound inverted and blackening present around the wound margins.

2. Fire arm wound of entry on back of left side of chest 2 cm X 2 cm X abdominal cavity deep present 5 cm below the inferior angle of left scaphla and 15 cm lateral to mid line margins of the wound inverted and blackening present around the wound margins.

3. Fire arm wound of exit on front of abdomen 3 cm below the umblicus just lateral to mid line on right side. It is 5 cm X 4 cm in size and margins of the wound everted. Intestines coming out of the wound.

Internal Examination of dead body

1. Pleura was lacerated. One litre blood was present in pleura cavity. Right and left lungs were lacerated. A cylinderical Metilical bullet was received from the right lung. Peritoneum was lacerated. Around 1-1/2 litre blood was present in Abdominal cavity. Around 150 gm partially digested food was present in stomach. Small intestine was lacerated. A plastic cap and four pellets were recovered from intestine. Large intestine was also lacerated. Left kidney was lacerated."

14. PW-3 stated that in his opinion, deceased died due to fire arm injuries resulting into hemorrhage and trauma. The post mortem report was prepared by him during postmortem. In his cross-examination, he stated that the deceased might have taken food 4-5 hours before the death. The pellets/bullets of firearm were

taken out of the body of deceased. The deceased had not undergone any operation before the postmortem. There was injury on the front of the person of deceased and another was on left side at the back. On further cross-examination, he sated that he cannot tell as to how many weapons caused injuries to the deceased. He denied the suggestion that the injury on the person of deceased was not caused by the firearm.

15. PW-4 (Dr. P.S. Sharma) stated in his testimony that on 8.8.2007 he was posted as Emergency Medical Officer at District Hospital, Moradabad. On that day at 11:40 p.m. he had examined the injuries of Amod, aged around 26 years. The identification mark has been mentioned and the following injuries were found on the person of injured:-

"Injury number 1- 3 cm below the right nipple and inwards covering 12 cm X 8 cm area on the right side of chest in front 1 cm X 2-1/2 cm length and 1/2 cm to 2 cm width. Four incised-lacerated entry wounds of firearm were found.

Injury number 2- 12 cm below xiphisternal nostch somewhat outwards navel incised-lacerated exit wound 4 cm X 4 cm on the front of stomach caused by firearm from where intestines and Mesentry were coming out stomach deep bleeding."

16. The PW-4 stated that the health condition of injured was poor and he was in trauma, therefore, detailed examination was postponed. The aforesaid injuries were fresh and were possible to have been caused by the firearm. The injured was admitted in emergency ward and was referred to surgeon and the X-ray was advised. He stated that the thumb impression of injured was obtained on report during the examination. On seeing medical report, the PW-4 stated that it was the same medical report (Ex Ka-5), which was prepared by him during examination and he certified the same. In his cross-examination, he stated that the injured was brought at P.S. Kotwali by Constable Shyam Kumar. The injuries sustained by the injured were fatal for his life. All the three injuries of the injured were caused by the firearms. He denied the suggestion that all the injuries of the injured were not caused by the firearms and the injuries sustained by the injured were not fatal for his life. Injured's injuries may have happened ½ hour before he did the test. He further denied the suggestion that the examination of the injuries of the injured was not done properly at the time of medical examination and the injury no.3 was mentioned later on just to strengthen the case.

17. PW-5 (Ram Autar Singh) stated on oath that he knew the deceased Amod. He was son of his brother-in-law (Behnoi) Rajaram, and was his real nephew (Bhanja). On 09.08.2007, he came to Moradabad from his house at Kashipur on hearing the information of Amod's murder but his dead body was not sealed in his presence, which was already sealed prior to his arrival. The Sub-Inspector had called him to the police station and got his signature there on the Panchayat Nama. At this stage, the witness was declared hostile on an application moved by the ADGC.

18. During cross-examination by ADGC (Criminal), the witness stated that he does not know as to how Amod was killed and he did not hear who did the murder. On the next day i.e. 09.08.2007, he reached the house of the deceased Amod after getting the information of his death.

He further stated that his sister had already died prior to this incident and hence, there arises no question of any interaction with anybody. He had met with his brother-in-law (Behnoi) Rajaram but he did not held any talk as to who had committed the murder of the deceased. After the death of his sister, his brother-in-law Rajaram had solemnized second marriage due to which he did not speak with his brother-in-law. When he reached there, the police was sitting inside the house but he did not see the dead body of Amod in open state. He admitted that both the deceased Amod and accused Pawan are sons of his real sister and brother-in-law Rajaram. He denied that he was giving false testimony before the court in order to save the accused Pawan. The accused Amit is also his nephew.

19. PW-6 (Hariom) has stated in his statement that he knew Amod and he was a good friend of mine. On 09.08.2007 morning, he went to Moradabad (Amod's house) from Kashipur with Ramavtar. Amod's body was not sealed in front of mine nor was the Panchayatnama filled in his presence. At this stage on the request of A.D.G.C. (Criminal), the witness was declared hostile and given an opportunity of cross-examination. During cross-examination, he stated that Ramavtar is the maternal uncle of Amod (deceased) and he also lives in his locality at Kashipur. Ramavtar is his real cousin. Due to this relationship, Amod (deceased), Pawan (accused) and Amit (accused) also seem to be his nephews. The witness was shown the panchayatnama available on the letter, the witness said that no such panchayatnama has been prepared by the police in front of us. The signatures on the panchayatnama are of mine. It is wrong to say that he has given false testimony against accused Amit and Pawan because they seem to be his nephews in the relationship. It is wrong to say that today he was deliberately giving false statement to save the accused.

20. PW-7 (Suresh Chandra) has stated on oath that on 09.08.2007, he was deputed as Constable in the Police Station Kotwali; on that day panchayatnama of the deceased Amod (son of Rajaram) was prepared by Daroga Ji Mukesh Kumar and the dead body of the deceased (son of Rajaram) was sealed and other forms were prepared. On that day, he had handed over the dead body of Amod for postmortem. Dr. R.P.S. Suman did the post mortem and after the postmortem the body of the deceased was handed over to his father Rajaram. The panchayatnama was prepared on 09.08.2007. In cross examination on behalf of the accused Amit, he stated that around 30-40 people were present while filling the panchayatnama. The dead body of Amod was handed over to him by the Inspector after filling the panchayatnama and after sealing the dead body of the deceased.

21. PW-8 (Inspector Sunil Kumar Pachauri) stated that on 08.8.2007, he was posted as Inspector in Kotwali, Moradabad. After getting the papers related to the case from the Police Station, he got engrossed in the investigation and took the statement of informant. He went to the spot with the informant, Majroore (injured) was admitted to the hospital prior to him. The inspection could not be done at the site of the incident as it was night. Thereafter PW-8 came to the hospital. The deadbody was kept in mortuary. His colleague SI Mukesh Kumar was directed to fill up the panchayatnama. S.I. U.K.Singh and a Constable were present in the District Hospital, who gave him medical report, which was recorded in the GD. All the proceedings of panchayatnama were done by SI Mukesh

Kumar, who has been posted with him. He recognized his writing and signature. He certified Ext.A-8, A-9, A-10, A-11, A-12 and A-13. The PW-8 stated that he came to the site of the incident on 09.8.2007 with the informant and inspected the site. He had prepared the site plan of the spot and taken plane and blood stain earth/soil from the spot and one cartridge (12 bore), one cartridge (315 bore) & also one flattened cartridge into his custody. It's Fard was written on the spot. The inverter and battery were seized from the spot and it's Fard was made. The witness read the same and signed the Fard (Ext.14, 15, 16, 17 and 18 (Fard of inverter and battery) after receiving postmortem report of deceased at the police-station the copy was attached to the GD. On 10.8.2007 again the statement of the informant was recorded, wherein he apprised that the third person, among those who killed his son, is a man named 'Subhash'. His wife apprised his name and consequently, Hanso Devi's statement was taken. The statement of informant's tenant Mahesh was taken and on 12.8.2007 the statements of witnesses of panchayatnama were also taken. On 17.8.2007 at 05.25 AM accused Pawan and Amit were arrested from Kashipur Tiraha on the informer's tip. They were brought to the police station and questioned. On being told by the accused, the recoveries of country made pistols/tamanchas (315 bore) and (12 bore) used in the crime were made from the field of Parkar Inter College. One country made pistol of 315 bore and one live cartridge (315 bore) were recovered from Pawan and one 12 bore country made pistol and one live cartridge (12 bore) were recovered from Amit. The same were sealed on the spot and the sample stamp was made on the recovered items. The Fard was prepared by SI J.K. Singh, which was also singed by him (Ext. A-19). The statement of SI Umesh Singh was taken on 26.8.2007 and the statement of the Inspector was written on 28.8.2007. On 08.9.2007 at 05.10 AM the third accused Subhash was arrested from his residence. On 09.9.2007, the PW-8 was transferred from Kotwali Police Station. The seal of the recovered items was opened in the Court in which one Tamancha (12 bore) and one Tamancha (315 bore) came out which the accused said that it was the same items.

22. During cross-examination, the PW-8 stated that he went to the spot at night but cannot remember the time by now. When he reached the spot for the first time, he did not take any empty cartridge on account of darkness at the site. He had not called any public witness while recording the statements of the accused persons on 17-8-2007. The complainant showed him two godowns and one staircase on the ground floor under his house. No shop was found on the ground floor of the house. On seeing the statement of the complainant under Section 161 Cr.P.C. the witness stated that the complainant had not told him that he was residing on the ground floor. In the site-plan, he had shown the second house of the complainant. He had recorded the statements of the informant's tenants Sachin and Dinesh. At the time of inspecting the place of the incident, he did not see the blood on the complainant's staircase from the first floor and on the road. Exhibit Ka-16 does not bear Naresh's signature or thumb impression. The memo (Exhibit Ka-15) does not bear the signature or thumb impression of the witness Naresh. Even Exhibits (Ka-17 and Ka-18) do not bear the signatures and thumb impressions of the witness Naresh. When he reached the hospital, he did not take the statement of Hanso Devi as she was not in a condition to give the statement. The place of the

incident was located in the middle of the city near the market. Amit and Pawan fired one gunshot each and one hit in the chest of the deceased and another hit in his stomach. The complainant did not tell him that the accused Subhash was a friend of Pawan and Amit and therefore, he went to the scene of the incident.

23. PW-9 (Umesh Kumar Singh) stated on oath that the S.H.O Suneel Kumar Pachauri, S.S.I. J.K. Singh, Constables Jitendra Singh, Akash Kumar, Satyapal, Constable/Driver Rafiq and the witness took the accused Pawan and Amit and when they reached inside the main gate of the Parkar Inter College, both the accused persons got down from the Jeep and went ahead and then took out a polythene from the bushes located at a distance of four steps from the wall and 10 steps away towards north from the southern corner of Ramesh Chandra Sahu Girls Inter College. Out of this polythene, the accused Pawan took out a country-made pistol 315 bore and handed it over at around 7:00 am and stated that he had inflicted the injury to Amod Yadav by firing gunshot with the same country-made pistol. From the same polythene, the accused Amit gave a country-made pistol 12 bore, and stated that with the same pistol, he had inflicted the injury to Amod by firing gunshot at the time of the incident. The cartridges of both the country made pistols were extracted from the barrels and sealed separately. During the cross examination the witness stated that the departure GD was prepared by the Inspector and he had not put his signature on the departure GD. The witness denied that he had not gone to the Parker Inter College. The recovery memo was prepared in duplicate and copy of the recovery memo was given to the accused Pawan.

24. PW-10 (Inspector Mahesh Chandra) stated that on 12.09.2007 he had taken the investigation on the transfer of the SHO Sri Pachauri. The statements of the S.I. Mukesh Kumar, S.S.I. J.K Singh, Constables Jitendra Singh, Akash Kumar, and Satyapal Singh were recorded on 14.09.2007. The statements of the witnesses to the inquest namely Ram Autar and Hariom were recorded on 21.09.2007. On 23.09.2007 the statements of Constable Prem Kumar and Suresh Chandra were recorded and on the offense being established, the charge-sheet under Sections 302, 504, 506 IPC was filed against the three accused. During the cross examination, the witness stated that he did not mention the time of the investigation. Neither, he had verified the statements, which were recorded by the earlier investigator nor the place of occurrence. He had not made any attempt to record the statements of the people living in the neighborhood of the place of occurrence. He had not found in his investigation that the deceased had died in 'Sai hospital'. As per his investigation, both the weapons were recovered from the same spot and he had not found in the investigation that both the weapons involved in the murder were kept at some distance from each other.

25. PW-11 (M.S. Chauhan) stated in his statement that the preliminary investigation in the Case Crime No.1340 of 2007 under Section 25 of the Arms Act lodged against Pawan Yadav and the Case Crime No.134 of 2007 lodged against Amit Yadav were conducted by Sub Inspector Mukesh. He had taken up the investigation on 31.08.2007 and thereafter, he had recorded the statement of the complainant, Sunil Kumar Pachauri and the statement of the witness. The site map of the place of occurrence (Exh. Ka-22) was prepared by

the witness in his handwriting and after completion of the investigation, he had filed charge-sheets (Exh. Ka-23 and Ka-24) against the accused Pawan Yadav and Amit Yadav before the court concerned. The sanctions for prosecution were obtained by him and these papers are marked as Exhibit Ka-25 and Exhibit Ka-26. During the cross-examination, he had mentioned in the case-diary about the GD for the police party proceeding for the arrest of the accused. He did not take permission of the Principal of the college for preparing the site-map. In the map, the recovery had been shown near Ramesh Sahu Inter College at the behest of the complainant.

26. After appreciating the evidence available on record, the trial court found the occurrence duly proved by ocular account as well as material collected during investigation. Consequently, the trial Court has convicted and sentenced the appellants as aforementioned on the ground that the convict-appellants Pawan and Amit had murdered their real brother and real cousin brother Amod with the illegal weapons in their hands and the accused persons had committed this offence at the house of their father in which the only witness is the father of accused-appellant Pawan and the offence of the accused persons is of grievous nature.

27. Learned counsel for the appellants submitted that there was a delay in lodging the FIR. The incident took place on 08.8.2007 at about 11 PM and the FIR was lodged on 09.08.2007 at about 01.00 a.m. (night) alleging that the accused persons injured his son Amod with fire shots in which he sustained injuries and died in the hospital. In the post mortem report, the cause of death was shown due to shock and hemorrhage, as a result of ante-mortem firearm injuries. The appellants have been assigned the role of firing of one shot each on the deceased. The co-accused Subhash was assigned the role of holding the deceased and he has been acquitted by the trial court. One country made pistol of 315 bore and one live cartridge were allegedly shown to be recovered from Pawan and one country made pistol of 12 bore and one live cartridge were allegedly recovered from Amit @ Amit Yadav. It was submitted that two eye-witnesses namely Rajaram (father of the deceased) and Hanso Devi (step mother of the deceased) were present at the time of occurrence. The statement of the father of the deceased (PW-1) was only recorded and the statement of the step mother of the deceased was not recorded.

28. It was submitted that in his statement, the PW-1 has stated that Amod used to close his shop in between 9 P.M. to 10 P.M. every day and the distance from the shop of Amod to informant's house is almost 55 ft. According to the informant, Amod used to come home straightaway after closing the shop and he reached home at around 11 p.m., which creates a doubt on the story of the prosecution. The PW-1 stated that some times his tenanted room remained vacant and some times it was occupied but at the time of occurrence, no one was residing in the said room. He has further stated that at the time of occurrence, both tenants Sachin and Dinesh were not present and he did not know whereabouts, of the tenants at the relevant point of time, which also creates doubt about his testimony. The PW-8 in his deposition stated that the shop of the deceased was on the ground floor and above two floors the appellant Pawan used to live with his wife and child. If the intention of Pawan was to kill Amod, because of the ownership of the shop, then why no such incident took place

earlier. The PW-8 in his statement stated that the complainant had shown him two godowns made at the ground floor of the house and one staircase and the same were shown in the map by the PW-8. But at the time of inspection there was no shop at the ground floor of the house. He had further stated that Sachin had given his statement before him and stated that there was some quarrel between the informant Rajaram and his son. All brothers of the complainant live nearby to his place and the place of incident but no other witnesses were examined. It was submitted that the PW-1 stated that he and his son used to take food together. The PW-1 stated that he was about to sit for taking food when Amit, Subhash and Pawan entered in his room. Three bullets were fired at the place of incident and two bullets hit the deceased and one bullet hit the wall but there was no mention of this particular fire in the FIR and also in the statement of PW-1.

29. Learned counsel for the appellants has vehemently attacked the alleged recoveries. One country made pistol of 315 Bore and one live cartridge was recovered from Pawan and one country made pistol of 12 Bore and one live cartridge was recovered from Amit @ Amit Yadav. From the same polythene bag (Exhibit-19), the recoveries of one empty cartridge of 12 Bore and one empty cartridge of 315 Bore (Exhibit-16) from the place of incident are also doubtful. One deformed bullet was also recovered from the place of incident. As per postmortem, one cylindrical metallic bullet from the right lung of the deceased and four pellets (Exh.-6) were recovered. He submitted that the recovery of one empty cartridge of 315 bore and one of 12 bore from the place of incident and also one country made pistol of 315 bore and 12 bore, which were allegedly recovered from the pointing out of the appellants, had been sent to Forensic Sciences Laboratory, Agra, Uttar Pradesh on 26.11.2007. Moreover, the deformed bullet which was recovered from the place of occurrence was not sent to FSL to match with the recovered cartridges and the country made pistol, even though the said recovery was made on the pointing of the appellants. The bullet recovered from the body of deceased was also not sent to the FSL to match with the country made pistol which is said to be recovered from the possession of the appellants and also with the empty cartridges recovered from the place of occurrence as the bore/dimensions of the bullet are not known. He submitted that the alleged recovery can always be in addition to the direct testimony but the recovery itself cannot be used to substitute direct evidence. He had vehemently submitted that the investigating officer (PW-8) made entry of the post mortem report in the case diary on 09.8.2007 itself and he had adequate knowledge of the recovery of the bullet from the body of the deceased and the same was sent to the Senior Superintendent of Police, Moradabad but inspite of the said fact, he did not try to obtain the same and no memo was prepared of the bullet. Admittedly, the said bullet was also not sent for examination to the FSL to be matched with the recovered weapons. He has further placed reliance on the arrest of the accused-appellant which was made on 17.8.2007 at about 05.25 a.m. and they were taken to Police Station. Thereafter at 06.30 a.m. they were taken to Parkar College and from the open place the alleged recoveries were made at about 07.00 a.m. The Parker College is a public place and surprisingly, the alleged recoveries were made from the open place which also creates great doubt about the fairness of the said recoveries.

Alternatively, he has argued that the said alleged recovery is planted. Moreover, no independent witness had endorsed the alleged recoveries. Even though, only two copies of the memo of recovery were prepared but only one copy of the same was given to accused Pawan.

30. He further submitted that in the present case, total 11 prosecution witnesses were examined but from the perusal of the evidence, it is clear that there is no direct evidence against the appellant Amit @ Amit Yadav in connected Criminal Appeal No.3744 of 2011 and he is the nephew of the PW-1, who is the informant of the case and he has been falsely implicated in the present case. He further submitted that there was a dispute between PW-1 and the deceased regarding a shop and the alleged incident had taken place at the house of the informant, which also creates doubt about the place of occurrence. He further submitted that one of the eye witnesses Smt. Hanso Devi, who is the step mother of the deceased, has not been produced before the trial court and the witnesses of recovery (PW-5 and PW-6) have turned hostile.

31. Per Contra, on behalf of the State it was argued that the convict-appellants Amit @ Amit Yadav and Pawan had fired one shot each on Amod (deceased), who sustained fire arm injuries. Further, the recovery of the weapon was made on the pointing out of the appellants. The PW-1 had deposed and had been cross-examined in the year 2008. The said witness has also proved that the appellants had assaulted with the fire arms referred to above and he was also present at the time of occurrence and had witnessed the crime as stated by the informant (PW1). Therefore, learned A.G.A. contended that the presence of the witness, the place and time of incident, the use of fire arms and cause of death keeping in view of the postmortem report as well as inquest report establishes the guilt of the appellants beyond doubt. He contended that any minor discrepancy in the investigation cannot belie the said incident, where the murder had taken place. He has invited attention of the Court to the statements of witnesses to urge that there is no infirmity in the description of the manner of assault, the place of assault and the timing thereof. Once the post-mortem report confirmed the injuries as well as the timing of the injuries, the chain of events through this direct evidence leaves no room for doubt that the appellants were not guilty. Even in such situation any attempt by the prosecution witnesses to alter his/her statement later on cannot obliterate the evidence led on behalf of the prosecution to prove the commission of offence. Moreover, the recovery of weapons has been established and multiple nature of injuries sustained clearly indicates the involvement of both the appellants and the use of two firearms. It was submitted that as per ballistic report, the said weapons were used in the commission of the present offence. As the prosecution story, there is a ring of truth about it and is fully supported by medical evidence as well as material collected during investigation and therefore, by convicting and sentencing the appellants as aforementioned, the trial Court has not committed any illegality. He submitted that no case is made out on behalf of the appellants so as to dilute the case set up by the prosecution. The conviction could be based even on the solitary evidence, provided it inspires confidence, as in the present case. There is no evidence on record which remotely indicates that accused-appellants were falsely implicated in the present case.

32. Having heard learned counsel for the parties, we find that the conviction is substantially based on the evidence of Raja

Ram (PW-1). He is the sole witness of the incident. When the appellants entered into his house, his son Amod was not present at that time. They did not fire at the complainant and he saw the appellants, who fired tamanchas on his son Amod. In the cross examination, he has categorically stated that the occurrence took place on 08.8.2007 at 11 o'clock night and the incident was seen in electric light of inverter. In the same light, he recognised the appellants properly. The accused Pawan is his elder son and lived separately after the marriage and the other accused Amit is his nephew. They used to visit his house sometimes and therefore, the question of identity does not arise. Defence has cross-examined this witness at length, but has not been able to elicit anything in his cross-examination to discredit his testimony that the appellants have not fired tamanchas on the deceased. His evidence clearly reveals that he was present on the spot and witnessed the incident, which is sufficient for drawing inference that the appellants have shot his son Amod by tamanchas. On 17.8.2007 at 05.25 a.m., accused persons Pawan and Amit were arrested at Kashipur Bus Station. They were brought to the Police Station and were questioned. On their pointing out, the country made pistols of 315 bore and 12 bore were recovered from the field of Parkar Inter College. One country made pistol of 315 bore and one live cartridge were recovered on the tip of Pawan and one 12 bore country made pistol and one live cartridge 12 bore were recovered on pointing out of Amit. The third accused Subhash was arrested from his residence on 08.9.2007 in the morning.

33. So far as the argument of the appellants regarding delay in lodging the FIR is concerned, the occurrence took place at about 11 PM on 08.8.2007 but the FIR was lodged next day on 09.8.2007 at about 01.00 AM (night). Learned counsel for the appellants contended that there is no explanation for the delay and the FIR is ante time. As per prosecution case the report was written exactly two hours after the incident and as such, there was no delay in writing the report, whereas according to the accused, it has been pressed before the trial court that the report has been written much later and by putting the time behind, an attempt has been made to show it within the time and too much cuttings have been made in it. The trial court on the basis of evidence had held that the Tehrir (Exh.1) has been proved by the PW-1.

34. The first core issue is with regard to doubt sought to be created about the presence of the eye witness (PW-1), who is also the father of Amod (deceased) and the convict-appellant Pawan. In the present matter, PW-1 was declared hostile for another accused Subhash, when he was brought to the witness box. In this respect, the law is settled that even that part of the statement of the hostile witness can be taken into account which supports the prosecution story provided it stands further corroborated from other material on record. In the present matter, the testimony of PW-1 cannot be doubted as it is direct testimony. The prosecution produced PW-1, whose statement was recorded on 26.6.2008 and he was also cross-examined by the defence on 26/27.6.2008. The PW-2 categorically narrated the facts and during the cross-examination this part of evidence was not contradicted. The next link is the actual assault made by the appellants with the country made pistols (tamanchas). The gun shot injuries in respect of the deceased, as is evident from the post mortem report and the recovery of the firearms used in the crime and live cartridges from the spot,

have also been testified by the witnesses. The firing of the shot and manner in which the deceased received injuries have been narrated by the PW-1, do not in any way waiver in his version during the cross-examination which leaves no room for doubt that he was not present on the spot. There is no other dimension to this possible visualisation of the injuries which were caused by the firearms. It is admitted case of the prosecution that the deceased died due to gun shot injuries. The ante mortem injuries found upon the body of the deceased was caused by the firearms.

35. In the instant case, the evidence of the eye-witness (PW-1) examined on behalf of the prosecution raises no doubt on his presence at the time of actual occurrence. The eye-witness has stated that at the time of occurrence, his wife Hanso Devi was very much present but in such situation, we find that whether in the facts and circumstances of the case, it was necessary to examine such other witness especially Hanso Devi and if so, whether such witness was available to be examined and she was being withheld from the Court. If the answer is in positive, then only the question of drawing an inference may arise but at no point of time during the trial, such situation had ever happened even from the defence side or from the Court. Once the testimony of the PW-1 was trustworthy and even his testimony was intact in the cross-examination then in such situation we do not find any good ground to make any adverse reference against the prosecution to the effect that even though other witness i.e. Hanso Devi was available but she was being withheld from the Court.

36. In **Vadivelu Thevar and another vs. State of Madrass1** it was observed on Page 619, as under:-

"Hence, in our opinion, it is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for, proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.In the first category of proof, the court should have no difficulty in coming to its conclusion either way-it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court, equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the

prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict,if it is satisfied that the testimony of a single witness is entirely reliable. We have, therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution."

37. We are of the opinion that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. (Ref. **Lallu Manjhi and another vs. State of Jharkhand)2.**

38. In the case at hand, no material/evidence has been brought on record to discard the single testimony of PW-1. However, we find his testimony to have been substantially proved at the trial. During the trial the PW-1 alleged that both the appellants had opened fire upon the deceased and it is the specific case of gunshot injury. There is another very material aspect of the place of occurrence and the manner in which the incident took place and we cannot resist and observe contrary to the investigation in the case. By no stretch of imagination, the same may be categorised as defective investigation. The investigating officer had prepared the site plan of the place of occurrence and efforts were made to recover and seize the weapon of offence.

39. No doubt, it it is well settled that the evidence of interested witness is to be scrutinized with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy then there is no bar on the Court relying on the said evidence. Interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution.

40. In **State of H.P. v. Raghubir Singh3**, the Supreme Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by this Court in **Wahid Khan v. State of M.P.4,** placing reliance on an earlier judgment in **Rameshwar vs. State of Rajasthan5.**

41. In **P. Rajagopal and others Etc. vs. State of Tamil Nadu6**, it has been held in para 12 that :-

"12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely. [See Apren Joseph v. State of Kerala and Mukesh v . State (NCT of Delhi)]"

(emphasis supplied)

42. In the case of **State (NCT of Delhi) vs. Pankaj Chaudhary7**, it is held that as a general rule, if credible, conviction of accused can be based on sole testimony, without corroboration. It is further observed and held that sole testimony of prosecutrix should not be doubted by court merely on basis of assumptions and surmises. In paragraph 29, it is held as under:

"29. It is now well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence. [Vishnu v. State of Maharashtra [Vishnu v. State of Maharashtra, (2006) 1 SCC 283]. It is well-settled by a catena of decisions of this Court that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration and as such it has been laid down that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. [State of Rajasthan v. N.K. [State of Rajasthan v. N.K., (2000) 5 SCC 30]."

43. In the case of **Ganesan V. State8,** Apex Court has held that there can be a conviction on the sole testimony of the victim/prosecutrix when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of sterling quality. In the aforesaid case, the Apex Court had an occasion to consider the series of judgments of the Apex Court on conviction on the sole evidence of the prosecutrix.

44. In the present matter, nowhere it is brought on record or even to suggest that prior to the said occurrence the PW-1 had any animosity or annoyance with his son, Pawan. Mere relationship with the deceased is not a ground to discredit his testimony, if it is otherwise found to be reliable and trustworthy. In the present matter it is difficult to accept that the father, who had lost one son, would implicate the other son, who is innocent. Therefore, considering the facts and circumstances, we do not find that it is necessary to scrutinize other witnesses with more care, caution and circumspection and we hold that the testimony of the PW-1 is wholly reliable testimony, though, the memo of recovery was not made in presence of public witness. Since no public witness has been examined to the said occurrence then in such situation the

statement made by PW-7 and PW-8 will have to be scrutinized with care, caution and circumspection. Considering their testimony that the recovery of country made pistols were made from the public place (bushes) which were accessible to one or all as such no reliance could be placed on such recovery. The said argument is not acceptable in this backdrop. The same is fully corroborated with the medical evidence and the injuries sustained to the deceased. In case of direct evidence and the ocular testimony of the eye witness being found to be trustworthy, reliable and cogent, it will not be necessary for the prosecution to prove the motive for crime. In the present matter, the appellants were annoyed with the settlement of the shop in question. However, we have already held hereinabove, that the testimony of the eye-witnesses could not be said to be unreliable.

45. We may gainfully refer to the following observations of the Apex Court in the case of **Anand Ramachandra Chougule v. Sidarai Laxman Chougala and others9:-**

"10. The burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required to establish or prove his defence beyond all reasonable doubt, unlike the prosecution.

If the accused takes a defence, which is not improbable and appears likely, there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt.

11. The fact that a defence may not have been taken by an accused under Section 313 CrPC again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything. In Sunil Kundu v. State of Jharkhand [Sunil Kundu v. State of Jharkhand, (2013) 4 SCC 422 : (2013) 2 SCC (Cri) 427] , this Court observed : (SCC pp. 43334, para 28) "28. ... When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt."

46. It is a trite proposition of law that in criminal trial, it is the quality of evidence which matters and not the quantity. Thus, no malafide could be attributed to prosecution case simply on that premise. Section 134 of Evidence Act does not require any particular number of witnesses to prove any fact. Plurality of witnesses in a criminal trial is not the legislative intent. Therefore, if the testimony of sole witness is found reliable on the touchstone of credibility, accused can be convicted on the basis of said sole testimony. This principle was highlighted in **''Vadivelu Thevar vs. State of Madras10,** wherein it is held by Hon'ble Apex Court that *"We have no hesitation in holding that the contention that in a murder case, the Court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act has categorically laid*

down that no particular witnesses shall in any case be required for the proof of any fact." Moreover, if the direct testimony of the eye-witness is reliable, the same cannot be rejected on the hypothetically medical evidence. The ocular evidence, if reliable should be preferred over medical evidence. Moreover, in the present matter, there is no conflict between ocular evidence and medical evidence. In any event, the ocular evidence being cogent, credible and trustworthy, minor variance, if any, with the medical evidence are not of any consequence.

47. The recovery of the country made pistols and live cartridges, which were testified to be true and the said weapons utilised by the appellants for commission of offence, which was proved by Dr. R.P.S. Suman (PW-3) and Dr. P.S. Sharma (PW-4), clearly corroborate the same and hence, the argument of recovery is also not tenable, rather the prosecution version is established.

48. Having said so it would be necessary for us to hold that the trial court had rightly accepted the prosecution version and the same was proved beyond reasonable doubt. The issue as to the nature of doubt which an accused can take benefit of has been settled in our criminal jurisprudence that the benefit can be denied if the prosecution is able to prove its version with proof beyond reasonable doubt. (Ref. State of U.P. vs. Pussu11)

49. In **Gangadhar Behera and others vs. State of Orissa12** it was held as under:-

"Above being the position, we find no substance in the plea that evidence of eye witnesses is not sufficient to fasten guilt by application of Section 149. So far as the observations made in Kamaksha Rai's case (supra), it is to be noted that the decision in the said case was rendered in a different factual scenario altogether. There is always peril in treating the words of a judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases (See Padamasundara Rao (dead) and Ors. v. State of Tamil Nadu & Ors. [JT 2002 (3) SC 1]. It is more so in a case where conclusions relate to appreciation of evidence in a criminal trial, as was observed in Krishna Mochi's case (supra) The inevitable result of this appeal is dismissal which we direct."

50. Close scrutiny of the evidence makes it clear that on 08.8.2007 at about 11.00 p.m. the accused/appellants had fired shots with country made pistols on the deceased, who sustained serious injuries and died. The incident was witnessed by Raja Ram (PW-1), who has categorically stated that the accused/appellants had fired one shot each on the deceased. Evidence of this witness finds corroboration from the medical evidence, wherein it has been stated that the injuries were possible to have been caused by the firearms and the cause of death was shown due to shock and hemorrhage, as a result of ante-mortem firearm injuries. Since nothing has been brought on record by the defence to controvert the stand of the prosecution, this Court does not find any reason to disbelieve the statements of eyewitness, who has described the incident in a lucid manner. The injuries sustained by the deceased were so grievous that there was

no chance for his survival any longer and he would have met the instantaneous death. The accused/appellants had intention to kill the deceased.

51. Considering the facts, we are of the considered opinion that the trial court has discussed the entire evidence in detail and we have already recorded our reasons hereinabove for not accepting the stand taken on behalf of the appellants. We hardly find that there is any scope of doubt about the date, time, and place of occurrence which also established by the ocular testimony of PW-1. The recovery of the weapons on their pointing out, the utilization thereof and the manner of assault by the appellants all stood corroborated with the medical evidence and further fortified by the post-mortem report. We are also of the opinion that the inquest proceedings also do not create any doubt. The trial court is also fully justified in coming to the conclusion that there was meeting of mind established from the evidence on record. The evidence on record also indicates that all the accused had joined together on spot with the common intention of committing murder of the deceased.

52. On close scrutiny of the evidence, we do not find any error in appreciation of evidences by learned trial court and arrive at the conclusion of convicting the appellants.

53. Consequently, both the appeals, being devoid of merit, are liable to be dismissed and are hereby dismissed.

(2022) 9 ILRA 1650
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA , J.

Criminal Appeal No. 4673 of 2019

Badri Narayan ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Amar Jeet Upadhyay

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Criminal Procedure Code,1973-Section 374(2)-Indian Penal Code,1860- Sections 376, 506 IPC - 3/4 POCSO Act-Challenge to-Conviction-From the statement of P.W.-1 and P.W.-2 it appears that prosecution story is cogent, credible and reliable-The prosecution is able to prove its case beyond shadow of doubt, therefore, prosecution has proved the charges against the appellant under Section 376 I.P.C. and Section 3/4 of the POCSO Act-In the present case, it is clear that the victim is below 10 than years and the appellant is 58 years adult committed rape upon a girl of tender age, so deterrent punishment is called for- Since the appellant has already undergone 8 years in jail thus, the awarded sentence is reduced to the period already undergone by the appellant-Therefore, the conviction (Para 1 to 34)

B. Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the

circumstances make it safe to dispense with it, must be present to the mind of the judge, …. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practise that there must, in every case, be corroboration before a conviction can be allowed to stand." Further, it is also a well settled principle of law that the testimony of child witness can be relied upon along with other circumstances and corroborative evidence to convict the accused. Undoubtedly, the settled proposition of law that the evidence of child witness is required to be scrutinised and appreciated with great caution. (Para 16,17)

C. The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence, which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter-productive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. (Para 28)

The appeal is partly allowed. (E-6)

List of cases cited:

1. Gopal Singh Vs St. of U.K. (2013) JT 3 SC 444

2. Guru Basavaraj @ Benne Settapa Vs St. of Karn. (2012) 8 SCC 734

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

4. Ahmed Hussein Vali Mohammed Saiyed & anr. Vs St. of Guj. (2009) 7 SCC 254

5. Ravji Vs St. of Raj. (1992) 2 SCC 175

6. Dhananjoy Chatterjee Vs St. of W. B. (1994) 2 SCC 220

7. Sevaka Perumal etc. Vs St. of T.N. (1991) AIR SC 1463

8. St. of Punj. Vs Ramdev Singh (2004) 48 ACC 300

9. St. of H.P. Vs Dharmapal (2004) 9 SCC Page 681

10. Rameshwar Vs St. of Raj. (1952) SCR 377, 386 : AIR 1952 SC 54 : 1952 Cri LJ 547

11. Gagan Bihari Samal Vs St. of Ori.(1991) 3 SCC 562

12. Yogesh Singh Vs Mahabeer Singh & ors. (2016) AIR SC 5160

13. St. of H.P. Vs Dharmapal (2004) 9 SCC Page 681

14. St. of Punj. Vs Ramdev Singh (2004) 48 ACC 300

15. Shri Bodhisattwa Gautam Vs Miss Subhra Chakraborty (1996) AIR SC 922

16. Sevaka Perumal etc. Vs St. of T.N. (1991) AIR SC 1463

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. This criminal appeal has been filed against the judgment and order dated 27.6.2019 passed by Special Judge, POCSO Act/Additional Sessions Judge, Court No. 8 Meerut, in Special Criminal Case No. 30 of 2015 arising out of Case Crime No. 831 of 2014, under Sections 376, 506 IPC and 3/4 POCSO Act, P.S. Inchauli, District Meerut in which the appellant has been convicted and sentenced for the offence under section 376 IPC for 10 years R.I. with fine of 10,000/- in

default of payment of fine additional imprisonment of 2 months, under section 506 IPC for 1 year R.I. with fine of Rs. 500/- in default of payment of fine additional imprisonment of 15 days and for under section 3/4 POCSO Act for 10 years simple imprisonment and fine of Rs. 10,000/- and in default of payment of fine additional imprisonment of 2 months.

2. Brief facts of the case is that F.I.R. was lodged by the mother of the victim, who is the complainant and the residence of Police Station- Kuvad, District- Girideeh, District- Jharkhand, presently residing in House No. 704, I Block, Ganganagar Meerut has lodged a written report at Police Station- Inchauli District- Mathura against the appellant with the allegation that that one month prior her maternal-father-in-law came for stay at her home. One month prior of lodging the F.I.R. the appellant committed rape upon her minor daughter, who is aged about 8 years. When on 10.11.2014 the condition of daughter became deteriorated then her daughter was checked up by the doctor and the doctor opined that sexual assault has been done against her daughter. Complainant enquired with the victim then victim told that one month earlier the appellant committed rape upon her by extending threat to her daughter. When the appellant was asked about the alleged incident, then the appellant on the behest of relationship requested for not saying about this incident to anyone and told that all the expenses on the treatment of her daughter shall be borne by him. She also stated that to create fear upon complainant, the appellant himself inflicted injuries on his neck and on account of injury on neck he was admitted in medical college.

3. On the basis of written report, (Exbt. Ka-1), F.I.R. was lodged against the appellant as Case Crime No. 831 of 2014, under Sections 376, 506 IPC and 3/4 POCSO Act, P.S. Inchauli, District Meerut. After lodging of the F.I.R. the investigation of the present case was entrusted to the Investigating Officer- S.I. Om Veer Gupta. During the course of the investigation the site plan was prepared. The statements of the complainant and victim were also recorded. In the statement of under Section 161 Cr.P.C. the victim has stated that her age is about 8 years. During the course of the investigation the victim was also medically examined on 15.11.2014 in which she herself stated that her maternal-grandfather committed rape upon her 2-3 times. A medical examination report was prepared by P.W.-5, Dr. Sangeeta and as per medical examination report, no external or internal injury was seen on the body of the victim and her hymen was also found intact. Vaginal smear was taken for further examination and as per report dated 18.11.2014, no spermatozoa was seen on the vaginal smear. During the course of the investigation, the statement of the victim was also recorded under Section 164 Cr.P.C. in which she clearly stated that the appellant committed penetrative sexually assaulted on her private part by inserting the finger. Thus, the victim has supported entire version of the prosecution.

4. After completing the entire formalities of investigation the charge sheet was filed against the appellant before the Additional District and Sessions Judge/Special Judge POCSO Act, Court No. 12 on 26.2.2015. The charges were framed on 25.1.2017 against the appellant under Sections 376, 506 I.P.C. and 3/4 POCSO Act. Charges were read over to the appellant. The appellant denied the charges against him and claimed to be tried.

5. Prosecution in order to prove its case examined

(i) P.W.-1,-Sangeeta, who is complainant of this case, has clearly supported the entire version of prosecution and she proved the written report as Exbt-Ka-1. She clearly stated in her statement that her daughter/victim told her that the appellant committed rape in the absence of the complainant and her husband. She further submitted that when the condition of the victim became deteriorated then the victim was examined by the doctor. In pursuance of examination of the victim, the doctor opined that the victim was sexually assaulted. When she asked her daughter then her daughter stated entire version to her mother. On the basis of statement of her daughter the F.I.R. was lodged by P.W.-1 by presenting the written report as Exbt- Ka-1.

(ii) P.W.-2 is the victim and in her statement recorded in October, 2015 she stated that the appellant committed rape upon her by extending threat. She clearly stated that the appellant inserted his finger in her private part and he had also shown the victim indecent film/picture on his mobile phone. He also extended threat to kill her for disclosing this incident to anyone. The victim is minor and the age of the victim was below than 10 years. The victim has also supported her previous version recorded under Section 161 Cr.P.C. in the statement recorded under Section 164 Cr.P.C. as Exbt. Ka-2.

(iii) P.W.-3, constable, namely, Gudia has clearly stated on the basis of written report that she registered the F.I.R. on 15.11.2014 against the appellant as Case crime No. 831 of 2014 under Section 376, 506 I.P.C. and 3/4 of the POCSO Act and thus she proved the chik F.I.R. as Exbt- Ka-3 and the general diary as Exbt- Ka-4.

(iv) P.W.-4- Investigating Officer/S.I. Om Veer Gupta proved the scatch map of the place of occurrence as Exbt- Ka-5 and charge sheet as Exbt- Ka-6.

(v) P.W.-5- Dr. Sangeeta examined the victim on 15.11.2014 and she stated that at the time of examination of the victim she opined that the victim was unmarried and was aged about 8 years. The menses of the girl was not started. At the time of examination of the girl, no external or internal injury was found on the body of the victim. She proved the medical report as Exbt- Ka-7. She clearly stated that hymen of the victim was intact. As per medical examination, no external or internal injuries was seen on the body of the victim and it is also stated in her statement that in vaginal smear no spermatozoa dead or alive seen.

Thus, the prosecution relied upon as oral evidence of P.W.1 to P.W.-5 and so far as documentary evidence is concerned the prosecution relied upon Exbt. Ka-1 to Exbt- Ka-7.

6. After conclusion of the trial the statement of the accused-appellant was recorded under Section 313 Cr.P.C. in which the entire prosecution evidence were read over to the appellant and the appellant submitted that all the witnesses stated false statement against him before the court. Although he stated that that he wants to lead evidence in his defence but no defence witness or document was produced by the appellant.

7. Lastly, in statement under Section 313 Criminal Procedure Code the appellant stated that the complainant- Sangeeta inflicted cut injury on the neck of the appellant by sharp edged weapon and when she came to know that the appellant had not got any serious injury then she lodged false

and frivolous F.I.R. on the basis of concocted story relating to sexual exploitation of her daughter.

8. After appreciating and considering the rival contentions of the parties and scrutinizing the evidence, the learned trial court held the accused guilty and convicted him for the charged offences as aforesaid.

9. Learned counsel for the appellant argued that the appellant is innocent and has been falsely implicated in this case. It is also submitted that the F.I.R. lodged against the applicant is too much delay so no reliance can be placed, as the delay in lodging in the F.I.R. itself belied the prosecution case. He also submitted that the appellant is aged about 60 years and closed relative of complainant. In fact, the complainant has taken money from the accused/appellant and when the appellant asked about him money from the complainant, then the complainant inflicted injury to the appellant and cut his neck by knife in which the appellant received serious injury on neck and was admitted at LLRM Medical College, Meerut. When the complainant was in apprehension that the appellant may die then to save her skin and save herself from any criminal proceedings the complainant registered false and frivolous case of rape against the appellant. It was further stated that as per medical examination no mark of internal or external injury was seen on the body of the victim and hymen was intact. Therefore, no question of rape arises. Thus, the learned trial court has committed material illegality and irregularity in convicting the appellant in the present case. Thus, the conviction of the appellant was only on the basis of conjectures and surmises. Thus, the order and judgment of the trial court is liable to set aside.

10. Learned counsel for the appellant submits that if this Court has come to conclusion that allegation against the appellant is well proved then he wants to advance his submission on the quantum of sentence imposed upon accused-appellant, therefore, he submits that the appellant is senior citizen and is in jail since 29.11.2014. Thus, he remained in jail during investigation during entire period of trial and during pendency of appeal, thus, appellant is languishing in jail about 7 years and 8 months, so he prays for leniency.

11. Learned A.G.A. opposed the argument raised by the learned counsel for the appellant and submitted that the arguments of the appellant has no force and the present appeal is liable to be dismissed. Learned A.G.A. also submitted that as per medical report redness and swelling was found on the private part of the girl. Penetrative sexual assault has been committed by the appellant. One of the arguments of the learned counsel for the appellant is that no mark of injury was seen on the body of the victim. It was also reported that hymen was intact and no spermatozoa was found on the private part of the victim in the vaginal smear of the victim and therefore, offence under Section 376 I.P.C. and 3/4 of the POCSO Act is not made out against the appellant. In reply to this contention of the learned counsel for the appellant, learned A.G.A. relied upon the provisions of Section 375 I.P.C. and Section 3 of the POCSO Act be read.

12. I have heard Sri Amar Jeet Upadhyay, learned counsel for the appellant, learned A.G.A. and perused the record.

13. The provisions of Section 375-b I.P.C. is given below:-

375. Rape.-- A man is said to commit "rape" if he--

(a) ----------

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

The provisions of Section 3-b of the POCSO Act is given below:-

Section 3-Penetrative sexual assault

A person is said to commit "penetrative sexual assault" if--

(a) -------

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

Thus, on the perusal of the the definition of Section 375-b and Section 3 of the POCSO Act it appears that offence under Section 376 I.P.C. and 3/4 of the POCSO Act is made out against the appellant, so it cannot be said that the appellant has wrongly been convicted by the trial court. Thus, if the appellant inserted his finger in private part of the child/victim then it cannot be said that the appellant is not guilty of offence of rape.

14. One of the contentions of the learned counsel for the appellant is that F.I.R. was lodged with inordinate delay thus no reliance can be placed and delay in lodging the F.I.R. itself belies the whole prosecution story. Hon'ble Supreme Court in a catena of judgement has held that mere delay in lodging the FIR is no ground to doubt the prosecution case when it is properly explained. In ***Tara Singh and others Vs. State of Punjab, AIR 1991 SC 63***, Hon'ble Supreme Court held that mere delay in lodging the FIR by itself cannot give scope for an adverse inference leading to rejection of the prosecution case outright. It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. On perusal of the statement of P.W.-1, it appears that delay is clearly explained by the complainant thus delay in lodging the F.I.R. does not affect the credibility of prosecution version.

15. It is a settled principle of law that in cases involving sexual assault/rape, it is generally difficult to find any corroborative witnesses, except the victim herself and therefore, the evidence of the victim is sufficient for conviction unless there exist compelling reasons for seeking corroboration. Thus, a conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The Apex Court has time and again held that the sole testimony of the prosecutrix is sufficient to hold the accused guilty if it inspires confidence and the same principles have been reiterated in ***Vijay v. State of Madhya Pradesh reported in (2010) 8 SCC 191***. Relevant paragraph of the

"14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict

the accused on the sole testimony of the prosecutrix."

16. In ***Gagan Bihari Samal v. State of Orissa reported as (1991) 3 SCC 562***, The Hon'ble Supreme Court of India whilst observing that corroboration is not the sine qua non for conviction in a rape case, held as follows :

"6. In cases of rape, generally it is difficult to find any corroborative witnesses except the victim of the rape. It has been observed by this Court in Bharwada Bhoginbhai Hirjibhai v. State of Gujarat [(1983) 3 SCC 217 : 1983 SCC (Cri) 728 : AIR 1983 SC 753] as follows:

"Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.

A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors, the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated."

The above observation has been made by Apex Court relying on the earlier observations made by Apex Court in ***Rameshwar v. State of Rajasthan [1952 SCR 377, 386 : AIR 1952 SC 54 : 1952 Cri LJ 547]*** with regard to corroboration of girl's testimony and version. Vivian Bose, J., who spoke for the Court observed as follows: (SCR p. 386)

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, ... The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practise that there must, in every case, be corroboration before a conviction can be allowed to stand."

17. Further, it is also a well settled principle of law that the testimony of child witness can be relied upon along with other circumstances and corroborative evidence to convict the accused. Undoubtedly, the settled proposition of law that the evidence of child witness is required to be

scrutinised and appreciated with great caution. In this regard, reference can be made to the dicta of the Apex Court in the case of Yogesh Singh v. Mahabeer Singh and others reported in AIR 2016 SC 5160, wherein the Apex Court has held that:

"22. It is well settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law. (See Prakash v. State of M.P. [Prakash v. State of M.P., (1992) 4 SCC 225 : 1992 SCC (Cri) 853] , Baby Kandayanathil v. State of Kerala [Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084] , Raja Ram Yadav v. State of Bihar [Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287 : 1996 SCC (Cri) 1004] , Dattu Ramrao Sakhare v. State of Maharashtra [Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341 : 1997 SCC (Cri) 685] , State of U.P. v. Ashok Dixit [State of U.P. v. Ashok Dixit, (2000) 3 SCC 70 : 2000 SCC (Cri) 579] and Suryanarayana v. State of Karnataka [Suryanarayana v. State of Karnataka, (2001) 9 SCC 129 : 2002 SCC (Cri) 413] .)

23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. (Vide Panchhi v. State of U.P. [Panchhi v. State of U.P., (1998) 7 SCC 177 : 1998 SCC (Cri) 1561])"Appreciation of testimony of the Victim 'T

18. In view of settled law, I shall examine whether the evidence adduced by the prosecution, particularly the testimony of the victim, is trustworthy, credible and can be relied upon. From the perusal of the record, it transpires that the prosecutrix has deposed on same lines and there are no material contradictions in her testimony. The statement of the victim, P.W.-2 is duly supported with the statement of P.W.-1-Sangeeta, mother of the victim. The statement of the victim is also supported with medical evidence.

19. One of the arguments of the learned counsel for the appellant is that no mark of injury is present on the body of the victim but there is no force in the contention that there is forcible intercourse and it would have resulted into some injury on the prosecutrix. Presence of injury are not always sine qua non to prove the charge of rape. It would be kept in mine in the case of rape on a girl- child, who is aged about 8 years and not upon a grownup woman. In case of rape upon a child, sensitive approach of court is always needed. In the present case, the appellant has been charges for inserting finger in the private part of the victim, so question of rapture of hymen is not inevitable.

20. Further there are catena of decisions of Hon'ble Apex Court that it is necessary for the court to have a sensitive approach when dealing with the cases of rape. It is also trite that in the case of **State of Himachal Pradesh Vs. Dharmapal, (2004) 9 SCC Page 681**, Hon'ble Apex Court held that "rape is a serious offence, as it leads to an assault on the most valuable possession of a woman i.e. character, reputation, dignity and honour."

21. In State of Punjab Vs. Ramdev Singh 2004 (48) ACC 300 Hon'ble Apex Court held as under:-

"Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor. It leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys, as noted by Apex Court in Shri Bodhisattwa Gautam Vs. Miss Subhra Chakraborty, AIR 1996 SC 922 the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21of the Constitution of India, 1950 (in short the 'Constitution'). The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."

22. Considering the entire facts and circumstances of the present case, the Court is of the view that the prosecution is able to prove the charges levelled against the appellant.

23. However, learned counsel for the appellant stated that if this Court finds that prosecution is able to prove his case, then he only wants to advance his submission on the quantum of sentence imposed upon the accused and prays for leniency.

24. Not pressing the criminal appeal after the conviction of the accused by the court below is like the confession of the offence by the accused. The Courts generally take lenient view in the matter of awarding sentence to an accused in criminal trial, where he voluntarily confesses his guilt, unless the facts of the case warrants severe sentence.

25. In the case of ***Sevaka Perumal etc. Vs. State of Tamil Nadu AIR 1991 SC 1463,*** the Apex Court in the matter of awarding proper sentence to the accused in a criminal trial has cautioned the Courts as under:

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

26. In the case of ***Dhananjoy Chatterjee Vs. State of W. B. [1994] 2 SCC 220,*** this Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's credibility. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the

crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. Similar view has also been expressed in **Ravji v. State of Rajasthan, [1996] 2 SCC 175.** It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

27. Appropriate sentence is the cry of the society. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

28. This position was reiterated by a three-Judge Bench of the Apex Court in ***Ahmed Hussein Vali Mohammed Saiyed and Anr. vs. State of Gujarat, (2009) 7 SCC 254,*** wherein it was observed as follows:-

"99.....The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence, which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

100. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime.

The court must not only keep in view the rights of the victim of the crime but the society at large also while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong."

29. In ***Jameel vs. State of Uttar Pradesh (2010) 12 SCC 532***, this Court reiterated the principle by stating that the punishment must be appropriate and proportional to the gravity of the offence committed. Speaking about the concept of sentencing, this Court observed thus:

"15. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing

process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

30. In ***Guru Basavaraj @ Benne Settapa vs. State of Karnataka, (2012) 8 SCC 734***, while discussing the concept of appropriate sentence, this Court expressed that:

"It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice, which includes adequate punishment cannot be lightly ignored."

31. In ***Gopal Singh vs. State of Uttarakhand JT 2013 (3) SC 444*** held as under:-

"18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence....."

32. On perusal of the entire record, considering the facts and circumstances of the present case and keeping in view of the statement of P.W.-1 and P.W.-2 it appears that prosecution story is cogent, credible and reliable. The prosecution is able to prove its case beyond shadow of doubt, therefore, prosecution has proved the charges against the appellant under Section 376 I.P.C. and Section 3/4 of the POCSO Act. In the present case, it is clear that the victim is below 10 than years and the appellant is 58 years adult committed rape upon a girl of tender age, so deterrent punishment is called for. Taking lenient view is out of question. Once a person is convicted for offence of rape, he should be treated with heavy hands and he is not deserving any indulgence or liberal attitude. Awarding of adequate sentence to him is not important.

33. On the present scenario the appellant is in jail since 29.11.2014 and during investigation and trial the appellant remained in jail. After conviction he was also in jail. Thus, presently he in incarceration for about 8 years. It is also admitted that the appellant is poor. During trial he was not represented by counsel of his choice, so the contention of learned counsel for the appellant to adopt a lenient view in awarding the sentence to the appellant is fully acceptable.

34. Therefore, the conviction of the appellant is confirmed under Section 376 I.P.C. and Section 4 of the POCSO Act. Thus, on the point of conviction the appeal is **dismissed**. So far as regards the quantum

of sentence is concerned, I considered that the minimum sentence of seven years is prescribed for offence under Section 376 I.P.C. and Section 4 POCSO Act. Therefore, keeping in view the facts and circumstances of the present case, I am of the view that end of justice would be served, if the appellant is sentenced to imprisonment for the period, which he has already undergone, **consequently awarded sentence is reduced to the period already undergone by the appellant-Badri Narayan**. It is hereby also directed that the fine clause shall be unaltered. Appellant is directed to deposit the fine of Rs. 10,000/- before the trial court. The deposited amount i.e. Rs. 10,000/- shall be awarded in favour of the victim under Section 357 (2) Cr.P.C.. Thus, this appeal is partly allowed on the point of sentence only.

35. With the above observations/ directions, this appeal is disposed of.

36. Let a copy of this order along with lower court record be transmitted back to the trial court concerned for necessary compliance. A copy of this order be also given to the Superintendent of Jail of the concerned District for compliance of order of this Court

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(2022) 9 ILRA 1661
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.08.2022

BEFORE

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

Criminal Appeal No. 4875 of 2014
With
Criminal Appeal No. 4713 of 2014
And
Criminal Appeal No. 1844 of 2015

Ishrar Ahmad @ Mintu ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Anubhav Chandra, Sri Devendra Mohan Singh, Sri Lallan Verma, Sri Mangala Prasad Rai, Sri Manoj Kumar Singh, Sri Ram Jatan Yadav, Sri Shivajee Srivastava

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Law - Criminal Procedure Code,1973-Section 374(2) - Indian Penal Code,1860-Sections 376 (2) (g), 307 302 - Challenge to-Conviction-Dying declaration- The accused persons committed rape with the victim-deceased very cleverly, cunningly and to avoid public shame the victim-deceased committed suicide-The dying declaration of the deceased regarding gang rape by the accused persons has been reiterated in her statement to her parents, I.O. or Magistrate and this fact is duly corroborated by the medical evidence and the report of Forensic Science Laboratory-*P.W 5 - Dr.* has also given evidence that Sperm was found in the vaginal smear of the deceased and on the underwear of the accused - Therefore, this part of her statement, which is supported and backed by medical evidence, forensic laboratory report and the evidence of other oral and documentary evidence is acceptable- So far as her evidence regarding burning of the deceased by accused persons is concerned, that part of her statement does not find support from any other evidence, accordingly, that part of the dying declaration has to be discarded being doubtful-if part of dying declaration is corroborated by an another evidence, then the same shall not be dispensed with merely on the ground that one part of the dying declaration is false- Trial court rightly convicted the accused persons who only for a momentary bliss ruined the life of deceased and forced herself to commit suicide.(Para 1 to 62)

B. In a case of rape, testimony of prosecutrix stands at par with that of an injured witness. It is really not necessary to insist of corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible. An accused can be convicted on the basis of sole testimony of the prosecutrix without any further corroboration provided the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. Woman or girl raped is not an accomplice and to insist for corroboration of the testimony amounts to insult to womanhood. On principle the evidence of victim of sexual assault stands at par with evidence of an injured witness just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender. The evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. Corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases but such evidence cannot be expected in sex offences having regard to the every nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from rules devised by the courts in the western world. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence as a general rule, there is no reason to insist on corroboration except from the medical evidence where having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to this qualification that corroboration can be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation or when the probability factor is found to be out of tune. (Para 57)

C. In India the *Maxim Falsus in Uno Falsus in Omni Bus* does not apply, meaning thereby, if part of the evidence of a witness is incorrect and part of the evidence is correct then the whole evidence cannot be thrown out and the correct part of evidence shall be taken into account. Since the dying declaration statement of the deceased has been considered as evidence under Section 32 of the Indian Evidence Act and her statement to her father (informant) P.W 1 under Section 6 of the Indian Evidence Act has also been considered by lower court, therefore, applying this principle, the learned trial court has concluded that part of the statement of the victim-deceased regarding the crime of gang rape is correct and acceptable, but the other part of her evidence regarding causing burn injury by pouring kerosene oil by the accused persons is incorrect.(Para 59)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Dinesh Vs St. of Raj.(2006) 3 SCC, 771

2. Mohd. Iqbal & anr. Vs St. of Jhar. (2013) AIR SC 3077

3. Raja Vs St. of Karn. (2016) 10 SCC 506

4. St. of U.P. Vs Chhotey Lal (2011) AIR SC 697

5. Santosh Moolya Vs St. of Karn. (2010) 5 S.C.C 445

6. George Kutty Vs St. of Ker.(1992) Cri.L.J. 1663

7. Godhu Vs St. of Raj.(1974) AIR SC 2188

8. Shakuntala Devi Vs St. of Hary. (2008)

9. Gulab Singh Vs St. of U.P. (2003) 47 ACC 161

10. Narendra Kumar Vs St. of N.C.T of Delhi (2016) AIR SC 150

11. Raju Dewada Vs St. of Mah. (2016) AIR SC 3209

12. Laxman Vs St. of Mah. (2002) 6 SCC 710

13. Bhupinder Sharma Vs St. of H.P.(2003) AIR SC 4684

14. Sanjeev Vs St. of Har. (2015) 4 SCC 387 para 16

15. G. Parshwanath Vs St. Of Karn. (2010) AIR SC 2914

16. St. of U.P. Vs Manoj Kumar Pandey (2009) AIR SC 711

17. Ram Das Vs St. of Mah. (2007) 2 S.C.C 170

18. Moti Lal Vs St. of M.P. (2008) 8 SCC Pg 20

19. Bhagwan Jagannath Markad Vs St. of Mah. (2016) 10 SCC 537

20. Bable Vs St. of Chh. (2012) SC 2621

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

1. We have heard learned counsel for the appellants, learned A.G.A for the State and perused the material available on record.

2. Criminal Appeal No. 4875 of 2014, Criminal Appeal No. 4713 and Criminal Appeal No. 1844 of 2015 have been filed by the appellants therein challenging a common judgment and order passed by Additional Sessions Judge, Court No. 2, Ballia in S.T No. 217 of 2011, arising out of Case Crime No. 53 of 2011, under Sections 376 (2) (g), 307 and 302 I.P.C, Police Station - Sukhpura, District - Ballia, convicting them under Section 376 (2) (g) I.P.C and sentencing for rigorous imprisonment for life and fine of Rs.50,000/- on each of them with default stipulation.

3. The brief facts of the case are as under :-

On a written complaint (Ex. Ka-1) of Nazim Ansari (PW-1), F.I.R (Ex. Ka-23) of Case Crime No. 35 of 2011 was registered under Section 376 I.P.C, at Police Station - Sukhpura, District - Ballia on 08.04.2011 at 12:15 hours by Constable Clerk (PW-10) against Israr @ Mintu, Pintu Yadav and Anoop Yadav. It has been stated in the F.I.R that Zareena Khatoon, daughter of the informant, aged about 17 years, was alone in the house at the time and date of occurrence when Mintu son of Saleem Ansari, Pintu son of Suraj Yadav and Anoop son of Laxmi Yadav, resident of Sukhpura, Police Station - Sukhpura, District - Ballia, resident of the same village came there and enquired about the mother of the girl. On having information that mother of the girl was away from the house, they got the door opened and sat inside the house to wait for her mother's arrival. Pintu and Anoop bolted the door from inside while Mintu @ Israr bolted from the outside. Thereafter Pintu and Anoop by pressing her face by a pillow committed rape upon her. On alarm being raised they fled from there. When the informant came to his house, the girl narrated the whole incident and when he went out of the house in search of the accused persons he saw that his daughter had immolated herself due to which her whole body was burnt. Immediately, the girl was rushed to the District Hospital, Ballia, where her treatment was going on and he came to give written complaint of the incident to the Police Station about the incident occurred at about 7:00 pm. On 07.04.2011. the incident was witnessed by the villagers, who saw the appellants coming out of the house of the informant hurriedly. On 08.04.2011 at about 12:05 dying declaration was recorded by the Nayab Tehsildar, Sadar Ballia, after examination by the Medical Officer,

District Hospital Ballia, who certified that she was mentally fit to give statement.

4. In her dying declaration, she narrated the whole story regarding the rape and also added that she was burnt by the accused persons, though, it is not in conformity with the contents of F.I.R and deposition of informant P.W-1. The lower court has not accepted part of the dying declaration that after rape she was set ablaze by the accused persons. After recording the dying declaration she died at 11:25 p.m on 18.04.2011. She was hundred percent burnt.

5. **P.W 5. Dr. Manju Singh**, District Women Hospital, Varanasi, the then Doctor at District Woman Hospital, Ballia, upon medical examination, found swelling on her private part due to burn, there was swelling upon the whole body due to burnt, but there was no sign of injury on her private parts. Her hymen was old torn and it was easily taking one finger entrance. After x-ray, she was found above 18 years old; in her vaginal smear examination male sperm was found.

6. **P.W. 6. Dr. V.K. Gupta,** Medical Officer, District Hospital, Ballia, did autopsy, he reported that the deceased was an average built lady of 16 years of age, she died due to burn injury.

7. **P.W. 7. Dr. Krishna Chandra Rai**, New Primary Health Center, Viravkot (Badagaon), Varanasi, the then Doctor District Hospital, Ballia, had examined the deceased on 07.04.2011 as Emergency Doctor, in District Hospital, Ballia, who found that deceased was hundred percent burnt. He referred the deceased to the Surgeon of District Hospital, Ballia and recorded and proved the injuries as Ex. - Ka 10. He has also proved his both certificates regarding fitness of the injured before and after recording of the Dying Declaration as Ex. K - 27 and Ex. K - 28 upon the Dying Declaration Ex. K-2.

8. **P.W 9. Kanhaiyya Lal Yadav**, Traffic Sub-Inspector, the then Chauki In-Charge, Police Station - Kotwali, Ballia, had completed the inquest report Ex. K-17 and prepared the papers of Photo-naash Ex. K-18, Chalan-naash Ex. K-19, letter sent to R.I. Ex. K-21, and letter sent to C.MO Ex. K-22 and prepared specimen seal (namuna mohar) Ex. K-20.

9. **P.W.10. Head Constable Bhagwan Ram**, Police Station - Suhpura, District- Ballia, has prepared the Chik F.I.R on the basis Tehrir and entered the same in G.D, which is called Kaimi G.D. and proved the same as Ex. K.23 and K-24.

10. **P.W 8. Ashok Singh Yadav**, S.O. Chopan, District Sonbhadra, I.O. of the case has investigated the case and prepared a map, proved the same as Ex K-11, he took ashes and burnt clothes of the deceased and prepared memo and proved the same as Ex. K-12. He also took the clothes of accused Pintu Kumar Yadav and Anoop Yadav prepared recovery memo and proved the same as Ex. K-13. He added Section 302 I.P.C and proved the same as Ex. K-14, when the victim died, he after inquest added Section 302 I.P.C and submitted the charge-sheet under Sections 376 (2) (g) /307/302 I.P.C and proved the same as Ex. K-16. He also proved the clothes of accused persons as material Ex. 1 to 7 and burnt clothes of deceased as material Ex. 8.

11. After submission of charge-sheet the case was committed to the Court of

Sessions, charges were framed on 11.08.2013 and 18.11.2013 and the evidences were recorded. Statement under Section 313 Cr.P.C as recorded on 16.05.2013 and later on written statement under Section 313 Cr.P.C were also adduced by all three accused persons and opportunity to adduce the evidence was also provided. In defence D.W-1 Shamshad Ahmad was examined.

12. After hearing the arguments the lower court found the charge under Section 376 (2) (g) I.P.C to be proved and also opined that the case under Sections 302/34 and 307/34 I.P.C have not been proved, accordingly the accused persons were convicted and sentenced against which this appeal has been preferred by the convicted accused persons.

13. No appeal has been preferred from the side of State so far as the acquittal under Sections 302/34 and 307/34 I.P.C is concerned.

14. The accused persons have taken following grounds:-

15. In Criminal Appeal No. 844 of 2015, the accused -Pintu Yadav has taken the ground that no eye witness in the aforesaid case has been examined to prove the charges. The defence version and evidence were not properly considered by the trail court and the appellant has not committed any crime. The impugned judgment and order has been passed against the weight of evidence on record. The judgment and order has been passed on the basis of conjectures and surmises and also the sentence is too severe, hence the appeal be allowed and the appellant be released on bail.

16. The appellant - Anoop Yadav in his Appeal No. 4713 of 2014 has taken the ground that the impugned judgment and order is against the law and facts of the case. The appellant has falsely been implicated in the aforesaid case. No eye witness has seen the incident nor examined. The defence version and statement version of the defence witnesses were not considered. Rests of the grounds are similar grounds taken by the co-accused and Pintu Yadav.

17. The accused - Ishrar Ahmad @ Mintu in Criminal Appeal No. 4815 of 2014, has taken the ground that the impugned judgment is bad in the eye of law, because the person, who records a dying declaration must be satisfied that the dying person was making a conscious and voluntarily statement with normal understanding, but the trial court without considering the settled principles of law recorded the convictions on the basis of dying declaration, which is unsustainable in the eyes of law. It is fully established that the deceased sustained hundred percent burn injuries and in such condition how she can adduce statement, this aspect has been ignored by the trial court. If the present appellant was outside of the house then he could not be one of the offender under Section 376 (2) (g) I.P.C and his act cannot be considered within the definition of gang rape under Section 376 (2) (g) I.P.C. The defence evidence has completely been overlooked and ignored by the trial court. The sentence awarded by the trial court is too severe in nature and also against the evidence on record, only relying on the dying declaration of the victim. There are material contradiction and discrepancies in the statement of the witnesses and the deceased's dying declaration. The judgment of conviction of the lower court is unjustified and against the evidence on record as there were several irregularities

and short comings in the prosecution case, which creates a doubt about the entire allegations made against the appellant, but despite of that the trial court has recorded the conviction of the appellant under Section 376 (2) (g) I.P.C. If the victim was hundred percent burnt then she was not in a position to state dying declaration. There is no single independent witness, who has supported the prosecution version, which itself creates doubt on the prosecution story, therefore the appeal be allowed.

18. **From the perusal of memo of appeal, it transpires that the accused persons have taken following grounds:-**

1. That the dying declaration made by the deceased is not liable to be accepted, as she was in the state of hundred percent burns and she had not given the statement in a conscious state of mind and voluntarily with the normal understanding.

2. That since the deceased had sustained hundred percent burn injuries; therefore, she was unable to give the dying declaration.

3. That the appellant -Israr Ahmad @ Mintu is said to be standing outside of the house, therefore, he cannot be said to be accused of gang raper under Section 376 2 (g) I.P.C

4. That Qamar-U-ddeen, uncle of the accused - Israr Ahmad @ Mintu had filed a Civil Suit No. 55 of 1989 - Qamar-U-ddeen Vs. Sikandar & Ors. in the Court of Munsif (West), Ballia, regarding opening of a window, due to which, he was falsely implicated.

5. That the deceased was having love affair with Chandan Gupta, due to which her father was defamed in the village and he wanted her early marriage with an another person, therefore when the family members of the deceased were out of the house shopping for her marriage proposal then being aggrieved, she put herself on fire to commit suicide and later on died.

19. After framing the charge and on denial of the charges, the prosecution adduced following witnesses to prove the charges.

P.W. 1 - Informant Nazeem Ansari, father of the deceased,

P.W. 2 - Sobra Begum, mother of the deceased,

P.W. 3 -Bhandari Prasad, Nayab Tehsildar, who recorded the dying declaration Ex. K 2.

P.W. 4 - Dr. R.N. Upadhyaya, Senior Surgeon, District Hospital, Ballia, who has treated the deceased and asked about the incident and proved the Ex-ray report Ex. K-3, Bed Head Ticket, Ex. K-4, Prescription District Hospital Ex. K-5 and paper regarding treatment Ex. K-6.

P.W. 5 - Dr. Manju Singh, District Women Hospital, Varanasi, examined the witnesses and proved her injury report as Ex. K-6 and supplementary report Ex. K-7 & K-8.

P.W. 6 - Dr. V.K. Gupta, Medical Officer, District Hospital, Ballia, has proved the postmortem report Ex.K-9.

P.W. 7 - Dr. Krishna Chandra Rai, New Preliminary Health Center, Viravkot (Badagaon), Varanasi, who first of all examined the victim and endorsed her injuries has and proved the same as Ex.K-10.

P.W. 8 - I.O Ashok Singh Yadav, S.O. Chopan, District Sonbhadra, has proved the map as Ex. K-11, specimen ashes and burnt clothes of the prosecutrix as Ex. K-12, clothes of the Pintu Kumar Yadav and Anoop Yadav, recovery memo of accused as K-13, G.D regarding addition of Section 307 I.P.C, Ex. K-14 and Charge-sheet Ex. K-16.

The witness has also proved the clothes of accused persons as material Ex. 1 to 7 and burnt clothes of the deceased material Ex. 8.

P.W. 9 - Kanhaiyya Lal Yadav, Traffic Sub-Inspector, who has proved the inquest report as Ex. K-17, Photo-naas as Ex. K-18, Chalaan-nash K-19, Specimen seal K-20, letter to R.I. K-21, letter to C.M.O, Ex. K-22.

P.W. 10 - Head Constable Bhagwan Ram, PS. Suhpura, District Ballia, who has prepared Chik F.I.R, and Kaymi G.D has proved its carbon copy respectively as Ex. K-23 and Ex. K-24.

Defence witness - D.W 1 - Shamshad Ahmad.

The prosecution has adduced and produced the following documentary evidence:

1. Written *Tehrir* Ex. K-1.

2. Dying Declaration Ex. K-2.

3. Ex-ray report Ex. K-3.

4. Bed Head Ticket Ex. K-4.

5. Prescription of District Hospital Ex. K-5.

6. Papers regarding treatment and Injury report Ex.K - 6.

7. Pathological report Ex. K-7 and K-8.

8. Postmortem Report Ex. K-9.

9. Injury Report Ex. K-10.

10. Map Ex. K-11.

11. Burnt clothes of the deceased Ex. K-12,

12. Recovery memo of the clothes of accused persons Ex. K-13.

13. G.D regarding addition of Section 307 I.P.C, Ex. K- 14.

14. Charge-sheet Ex. K-15, under Sections 376 and 307 I.P.C.

15. Charge-sheet Ex. K-16, under Sections 376 (2) (g) /307/302 I.P.C.

16. Inquest and other papers with inquest report Ex. K-17 and K-22.

17. Chik F.I.R and Kayami G.D. Ex K-23 and Ex. K-24.

18. Forensic Science Laboratory Report, Varanasi Ex. K -25 that sperm were found on the underwear of the accused Pintu Yadav.

19. On the lower half of the accused - Anoop Yadav Ex. K - 26, certificate by P.W 7 Dr. K.C Rai before and after recording the Dying Declaration as Ex. K-27 and Ex. K-28.

20. Underwear, lower & T. Shirt of accused - Pintu Yadav and Anoop Yadav as materiel Ex. 1, 2, & 3.

21. Underwear, T. Shirt, Full-pant, Ganzi of accused Israr @ Mintu as material Ex. 4 to material Ex.7.

22. Burnt clothes of victim deceased and ashes material Ex. 8.

20. Statements under Section 313 Cr.P.C of the accused persons were recorded, wherein they denied the incident and allegations and contended that the case has wrongly been instituted against them and false evidence has been adduced by the prosecutrix on the instigation of family members. Accused Israr @ Mintu has produced written statement in addition to his statement under Section 313 Cr.P.C. that he has falsely been implicated in the present case due to political enmity. The prosecutrix had love relation with Chandan Gupta, due to which her father was badly defamed and he wanted to settle her early marriage. Smt. Shahida, sister of deceased's mother had come with a proposal of marriage of the prosecutrix. On 07.04.2011 informant, his wife and Smt. Shahida had gone to purchase clothes and ornaments proposed to be given at the time of proposal, being aggrieved of that, the deceased herself immolated and attempted to commit suicide. Thoughtfully taking advantage a false report was lodged at behest of the informant against appellant-Israr @ Mintu and accused persons.

21. All the appeals are being decided together in following manner:-

22. The learned trial court acquitted the accused persons from the charges under Sections 307 & 302 I.P.C. Section 307 I.P.C had been framed against the accused persons Pintu Yadav and Anoop Yadav on the ground that an attempt was made by the accused persons to kill the deceased by pressing her face with pillow. The lower trial court has concluded that the pillow was put on the mouth and nose of the deceased only to prevent her from making hue and cry at the time of rape. There was no intention to commit the murder. It was done so that the deceased could not shout at the time of rape. This Court finds this finding factually and legally correct and no counter appeal has been preferred from the side of the State or the informant. Therefore, this Court accepts the conclusion regarding the acquittal under Section 307 I.P.C of the accused persons.

23. So far as the acquittal under Section 302 I.P.C is concerned, the State or the informant have not preferred any appeal against the judgment and order of acquittal under Section 302 I.P.C. In this regard, the lower court has categorically discussed the dying declaration made by the deceased and also the statement of her parents P.W 1 and P.W 2, and came to the conclusion that the dying declaration of the prosecutrix regarding rape is proved and regarding committing murder by setting her on fire by the accused persons is incorrect and not proved.

24. In view of the statement of P.W-1 - and averments of first information report, the lower court has concluded that only that part of the dying declaration regarding offence under Section 376 (2) (g) is proved and regarding setting the victim on fire by the accused persons to commit murder is not proved rather an improvement, which is an after thought and has come after the victim meeting with the parents to make the allegations serious against the accused persons. It has already been noted that no appeal has been preferred by informant or by the State against acquittal under Section 302 I.P.C of the accused-appellants.

Therefore this Court would not consider that part of alleged offence under Section 302 I.P.C and acquittal of the accused under Section 302 I.P.C. The Court is confined to the legality and illegality of the judgement and order of conviction of the accused appellant persons under Section 376 (2) (g) I.P.C.

25. **All the above questions shall be dealt with and answered in the decision of this appeal.**

26. (A) As per the F.I.R version, the occurrence took place on 07.04.2011 in the evening at about 07:00 p.m, F.I.R was lodged in Police Station - Sukhpura on 08.04.2011, at 12:00 p.m. naming all the accused persons and stating their specific role as to which accused had committed the offence and in which manner with the deceased. According to the prosecution version, the deceased aged about 17 years old, was alone in her house when all the three accused persons knocked the door and asked about her mother and when she informed them that her mother was out of station, then they got the door opened to wait for her mother, but when they entered into the house, accused Pintu Yadav and Anoop Yadav, bolted the house from inside and accused Israr Ahmad @ Mintu bolted the house from outside. They both raped the deceased, putting pillow on her mouth and nose to prevent hue and cry, threafter, they fled away from the incident. When the informant returned, his daughter narrated the whole story and thereafter he (informant) went to search the accused persons, after sometime he heard hue and cry and smoke rising from his house, then he returned immediately and found that deceased was burning and crying. He with the help of some villagers put out the fire and admitted her to the District Hospital, Ballia, carrying her in a Tempo. In the night her mother also reached from her Maika. On the next day, he narrated the whole story to Raju Warsi, who wrote the Tehrir, and he put his thumb impression and presented before the S.H.O, F.I.R was lodged and Chik F.I.R Ex. K-23 was prepared. This witness has proved the written Tehrir as Ex. K-1.

(B) Thus there is a plausible explanation of delay in lodging the F.I.R, as the informant was busy in treatment of the deceased and his wife (mother of the deceased) was also out of station.

(C) Delay in lodging the F.I.R is no ground to doubt the prosecution case, especially in the case of rape.

(D) In the case of ***Bable Vs. State of Chhattisgarh, A.I.R 2012, Supreme Court, 2621,*** Supreme Court held that it is settled law that an F.I.R registered under Section 154 Cr.P.C is not substantive peace of evidence. It is a document to accelerate the police machinery. If the scribe, who is not an eye-witness had not been examined, then it is not fatal for prosecution, and no adverse inference can be drawn. When the informant has proved the execution of the F.I.R by examining himself as P.W. (refer : ***Moti Lal Vs. State of M.P. 2008 (8) SCC Page 20).***

(E) In the case of ***Bhagwan Jagannath Markad Vs. State of Maharashtra (2016) 10 S.C.C, 537,*** Supreme Court held that F.I.R is not encyclopedia of all the facts relating to crime. The only requirement is that at the time of lodging the F.I.R, the informant should state all those facts, which normally strike to mind and help in assessing the

gravity of the crime or identity of the culprit briefly.

(F). In the case of ***Ram Das Vs. State of Maharashtra, (2007) 2 S.C.C 170,*** it is held that the mere delay in lodging an F.I.R about the incident of rape, is not by itself necessarily fatal to the prosecution case. But a belated report is a relevant fact which the Court must take notice.

(G). In the case of ***State of U.P. Vs. Manoj Kumar Pandey, A.I.R 2009 Supreme Court 711*** (three Judges Bench) and in the case of ***Santhosh Moolya & Anr. Vs . State of Karnataka (2010) 5 SCC 445,*** the Supreme Court held that normal rule that prosecution has to explain delay and lack of prejudice does not apply per-se to rape cases.

(H). In the facts of this case, the victim was hundred percent burnt, therefore, she was carried to the District Hospital by the informant and the informant was busy in her treatment attempting to save her life, therefore he was not having sufficient time to lodge the F.I.R on the same day. Lodging the F.I.R next day cannot be said to be a case of undue delay.

(I). In this case sufficient facts with regard to the commission of the offence has been mentioned in Tehrir on which ground the Chik F.I.R has been prepared and G.D entries made and proved. Though certain improvement have been made in dying declaration and in the evidence of P.W-2, (mother of the deceased), which shall be analyzed later on.

(J). In this case, the accused persons were well-known to the deceased, informant and mother P.W-2; they are named in the F.I.R with their parentage and specific role of each accused has been mentioned in the F.I.R. As per the F.I.R, dying declaration of the deceased and statement of the informant P.W-1, it has been established that at the time of incident, mother of the deceased had gone to her Maika (parental house), the informant had gone to Sukhpura to purchase vegetable and when he returned he found his daughter was weeping bitterly and he asked for the reason. She informed that Israr @ Mintu opened the door of the house on the pretext of meeting her mother, when she informed that her mother had gone to her maternal house then he said to open the door so that they may sit inside and wait for her mother. When she opened the door then accused Pintu and Anoop bolted the door from inside and accused Israr Ahmad @ Mintu stood outside and started monitoring of people. After committing the gang rape one by one, the accused persons ran away towards the west side and she started sobbing. The statement of the deceased to her father is admissible, reliable and acceptable under Section 6 and Section 32 of the Indian Evidence Act.

Section 6 of The Indian Evidence Act, 1972, reads as under :-

"6. Relevancy of facts forming part of same transaction.--Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places. Illustration.

(A) A is accused of the murder of B by beating him. Whatever was said or

done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

27. The case rests on the direct evidence and dying declaration of the deceased, in such cases motive has no significance.

Even in cases based on circumstantial evidence at times motive has no significance.

In the case of ***G. Parshwanath vs. State Of Karnataka on A.I.R 2010 S.C. 2914*** and in the case of Jagdish Vs. State of M.P. 2009 (67) ACC 295 SC, the Supreme Court held that it is true in a case of circumstantial evidence motive does have extreme significance but to say that in the absence of motive, the conviction based on circumstantial evidence cannot, in principle, be made is not correct. Absence of motive in a case based on circumstantial evidence is not of much consequence when chain of proved circumstances is complete.

In the case of ***Sanjeev Vs. State of Haryana (2015) 4 SCC 387 para 16,*** the Hon'ble Supreme Court has held that

"It is settled principle of law that to establish an offence (murder) by an accused, motive is not required to be proved. Motive is something which prompts a man to form an intention. The intention can be formed even at the place of incident at the time of commission of crime. It is only either intention or knowledge on the part of the accused which is required to be seen in respect of the offence of culpable homicide. In order to read either intention or knowledge, the courts have to examine the circumstances, as there cannot be any direct evidence as to the state of mind of the accused".

28. In this case D.W. 1 - Shamshad Ahmed, has been examined from the side of appellant - accused Israr Ahmad @ Mintu. D.W-1 deposed that the deceased was having love affair with Chandan Gupta of Sukhpura, she was student of Class 12 standard. Due to love affair between the deceased and Chandan Gupta, family of the informant was defamed in the village and in the area, therefore, sister-in-law of the informant came with a proposal of marriage of the deceased with another boy, and for making arrangement the informant and his wife and sister-in-law left the house for purchasing some clothes, sweets etc. Then a hue and cry was heard by him that house of the informant is on fire, people reached there, they found that the deceased was burning and some women neighbour of the house were extinguishing the fire with water; informant was the only man to reach there, thereafter, the villagers gathered and put the deceased on cot for carrying the deceased to District Hospital. The informant, his wife and sister-in-law reached the house and immediately victim was taken to District Hospital by a Tempo of Parashuram Chaudhary. Later, the deceased had died. Except the informant no other person of the village or woman who tried to save the deceased, has been examined. It has been established that first of all the informant reached the house alone and mother and Maushi of the deceased had not reached the house with him. After knowing the incident mother of the deceased reached the hospital, therefore, the defence version does not find support from the evidence of the prosecution and the circumstances.

It is admitted by D.W. 1 that he is a driver of Jeep (four wheeler), who leaves the house at between 6:00 to 6:30 a.m in

the morning and plies Jeep from Ballia to Sikandarpur and returns home in the evening. It is also noteworthy that this witness is interested witness and accused Israr Ahmad @ Mintu is the son of his maternal uncle, therefore, he is giving a false evidence to save the accused-appellant Israr Ahmad @ Mintu. No independent witness in support of the accused persons have been examined. Therefore, the defence version that the accused persons had not committed gang rape and the prosecutrix tried to commit suicide by burning herself due to marriage being fixed with an another person is not proved and is also not acceptable and creditworthy. In the Indian context normally no person will falsely make his unmarried girl child victim of rape to bring disrepute to herself and his family.

For want of any other oral or documentary evidence, it is also not proved that the informant or the victim had any reason or ground to falsely implicate the accused persons. The deceased before her death, has given a dying declaration to P.W. 3 - Bhandari Prasad, *Nayab Tehsildar*, that accused Pintu Kumar Yadav and Anoop Yadav after bolting the house from the inside raped her one by one while accused Israr @ Mintu locked the door from outside to provide them convenience.

P.W 5. Dr. Manju Singh, District Women Hospital, Varanasi, has proved that male sperm had been found, in the vaginal smear of the deceased. She has deposed that on 07 April, 2011 at about 8:50 p.m., victim was brought to District Hospital, Ballia, who died at 12:00 O' clock on 08 April, 2011, while giving a statement she was speaking, which establishes that she was in a position to give dying declaration.

Thus the motive behind the commission of crime is apparent and obvious that the deceased was a young girl and alone in the house, therefore, the accused persons found an opportunity to fulfil their desire and committed gang rape.

29. On 09 April, 2011 at about 11:30 a.m, inquest proceeding was conducted by the Police, her body was hundred percent burnt with medicine layer on her body and the dead body was sent for postmortem. Before her death she was admitted in District Hospital, Ballia, and was treated by the P.W-7 Dr. K.C. Rai in emergency, where she was brought in hundred percent burnt conditions. Bed Head Ticket and Injury Report have been proved as Ex. K-5 and Ex. K-10. As per Medico Legal Examination Ex.K-6, her hymen was found with inverted tag, vagina admitted one finger easily, vaginal smear was taken and the same was sent for pathological examination for presence of spermatozoa. The x-ray was done of her right elbow and right wrist joints for determination of her age and as per the supplementary report Ex. K-7, she was found to be above 18 years, sperms were also found in pathological report; Dr. Manju Singh opined that possibility of rape could not be ruled out.

30. As per postmortem report superficial to deep burn wound was present on all over the body and the death was due to septicemic shock as a result of anti-mortem burn injury. Report Ex. K-25 of Forensic Laboratory U.P. Police Line, Varanasi, reported that sperm was found on the underwear of the accused Pintu Yadav and as per report Ex. K 26 male sperm were also found on the half lower of the accused Anoop Yadav. Thus, the commission of crime of rape by the accused persons namely Pintu Yadav and

Anoop Yadav is also confirmed from the medical evidence. The learned counsel for the appellants was specifically confronted with the report to explain on instructions from the appellants, the learned counsel submits it is a case of false implication.

31. So far as the role of accused-appellant Israr @ Mintu is concerned, as per the F.I.R, first of all Israr @ Mintu, in the evening at 07:00 O' clock came and said for opening the door to meet the mother of the deceased, when the deceased said that she has gone to her maternal uncle's house then he insisted to open the door, they shall sit down inside the house and they shall wait her. When the door was opened, Mintu, Pintu and Anoop entered the house and locked the door from inside. Pintu and Anoop raped the deceased in turn. During that time the door of the room was locked from the outside by the accused Israr @ Mintu and he was standing outside the house of the informant and as watchman he was monitoring the people passing by. On the noise Pintu and Anoop ran away to the west side and Israr @ Mintu had also ran away. Knowing the said incident, informant went to the village to find Israr @ Mintu, Pinto and Anoop, and on reaching some distance from the house, he heard hue and cry and saw smoke rising from his house, he came back and saw that his daughter Zareena Khatoon (deceased) was burning and screaming; he with the help of the villagers put out the fire and after loading the victim in burnt condition, by the Tempo admitted her to the Sadar Hospital, Ballia, for her treatment. He also informed his wife, who reached the hospital in the night. Next day he went to Sukhpura and got Raju Warsi who wrote Tehrir on his narration and thereafter he put thump impression on the Tehrir and lodged the F.I.R.

Thus as per the F.I.R version accused Pintu Yadav and Anoop Yadav committed gang rape physically with the deceased with the help of the accused Israr @ Mintu providing protection to rest of the accused persons before her burning and death. He got opened the door being member of her community taking her into confidence and after entry of the two accused persons he bolted the door from the outside and started monitoring the people. On these facts, he has also been implicated as accused and member of gang rape, but according to the accused Israr @ Mintu, he has been falsely implicated on account of village rivalry and litigation, but no such direct litigation or rivalry has been found between the informant and the accused- Israr @ Mintu so that informant would falsely implicate him in the aforesaid crime.

It has already been concluded that D.W 1- Shamshad Ahmed is not a credible and independent witness as he is the maternal brother and son of maternal uncle of the accused Israr @ Mintu.

32. Under Section 376 (2) (g) I.P.C, gang rape has been defined, which is as under:-

Section 376 (2) (g) I.P.C, whosoever

"(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation 1.--Where a woman is raped by one or more in a group of persons

acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2.--"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3.--"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.]"

From bare perusal it is clear that in furtherance of a common intention to commit gang rape, if it is proved, that one or more persons had constituted a group or had formed a gang and each of them were acting in furtherance of the common intention of the said gang, then each member of the gang shall be deemed to have committed the offence of rape and shall be punished as provided above. Therefore, from the bare provision of Section 376 (2) (g), it is clear that actual rape by all member of the gang is not necessary.

In ***Bhupinder Sharma Vs. State of Himanchal Pradesh, AIR, 2003 S.C, 4684,*** Supreme Court held that where more than one accused has completed the act of rape, in will constitute a "gang rape' and as per explanation of Section 376 I.P.C, it is not necessary for the prosecution to adduce proof that everyone of the gang had actually raped the victim. Every member of the gang rape acting in furtherance of common intention of the group has to be awarded minimum sentence of 10 years rigorous imprisonment as stipulated in Section 376 (2).

33. From the evidences of P.W 1, P.W 2 and Dying Declaration of the deceased, it is established that accused Israr @ Mintu, firstly got the door of the house of the victim opened and when the accused-appellant Anoop and Pintu Yadav entered the house, he bolted the door of the house from outside and started monitoring and only after commission of crime all the accused-appellants disbursed and ran away. Therefore, it can not be said that accused Israr @ Mintu would not be considered to be member of gang rape because he not only facilitated the other accused persons in physically raping the victim but also opened the door after commission of crime when the victim started screaming and made hue and cry. Such active role played by him shall not exonerate him from the liability.

The role of the accused Israr @ Mintu is very much enumerated in *Tehrir* Ex. Ka-1 and Chik F.I.R Ex. Ka- 23. This Court has already concluded that the narration of the deceased to her father informant P.W 1 - Nazeem Ansari, is relevant and admissible in evidence under Section 6 of the Indian Evidence Act.

The deceased has also narrated the story of gang rape to the informant P.W-1 and her mother P.W-2, and the I.O before her death, therefore her statement to her parents shall also be taken into account as dying declaration under Section 32 of the Indian Evidence Act.

34. P.W 1 - Nazeem Ansari has deposed that on the fate-full day his wife had gone to her parental house and he had gone to Sukhpura to purchase vegetable

etc. leaving the deceased alone in the house and when he returned at about 07:00 p.m in the evening, he found that his daughter was sobbing and when he asked the reason, she narrated the whole story of the incident that Israr @ Mintu knocked the door and asked to meet her mother and when she informed that she had gone to the house of maternal uncle then he insisted to open the door with the averment that they shall wait for her mother inside the house. After opening the door all the three persons entered into the house and Pintu and Anoop bolted the door from inside and Israr @ Mintu after coming out bolted the door from out side and two offenders inside the house raped her in turn. Accused Israr @ Mintu was standing outside the house and locked the door from outside and was monitoring the people passing by the road and when she made hue and cry, the accused persons ran away, and when he (complainant) went to the village to search for the accused persons, his daughter put herself on fire then he returned and with the help of villagers put out the fire and carried her to District Hospital by Tempo.

This witness has not deposed that his daughter was burnt by accused persons.

35. **P.W. Sobra Begum**, mother of deceased, has deposed that her daughter told that Mintu and Anoop of the village had done bad deeds with her and set her on fire by sprinkling kerosene oil; on information her husband took his daughter to the District Hospital, Ballia, in a burnt state and she also went the hospital there and when her daughter became conscious she told her all the things at 12:00 in the night about the said incident. In cross-examination she accepted that her daughter had not told that accused persons had burnt her, but victim herself after pouring kerosene oil burnt herself.

During the course of cross-examination, she admitted that in her statement recorded under Section 161 Cr.P.C, she had stated to the I.O that her daughter had told her that when her father came, she was weeping due to humiliation and misery. When her father asked the reason, she narrated the wrong done by the accused persons, and when her father left the house to find accused - Israr @ Mintu, Pintu and Anoop, then due to humiliation and insult, after pouring kerosene oil on her body she put herself on fire, her whole body started burning, she started crying and shouting, on which people came and put out the fire and took her to the Hospital. She also admitted that earlier she had not given any statement that the accused had burnt her daughter by pouring kerosene oil.

Thus from the averments of the F.I.R and from the statements of informant P.W 1 and P.W. 2, the truthfulness has come before the Court that the accused persons had committed the offence of gang rape and not the murder of the deceased by pouring kerosene oil.

36. **P.W 3 Nayab Tehsildar Bhandari Prasad,** had written the dying declaration of the deceased. According to this witness before recording the statement P.W-7 Doctor Krishna Chandra Rai had given the report that the victim was in position to give her statement, then he started recording the statement. According to him the victim narrated that two boys Anoop Yadav S/o Laxmi Yadav and Pinto S/o Suraj Yadav started chasing her when she had gone for defecation, to escape she

ran inside the house, Israr Ahmad @ Mintu S/o Saleem Ansari and other accused persons entered and closed the door, after which both of them raped one by one. She tried to shout, they closed her mouth and burnt her by spraying kerosene oil. Her father had admitted herself in District Hospital in a burnt condition. After recording the pre-death statement of the deceased, the concerned Medical Officer has certified her to be fit and conscious during the statement. This witness has proved the dying declaration as Ex. K-2.

37. A question was put this witness (P.W-3) that whether he asked the deceased from where the kerosene oil was brought in. The witness answered no. Victim herself had told that in the house, there was kerosene oil. He admitted that he has not written that there was kerosene oil in the house. He admitted that the deceased did not tell him as to who had come to save her from getting burnt. He admitted that the deceased did not tell him, which person poured the kerosene oil upon her.

38. The accused appellants have also heavily relied upon the statement of P.W 4 Dr. R.N. Upadhyaya, Senior Surgeon of District Hospital, Ballia, in cross-examination he has admitted that the patient was hundred percent burnt, she was not conscious. He had given information on the same day to take pre-death statement, but he has admitted that before taking the dying declaration, Executive or Judicial Magistrate had not contacted him about the patient's condition.

We find that another Doctor Krishna Chandra Rai - P.W-7, who first of all attended the injured in emergency ward, had examined the deceased before taking her statement and had found herself fit to give statement, therefore, the fact that especially Dr. R.N. Upadhyaya, was not contacted and another Doctor has given the certificate about the mental condition of the deceased is no ground to throw away the dying declaration recorded by P.W. 3.

39. In the case of ***Laxman Vs. State of Maharashtra, (2002) 6 SCC 710*** (Five Judge Bench), it is held that no statutory form for recording dying declaration is necessary. A dying declaration can be made verbally or in writing by any method of communication like sign, word or otherwise provided the indication is positive and definite.

In this case, it is held that a dying declaration can be made by the declarant even verbally. Reducing the dying declaration to writing is not mandatory. The certificate by Doctor as to mental fitness of the deceased is not necessary because the certificate by Doctor is only a rule of caution. Voluntary and truthful nature of the declaration can be established otherwise also.

40. In ***Raju Dewada Vs. State of Maharashra, A.I.R 2016, Supreme Court 3209,*** It is held that mere absence of certificate of Doctor would not render the Dying Declaration unreliable particularly when the Doctor was not present in the Hospital at the relevant time.

41. Considering the principles laid down in the above decisions, this Court finds that at the first instance deceased had made dying declaration to her father informant P.W 1 and thereafter to her mother P.W 2 and the I.O. P.W-8 Ashok Singh Yadav and thereafter to the Nayab Tehsildar P.W. 3. In all these dying declarations, the whole story regarding rape

and role of the accused persons is intact and without any infirmity which also finds support from the medical evidence which confirms presence of spermatozoa in her vaginal smear and on the clothes of the accused - Pintu and Anoop Yadav.

42. In ***Narendra Kumar Vs. State of N.C.T of Delhi, A.I.R 2016, Supreme Court 150***, it is held that where the dying declaration recorded under Section 32 of Indian Evidence Act, did not contain signature or thumb impression of the deceased and alleged to be in violation of the guide lines issued by the Delhi High Court, it has been held that defect in following guideline is of trivial in nature. The dying declaration otherwise proved by ample evidence can not be rejected.

43. ***P.W 7 - Dr. Krishna Chandra Rai***, had examined the deceased before recording her dying declaration by P.W. 3 - Nayab Tehsildar and has deposed that on medical check-up of the deceased, before writing the statement she was fully conscious. She was fully conscious during the recording of the statement. He had written both the certificates in his own handwriting and signed on it and put the Government Seal. He has proved his signature and seal and mode of writing of the dying declaration. He deposed that he has given certificate at the top of the statement and also at the bottom of the statement. The certificates given by this Doctor witness has been exhibited as Ex. A-27 and Ex. A-28 respectively.

In this case, the Doctor has given certificate at 12:00 O' clock that the patient is fully conscious and is in a position to give her statement. After recording the statement the concerned Doctor has again given certificate at 12:10 p.m. that during the statement of the patient, she was in full consciousness. Therefore, so far as the dying declaration regarding the commission of crime under Section 376 (2) (d) I.P.C is concerned, it is proved from the dying declaration statement and from the statement of the informant P.W. 1 which is also admissible under Section 6 and Section 32 of the Indian Evidence Act. The statement of mother P.W 2 and I.O. P.W-8 and also from the report of Forensic Laboratory, that sperms were found on the underwear and half lower of the accused persons and sperms in the vaginal smear of the deceased.

44. The question that arises is regarding part of the dying declaration made by the deceased regarding her being burnt. According to the prosecution, the accused persons ran away after committing the crime of rape. The deceased was sobbing at her house and when her father informant P.W 1 reached his house and asked the reason of sobbing, she narrated the story regarding the gang rape and thereafter P.W-1 left the house for searching the accused persons, after few moment he saw smoke rising from his house. He returned, he found that the deceased had put herself on fire. It is pertinent to mention here that the deceased suffered hundred percent burn injury when she was admitted in District Hospital, Ballia, P.W-4 - Dr. R.N. Upadhyaya, visited her in emergency room, thereafter, she was laid at Bed No. 14 of the Surgical Ward and treatment was started. He had questioned the deceased on 08.04.2011, in response she said that she has been raped for which she was sent for medical examination at the Women's Hospital, Ballia.

45. From the above statement of this witness it has been established that even having suffered hundred percent burn injury, the deceased was able to speak and narrate the whole story of the incident,

which happened with her. Therefore, it cannot be said that on 08.04.2011, she was unable to give her statement before the concerned Magistrate. From the evidence of this witness, it is also established in favour of the accused persons that they had not set her on fire. They have only raped the deceased. It is also noteworthy that from the evidence that it is not established that the accused persons had come with kerosene oil. They were not aware that where the kerosene oil was kept in the house of the informant, therefore, it cannot be said that after commission of rape all the three persons entered the house, they searched for the kerosene oil and after finding it they poured the kerosene oil upon the deceased and that they were also having match box, or obtained it from her house to put the deceased on fire. From the above facts and circumstances of the case, it is again proved that the accused-appellants have not committed murder by pouring kerosene oil upon the deceased and setting her on fire.

46. Though, this witness (P.W-4) has admitted this fact in his cross-examination that patient suffering hundred percent burnt generally is not able to understand anything, but this witness has refused and denied the suggestion from the accused persons that he has wrongly written on the dying declaration of the deceased being conscious to give statement. This witness in cross-examination has deposed that though the deceased was restless when she came to the hospital, but he has not found that she was unconscious. Being an unconscious patient and being a restless patient both are quite different stage of physical and mental status of a person.

47. From the statement of P.W. 8 - I.O. Ashok Singh Yadav, it is quite clear that deceased was able to give statement even on 08 April, 2011. After recording the statement of the informant and his wife Smt. Sobra Begum, he recorded the statement of the deceased, who was admitted in District Hospital, Ballia on Bed no. 14 of ward no. 8 and made statement part of the case diary. According to him the victim in her statement stated that when she was inside of her house, Israr @ Mintu called her for opening the door, after hearing his voice she recognized him and opened the door. Immediately thereafter Pintu Yadav and Anoop Yadav came inside and Israr @ Mintu closed the main door and started monitoring. These two accused persons after locking the door from inside raped the victim alternatively. The statement recorded under Section 161 Cr.P.C given by the deceased before her death to the I.O of the case, is also a dying declaration. In this statement the deceased has not said that the accused persons had also put her on fire, but said that they had only raped her. The statement given by the injured to the I.O, statement by her to her father informant P.W 1 and the mother P.W-2 and the version of Tehrir Ex. K-1 will be taken as dying declaration. Though the statement of any witness recorded under Section 161 Cr.P.C is not a substantive piece of evidence, but if the injured person dies after giving the statement under Section 161 Cr.P.C, such statement shall be considered as dying declaration under Section 32 of the Indian Evidence Act. In case, the person survives, it would be only a corroborative piece of evidence under Section 157 of the Indian Evidence Act.

48. In ***Gulab Singh Vs. State of U.P. (2003) 47 A.C.C 161*** Division Bench of Allahabad High Court, upon noting the fact that the victim lodged an F.I.R and the I.O.

of the case recorded his statement under Section 161 Cr.P.C before his death. The victim and witnesses recognized the accused persons in the night. The accused was the grandson of the deceased, dying declaration was corroborated by ocular witnesses; the Investigating Officer and Constable recorded his statement under Section 161 Cr.P.C which was found worthy to be relied on as dying declaration.

In the facts of the present case, recording the statement of the injured under Section 161 Cr.P.C is almost similar to the above cited case except the other facts of the case. In Gulab (supra) the deceased had also lodged an F.I.R, but in the present case on the narration of the story by the deceased, her father has lodged the F.I.R, and the I.O. of the case has recorded the statement of the deceased before her death, which is admissible in evidence as dying declaration under Section 32 of the Indian Evidence Act. This witness has also deposed that the deceased had also given statement that before leaving the house the accused persons had threatened that if she will come out they will kill her but after that they threw kerosene oil on her body, which was kept in the house with the intention of killing her and applied match stick which was kept next to her and burnt her and ran away after closing the door.

49. The deceased has given similar statement to P.W 3. Bhandari Prasad, Nayab Tehsildar. According to the Court, the part of the statement regarding immolation of the deceased by accused persons by pouring by kerosene oil and putting her on fire is doubtful and does not find support from the averment of the F.I.R and the statement of informant P.W 1, thus, it can be said and concluded that when the victim met her mother, to enhance the gravity of the offence, deceased has given statement regarding Section 302 I.P.C against the accused persons, which appears doubtful.

50. Now the question arises as to whether part of the statement of dying declaration regarding commission of gang rape is admissible and reliable or not, and if the Court finds that part of the statement of dying declaration is incorrect then whether the whole dying declaration can be thrown away and can be said to be unreliable. This aspect has been dealt with by the lower court. It is true that the death of the deceased is not accidental. In this context, the lower court has discussed several rulings, including, ***Shakuntala Devi Vs. State of Haryana 2008, Dand Nirnaya Sangrah 741,*** wherein it is held that neither there is rule of law nor a rule of wisdom that a dying declaration cannot be acted upon without confirmation.

51. The learned trial court has discussed the position that when part of the dying declaration is proved and other part is doubtful then what would be the correct position of law. In this regard, the learned trial court has referred ***Godhu Vs. State of Rajasthan, A.I.R 1974 S.C. 2188,*** wherein it is held that if a part of the dying declaration is true and one part is false in such a situation if only part of the truth is corroborated by an another evidence, such part of truthful dying declaration can be relied on for conviction.

52. In ***George Kutty Vs. State of Kerala, 1992 Cri.L.J. 1663***, it is held that if part of dying declaration is corroborated by an another evidence, then the same shall not be dispensed with merely on the ground that one part of the dying declaration is false.

The dying declaration of the deceased regarding gang rape by the accused persons has been reiterated in her statement to her parents, I.O. or Magistrate and this fact is duly corroborated by the medical evidence and the report of Forensic Science Laboratory.

53 . ***P.W 5 - Dr. Manju Singh,*** has also given evidence that there is possibility of rape. Sperm was found in the vaginal smear of the deceased and on the underwear of the accused - Pintu Yadav and half lower of the accused - Anoop Yadav. Therefore, this part of her statement, which is supported and backed by medical evidence, forensic laboratory report and the evidence of other oral and documentary evidence is acceptable.

54. So far as her evidence regarding burning of the deceased by accused persons is concerned, that part of her statement does not find support from any other evidence, accordingly, that part of the dying declaration has to be discarded being doubtful.

55. P.W 1 has given statement that when he reached at the house, he found his daughter alive and sobbing and after knowing the names of the accused persons, he went to search them, then victim set herself on fire. Therefore, the learned trial court has rightly acquitted the accused persons under the charge of Section 302 I.P.C. Similarly, as per the evidence, the accused persons put pillow on the mouth of the victim at the time of rape, but it was not to commit murder, rather it was for the purpose to prevent the victim from screaming and making hue and cry, therefore, the learned trial court has rightly acquitted the accused persons from the charge under Section 307 I.P.C.

56. So far as the charge under Section 376 (2) (g) I.P.C is concerned, before the amendment of Section 376 I.P.C, vide Criminal Law Amendment Act, 2013, Section 9 with effect from 03.02.2013, "gang rape' was described in Section 376 (2) (g) I.P.C, providing minimum ten years' rigorous imprisonment, which may extend for life and shall also be liable to fine, was provided.

In this regard **explanation no. 1** is relevant, which reads as under:-

Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the person shall be deemed to have committed gang rape within the meaning of this Sub Section.

From perusal of the explanation, it is crystal clear that there is no requirement of law to commit rape physically by all persons of the group, acting in furtherance of their common intention. In the present case, it is established from the oral, documentary and medical evidence that accused - Pawan and Pintu committed rape with the deceased and accused Israr Ahmad @ Mintu facilitated them, got the door of the victim opened and after entrance of the two accused persons in the house he bolted the door from the outside of the house and monitored the people to facilitate the commission of gang rape, therefore, the act of gang rape committed in furtherance of common intention by all three accused persons is covered under the definition of gang rape and even the accused Israr Ahmad @ Mintu shall be held guilty of gang rape.

57. In the case of ***Raja Vs. State of Karnataka, (2016) 10 S.C.C 506; State of U.P. Vs. Chhotey Lal, A.I.R 2011 S.C 697***

and Santosh Moolya Vs. State of Karnataka, (2010) 5 S.C.C 445, the Supreme Court held that :-

"In a case of rape, ***testimony of prosecutrix stands at par with that of an injured witness.*** *It is really not necessary to insist of corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible.* ***An accused can be convicted on the basis of sole testimony of the prosecutrix without any further corroboration provided*** *the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. Woman or girl raped is not an accomplice and to insist for corroboration of the testimony amounts to insult to womanhood. On principle the evidence of victim of sexual assault stands at par with evidence of an injured witness just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender. The evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. Corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases but such evidence cannot be expected in sex offences having regard to the every nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from rules devised by the courts in the western world. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence as a general rule, there is no reason to insist on corroboration except from the medical evidence where having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to this qualification that corroboration can be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation or when the probability factor is found to be out of tune. "*

58. In the present case there is no need to apply the provisions of Section 114-A, which provides presumption of absence of consent because accused persons have not taken the plea that it was a consensual cohabitation but have denied the charges. From the evidence on record it has been fully proved that the accused appellants have committed gang rape with the deceased against her will before her death. In ***Mohd. Iqbal & Anr. Vs. State of Jharkhand, A.I.R 2013 SC 3077***, Supreme Court held that in a case of gang rape under Section 376 (2) (g) of the I.P.C, consent of victim of gang rape cannot be presumed but its absence shall be presumed.

59. In India the ***Maxim Falsus in Uno Falsus in Omni Bus*** does not apply, meaning thereby, if part of the evidence of a witness is incorrect and part of the evidence is correct then the whole evidence cannot be thrown out and the correct part of evidence shall be taken into account. Since the dying declaration statement of the deceased has been considered as evidence under Section 32 of the Indian Evidence Act and her statement to her father (informant) P.W 1 under Section 6 of the Indian Evidence Act has also been considered by lower court, therefore, applying this principle, the learned trial court has concluded that part of the statement of the victim-deceased regarding the crime of gang rape is correct and acceptable, but the other part of her

evidence regarding causing burn injury by pouring kerosene oil by the accused persons is incorrect.

60. This Court is in-conformity with the conclusion of learned trial court and affirms the finding that the accused-appellants had not burnt the deceased after the incident of gang rape, because when the informant (father) P.W. 1 came to his home, he found his daughter alive and sobbing, she narrated the whole story that the accused persons committed the offence under Section 376 (2) (g) I.P.C, and when P.W-1 went to search the accused persons, after some time she poured kerosene oil and set herself on fire, later she succumbed to the injury during the course of treatment in hospital. Therefore, the allegations regarding Section 302 I.P.C has not been proved. This Court has already discussed this aspect and also the aspect regarding Section 307 I.P.C.

61 . The Investigating Officer had not submitted charge-sheet under Section 306 I.P.C, considering that the deceased has committed suicide on abatement by the accused persons, neither the accused persons have been convicted under the aforesaid Section nor the State has preferred any appeal regarding the acquittal of the accused-appellants under Sections 307 & 302 I.P.C.

This Court is of the opinion, that it is a case of self-immolation, because in the case of burning by others, the person tries his best to escape, resist and save himself unless he is not unconscious or helpless by any means. But if he is committing suicide by self-immolation, it is probable that hundred percent burn may occur, as in this case. Therefore, this Court is confined to the conviction and sentencing order passed under Section 376 (2) (g) I.P.C challenged by the accused appellants.

62. From the above discussions, it is fully established that accused persons committed gang rape and they were rightly convicted and sentenced by the learned trial court. The accused persons committed rape with the victim-deceased very cleverly, cunningly and to avoid public shame the victim-deceased committed suicide. Only for a momentary bliss the accused persons ruined the life of deceased and forced herself to commit suicide.

In ***Moti Lal*** *(supra)*, the Supreme Court citing Para 12 of the Judgment in ***Dinesh Vs. State of Rajasthan, (2006) 3 SCC, 771***, has expressed an opinion about the quantum of punishment that would be appropriate in the case of rape. The relevant part is extracted :-

"The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases

of the heinous crime of rape on innocent helpless girls of tender years, married women and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum..... To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced."

Therefore, the sentence of life imprisonment and a fine of Rs.50,000/- imposed on each accused by the learned Trial Court can not be said to be excessive or penal.

Thus, the appeals fail and are liable to be dismissed accordingly.

All the aforesaid Criminal Appeals Nos. 4875 of 2014 - *Ishrar Ahmad Alias Mintu Vs. State of U.P., Criminal Appeal No. 4713 of 2014 - Anoop Yadav vs. State of U.P. and Criminal Appeal No. 1844 of 2015 - Pintu Yadav Vs. State of U.P.* are hereby **dismissed**. The conviction order and sentence awarded by the learned Trial Court, is hereby affirmed.

A certified copy of this order be sent for compliance to the learned Trial Court, as well as, to the concerned Jail Superintendent.

Registry to return the Lower Court Record alongwith the copy of this order.

(2022) 9 ILRA 1683
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFATB HUSAIN RIZVI, J.

Criminal Appeal No. 7306 of 2010

Kala @ Ankit ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Saurabh Gour, Sri A.B.L. Gour, Sri Briendra Singh Khokher, Sri Brij Raj Singh, Sri Kailash Prakash Pathak, Si Amit Kumar Mishra

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Law - Criminal Procedure Code,1973-Section 374(2) - Indian Penal Code, 1860-Sections 302/34-Challenge to-Conviction- the ocular testimony of sole eye witness (P.W. 2) is not reliable and trustworthy-No reliance can also be placed on the evidence of recovery of knife-So there is no reliable and cogent evidence on record to hold the accused guilty-The trial court has failed to appreciate the evidence in proper manner-The trial court has erred in placing reliance on the testimony of the sole eye witness (P.W.2) who is related as well as a chance witness and whose presence at the spot appeared doubtful-The learned trial court has also failed to take into consideration the defence evidence and also ignored the fact that the evidence of recovery of knife is not supported with any forensic report confirming that the recovered knife has been used in the offence. Therefore, The finding of conviction and sentence as recorded by the learned trial court is not sustainable in the eye of law and is liable to be set-aside.(Para 1 to 25)

B. It is well settled principle of law that the testimony of a witness can not be discarded solely on the ground that he is an interested witness or a chance witness. What is required is to make a close scrutiny of the probability and reason for a chance witness being present on the spot. The court must also be cautious in appreciating and accepting the evidence of an interested witness. The evidence of a related and a chance witness requires cautious and close scrutiny to test whether it is reliable.(Para 17)

The appeal is allowed. (E-6)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Mr. Amit Kumar Mishra, learned counsel for the appellant, Sri H.M.B. Sinha, learned A.G.A. for the State and perused the record.

2. This criminal appeal has been filed against the judgment and order dated 28.10.2010 passed by Additional Sessions Judge, (F.T. Court No. 1) Bagpat in Sessions Trial No. 166 of 2007 (State of U.P. Vs. Kala @ Ankit), Case Crime No. 16 of 2007, under section 302/34 IPC, P.S. Baraut, District Bagpat. By the impugned judgment and order the learned trial court has convicted the appellant for offence under section 302/34 IPC and sentenced him to imprisonment for life and a fine of Rs. 20,000/- and in default of payment of fine imprisonment of six months.

NARRATION OF FACTS

3. The complainant Madan Singh gave an application dated 12.1.2007 at P.S. Baraut alleging therein that he is resident of village Luhara, P.S. Chhaprauli, District Bagpat and runs a medical store at his village. His son Badal aged about 18 years was studying in Priya Bharati School Baraut in class 12. He also used to sit at the medical store in morning and evening. On 2.1.2007 at about 7:00 P.M. his son was in the shop. Manish came to purchase some medicine. When his son asked for payment he refused to pay but his son took the price of the medicine. Manish left extending death threat. After this Manish once committed marpit for which he made a complaint to the family of Manish. On 12.1.2007, his son, Badal had come to Baraut to attend his college. At about 12:30 noon Manish and his friend Kala caught his son near C field Nehru Road and Kala inflicted knife blows on his head, neck and other parts of the body with intention to cause death. His son fell down on the spot. Deepak and Kripal who were with his son saw the incident and tried to catch them but, wielding the knife, the accused ran away towards the C-field. Kripal, Deepak and other boys Ankit, Puneet and Mohit took Badal to Akshaya Nursing Home but he died on the way. The complainant was at his medical store. Kripal Singh came there and informed him about the incident. The dead body of his son is kept in the nursing home.

4. A chik report no. 14 of 2007, under section 302 IPC, was registered against Manish and Kala at P.S. Baraut at 14:00 hours. S.I. Rajvir Singh (P.W. 5) was entrusted with the investigation of the case. He recorded the statement of complainant, thereafter went to Akshaya Nursing Home and conducted the inquest proceeding on the dead body, prepared the related papers and sent the body for postmortem examination. Thereafter, he recorded the statements of other witnesses and went to the place of occurrence and at the indication of Deepak and Kripal inspected the place of occurrence and prepared the

site plan, collected blood stained and plain concrete of the road and prepared its memo. A register of the deceased was also recovered from the place of occurrence. The Investigating Officer took it into his possession and prepared its memo. From the (pant) jeans of the deceased one currency note of Rs. 20/-, two currency notes of Rs. 10/- and one currency note of Rs. 5/-, one match box and one ball pen was also recovered during inquest proceeding. The I.O. prepared its memo. He also prepared the site plan of Akshaya Nursing Home where the dead body of the deceased was kept. On 14.1.2007 on the information of the informer accused Kala was arrested. On interrogation he confessed his crime and also disclosed that he can get the weapon used in the crime recovered. Memo of interrogation was prepared by the I.O. Thereafter, the police party along with the accused came at the C field from where at the pointing out of the accused Kala one knife was recovered from the bushes at 8:00 hours. The I.O. sealed the knife and prepared its memo. Further investigation of the case was entrusted to S.I. Nathi Ram Panwar (P.W. 6). He took up the investigation on 26.01.2007. Recorded the statements of other witnesses and the accused Manish. Prepared the site plan of the place of recovery of knife and after completion of the investigation submitted charge-sheet against accused Kala and Manish.

5. The Chief Judicial Magistrate, Bagpat committed the case to the Court of Session. Co-accused Manish was declared juvenile and his case was forwarded to Juvenile Justice Board, Meerut. The trial court framed charge under section 302/34 IPC against appellant-accused Kala. The accused denied the charge and claimed for trial. In oral evidence the prosecution examined seven witnesses while in documentary evidence twenty papers Ext. Ka. 1 to Ka. 20 were produced. The incriminating circumstances against the accused were put to him under section 313 Cr.P.C. The accused denied the whole prosecution case. He has also stated that the witnesses have deposed against him due to enmity and a false case has been lodged. In defence, one witness Mohit Tomar (D.W. 1) was examined. The learned trial court after hearing the arguments, by the impugned judgment and order held the appellant-accused guilty for the offence under section 302/34 IPC and sentenced him as above.

AUTOPSY REPORT

6. According to autopsy report (Ext.Ka.2) the postmortem of the deceased was conducted on 13.1.2007 at 12:00 noon.

External Examination:

The age of the deceased was about 18 years. Body was average built. Rigor-mortis was all over the body. Abdomen distended, decomposition started. Eyes were closed. Following ante mortem injuries were on the body.

1. Incised wound of size 10.0 x 3.0 cm x bone deep on mid of top of head.

2. Incised wound of size 4.0 x 05 cm x bone deep on left side back of head 4.0 cm turn to left ear.

3. Incised wound of size 5.0 x 2.0 cm x bone deep on left side head just behind left ear pinna.

4. Incised wound of size 2.0 x 0.5 cm x bone deep on left side head 2.0 cm from injury no. 2.

5. Incised wound of size 2.5 x 0.75 x through & through on left ear lobule & pinna.

6. Incised wound of size 3.5 x 1.5 cm x cavity deep on left side back of neck. On dissection left clavicle bone cut, left major blood vessels also cut & Apex of left lung also cut.

7. Incised wound of size 11.0 x 4.0 cm x bone deep on left mid scapular area.

8. Incised wound of size 2.0 x 1.0 cm x muscle deep on back, 2.0 cm below & lateral to (6-7) cervical spine.

9. Multiple incised wounds of size smallest (2.0 x 1.0 cm x muscle) & largest 8.0 x 3.0 cm x muscle deep (4 in number) on outer and front part of left arm upto elbow joint in the area 21.0 x 12.0 cm.

10. Multiple incised wound in the area 13.0 x 7.0 cm (7 in number) on inner & back of right hand & wrist (Largest size 4.0 x 1.5 cm & smallest 1.0 x 0.5 cm x muscle deep).

Internal Examination:

First rib and left clavicle were fractured. Left pleura and left lung were cut. About 800 c.c. free and clotted blood in thoracic cavity was present. Stomach was empty.

Cause of death was shock and haemorrhage due to ante mortem injuries and death could have occurred about one day before the postmortem. The aforesaid autopsy report has been proved by Dr. Krishna Kumar (P.W. 3) as Ext. Ka.2. The witness has admitted the suggestion of the prosecution that injuries of the deceased may be caused on 12.1.2007 at 12:30 p.m.

PROSECUTION EVIDENCE

7. Madan Singh (P.W. 1) is the informant. In his examination-in-chief the witness has stated that his son Badal aged about 18 years was a student of class 12 of Priya Bharati School Baraut. He also used to sit at the shop of complainant in the morning and evening. On 2.1.2007 at about 7:00 p.m. his son was sitting at the shop. Manish came there to purchase some articles. His son after giving articles asked for payment. Manish refused to make payment but his son took the payment. On this Manish threatened him with death and went back from there. Thereafter, Manish once committed marpit with his son. He (the witness) made a complaint of this to the family of Manish. The witness has stated that the incident is of 12.1.2007 at 12:30 p.m. His son had gone to school at Baraut. Manish and Kala caught his son near C field of Jain College Nehru Road. Manish caught hold his son and Kala inflicted knife blows on his son's head, neck and other parts of the body. His son fell down. The incident was witnessed by Deepak, Kripal and Dharmendra and they tried to catch the accused. The accused wielding knife escaped towards C field. Kripal, Deepak, Ankit, Puneet and Mohit took his son to Akshaya Nursing Home, Baraut but he died on the way. Deepak, Kripal and Dharmendra informed him at Vardhman medical store, Baraut, then he came at the nursing home and found that his son was dead. The witness has further stated that he lodged the report of the incident scribed by his brother Manoj Saroha. The witness has proved it as Ext.Ka.1. The witness has further stated

that his village and village of the accused Kala are adjacent, hence, he knows Kala very well. Manish and Kala are friends.

8. Deepak Kumar (P.W. 2) is the eye witness. In his examination-in-chief the witness has stated that the incident is of 12.1.2007 at 12:30 P.M. He along with Kripal and Badal were going on Nehru Road and reached near C-field of Jain College. At that time, accused Kala and Manish came there. Manish caught hold Badal and Kala inflicted knife blows on the neck and head etc. with intention to kill Badal causing serious injuries to Badal. Kala continued stabbing Badal till he fell down. Badal fell down on the ground. They tried to catch Kala and Manish and to save Badal but Kala wielded knife towards them and escaped towards C-field. Ankit, Puneet and Mohit also came on the spot. They took Badal to Akshaya Nursing Home on a richshaw. Badal died due to the injuries. Witness has further stated that in the year 2006 when he was studying at Baraut, he used to go to the house of her aunt (Bua) at village Sherpur Luhara, because of this he knows the accused persons. They used to come by bus with him and they also use to meet at Baraut. He, Kripal and Dharmendra informed Madan Singh, the father of Badal, at his Vardhman Medical Store. On receiving information, Madan Singh came to nursing home and thereafter went to the police station to lodge the FIR.

9. Constable Sahab Singh, P.W. 4 is the chik and G.D. writer. The witness has stated that on 12.1.2007 on the written information of Madan Singh he prepared chik no. 14 and registered case crime no. 16/07, under section 302 IPC and made G.D. entry of it at serial no. 30 at 14:00 hours. The witness has proved chik FIR and copy of G.D. as Ext.Ka-3 and Ext.Ka-4. The witness has further stated that on 14.1.2007 on the basis of recovery memo he prepared chik no. 16 case crime no. 18/07, under section 4/25 Arms Act and made the G.D. entry of it at serial no. 36 at 21:15 hours. Witness has proved the chik and copy of the G.D. as Ext.Ka-5 and Ext.Ka-6.

10. S.I. Rajvir Singh, P.W. 5 is the Investigating Officer. The witness has stated that on 12.1.2007 after registration of the case the investigation was entrusted to him. He recorded the statements of complainant and other witnesses. Thereafter, he proceeded for Akshaya Nursing Home and conducted the inquest proceeding of deceased Badal. His body was in the general ward of the Nursing Home. The witness has proved inquest report and related papers as Ext.Ka-7 to Ext.Ka-12. The witness has further stated that he recorded the statements of witnesses present at Akshaya Nursing Home, thereafter, he proceeded to the place of occurrence and on the pointing out of witnesses inspected it and prepared the site plan. He also collected blood stained and plain concrete from the road and one register which was lying at the place of occurrence and prepared its memo. The witness has proved the aforesaid documents as Ext.Ka-13 to Ext.Ka-15. The witness has further stated that during inquest proceeding he recovered one currency note of Rs. 20/-, two currency note of Rs. 10/- and one currency note of Rs. 5/- and one match box and one ball pen from the pocket of the deceased and prepared its memo as Ext.Ka-16. He also prepared the site plan (Ext.Ka-17) of Akshaya Nursing Home where the dead body of the deceased was lying. He recorded the statements of witnesses of inquest proceeding. On 14.1.2007 he arrested accused Kala @

Ankit near Puliya of Malakpur drain and interrogated him. The accused confessed his crime and disclosed that the knife used in the murder has been concealed by him in the bushes of C-field. On the aforesaid disclosure statement he along with witnesses Dayanand Malik and Pramod Kumar and accused came there and at the pointing out of the accused recovered one knife from the bushes of C-field at about 8:00 P.M. He sealed it and prepared its memo as Ext.Ka18. The witness has also proved the recovered knife, clothes and other articles found from the body, blood stained and plain concrete as material Ext.Ka1 to Ext.Ka-14. The witness has also proved the articles recovered from the dead body at the time of inquest proceeding and the register taken into possession from the place of occurrence as material Ext.Ka.17 to Ext.Ka-23.

11. S.I. Nathi Ram Panwar, P.W. 6 is the second Investigating Officer. The witness has stated that further investigation of this case was handed over to him on 26.1.2007. He recorded the statements of witnesses on different dates, visited the place of occurrence from where knife was recovered and prepared its site plan (Ext.Ka-19). After the completion of the investigation, submitted charge-sheet against accused Kala (Ext.Ka-20).

12. S.I. Ram Kishan Rathi, P.W. 7 is the Investigating Officer of Case Crime No. 18/07, under section 4/25 Arms Act. The witness has stated that investigation of this case was entrusted to him. He recorded the statements of witnesses and accused. He also visited the place of incident at the pointing out of the complainant S.I. Rajvir Singh and prepared the site plan (Ext.Ka-21) and after the completion of the investigation submitted charge-sheet (Ext.Ka-22).

DEFENCE EVIDENCE

13. One defence witness Mohit Tomar (D.W.1) has also been examined. The witness has stated that he knows Badal who was his class-mate. The incident is of 3 and a half years before. He along with his friends Puneet, Malik and Ankit Tomar were returning from Baraut after tuition. When they reached near C-field of Jain College seven-eight boys were assaulting Badal holding knives in their hands. It was 2-2:30 p.m. The boys who were assaulting Badal escaped. He and Puneet, Malik and Ankit Tomar took Badal to Akshaya Nursing Home in injured condition. Except them no other person was present there. Thereafter his friend Puneet informed the father of Badal about the incident on the telephone. The father of Badal arrived at the hospital at 3-3:30 p.m. Before the arrival of the father of the deceased at the hospital no other relative or family member of Badal reached the hospital. Neither Deepak Kumar of village Basi nor any other person of the village of the deceased was present at the place of occurrence or at the hospital. The witness after looking at the accused Kala @ Ankit in court stated that this boy was not present with the boys who assaulted Badal.

SUBMISSION ON BEHALF OF APPELLANT

14. Learned counsel for the appellant contended that the sole eye witness Deepak Kumar, P.W. 2 is a close relation of the deceased and resident of other village, so he is related as well as chance witness. The complainant has not taken his name as a person who informed him about the incident. In the FIR the complainant has only taken the name of Kripal as the person who gave him information. Deepak Kumar (P.W. 2) has not suffered any injury nor he

made any effort to save Badal which makes his presence on the spot highly doubtful. It is also contended that this witness has stated that knife was used to stab but the deceased has not suffered any stab wound. All his injuries are incised wound, so the manner of assault as stated by this witness does not stand corroborated with the medical evidence. It is further contended that the witness has also stated that Ankit, Mohit and Puneet also reached on the spot and they took Badal to Akshaya Nursing Home in a rickshaw. In such a situation, considering the number and nature of the injuries on the body of the deceased, it was natural that the clothes of witnesses should have blood stains, but it was not so. It is also contended that the presence of defence witness Mohit Tomar (D.W. 1) has been admitted by P.W. 2. Mohit Tomar (D.W. 1) has denied that Deepak Kumar or any other relative or family member of the deceased was present at the time of occurrence or was at the hospital. So the oral statement of the sole eye witness is not trustworthy. The learned trial court has committed illegality in relying on the sole testimony of this eye witness and on its basis held the appellant accused guilty. Learned counsel further contended that the recovery of knife used in the offence as alleged by the prosecution is also not trustworthy and reliable. No public witness of this recovery has been produced and in this regard there is only the statement of I.O. S.I. Rajvir Singh, P.W. 5. Both the Investigating Officers have also admitted that knife was not sent for forensic examination. There is no evidence on record to link the alleged recovered knife with the offence. The learned trial court has therefore erred in placing reliance on the evidence of recovery of knife. It is further contended that the complainant Madan Singh (P.W. 1) in his cross-examination has admitted that his son was surrounded and assaulted by 4-5 boys and at that time he was going with Mohit and Puneet, so Madan Singh (P.W. 1) has also admitted the presence of defence witness Mohit Tomar (D.W.1) at the time of occurrence. The learned trial court has not taken into consideration the statement of D.W. 1 Mohit Tomar. The learned trial court has not analysed the oral testimony of Mohit Tomar (D.W. 1) and has given no reason to disbelieve him. Lastly it is contended that the trial court has committed grave error in recording the finding that the appellant-accused is guilty. The finding of the trial court is illegal and against the evidence on record.

SUBMISSION ON BEHALF OF STATE

15. Per contra; learned A.G.A. contended that complainant Madan Singh (P.W. 1) from his statement has proved the motive of the incident. Deepak Kumar (P.W. 2) is an eye witness. Although he is related with the deceased and also resident of other village but he has explained the circumstances of his presence on the spot. He has stated that on the day of incident he came to take his Bua (mother of the deceased) from village Luhara. He reached Baraut by train at 12:00 noon. He contacted the deceased on telephone. The deceased reached the railway station from where both were going towards C-field when the incident occurred. It is further contended that the witness has stated that the deceased was assaulted with knife by appellant-accused. The medical evidence fully corroborates the ocular version. According to postmortem report the deceased has suffered several incised wounds on his body resulting in his death. There is no discrepancy in respect of time of incident. Place of occurrence is also established. The testimony of the sole eye witness Deepak

Kumar (P.W. 2) is consistent. There is no major discrepancy in it. There was no reason to disbelieve him. The learned trial court has rightly placed reliance on his statement. It is further contended that blood stained knife used in the offence has been recovered on the pointing out of the appellant-accused. The aforesaid recovery has been proved by S.I. Rajvir Singh (P.W. 5) It is mere lapse on the part of the I.O. that he has not sent it for forensic examination but the recovery is established and it further supports the ocular version. Learned A.G.A. further contended that the testimony of an eye witness can not be discarded solely on the ground that he is interested or chance witness. If his testimony is otherwise reliable and trustworthy and there is no major discrepancy in it, it can be safely relied on and conviction can be based on it. So there is no illegality in the finding of the trial court that the appellant-accused is guilty of offence of murder.

ANALYSIS OF EVIDENCE

16. Out of two public witnesses produced by the prosecution, Madan Singh (P.W. 1), the complainant, is not an eye witness. He has admitted in his cross-examination that he got the information at his shop/medical store and on receiving the information he arrived at Akshaya Nursing Home where the dead body of his son was kept. He was informed about the incident by Kripal and Deepak. He has not witnessed the incident.

17. The prosecution has relied on the sole eye witness account rendered by Deepak Kumar (P.W. 2).. In his examination-in-chief P.W. 2 has said that on 12.1.2007, at about 12:30 p.m., he, Kripal and Badal were going on Nehru Road and when they reached near C-field of Jain College, the accused Kala and Manish came there. Manish caught hold Badal and Kala @ Ankit inflicted knife blows on Badal causing him serious injuries and he fell down. The witness has also stated that Ankit, Puneet and Mohit also came on the spot and they all took Badal to Akshaya Nursing Home on a rickshaw. Admittedly this witness is a close relative of the deceased being the cousin (son of maternal uncle) of the deceased Badal. This witness is also a chance witness. He is a resident of village Bassi, P.S. Khekara while the incident has occurred at Baraut town. It is well settled principle of law that the testimony of a witness can not be discarded solely on the ground that he is an interested witness or a chance witness. What is required is to make a close scrutiny of the probability and reason for a chance witness being present on the spot. The court must also be cautious in appreciating and accepting the evidence of an interested witness. The evidence of a related and a chance witness requires cautious and close scrutiny to test whether it is reliable. Regarding his presence, P.W. 2 has said that on the day of the incident he had come to take his Bua from village Lohara. He reached Baraut by train at 12:00 O'clock. He was alone. Badal met him at the station and they went to Nehru Road from the station. The fact that on the day of incident witness Deepak Kumar had come to Baraut by train to take his Bua, has been disclosed for the first time in the court. In the statement recorded by the I.O. under section 161 Cr.P.C., there is no such statement. From the statement of Deepak Kumar (P.W. 2) it is also not clear that under what circumstances he along with Badal were going to Nehru Road near C-field. In the FIR, the name of Deepak (P.W. 2) has not been taken by Madan Singh

(P.W. 1) as a person who has come to his shop to give information of the incident. He has taken only the name of Kripal. P.W. 1 was confronted with this information.

The witness has assigned the role of grasping Badal to co-accused Manish and role of inflicting the knife blows to the appellant-accused Kala @ Ankit. If the statement of Deepak (P.W. 2) that Manish caught hold Badal and Kala @ Ankit inflicted knife blows on his body is to be believed then in such a situation there is no possibility of injuries on the back side of the deceased but in the autopsy report injury nos. 6, 7 and 8 are on the back side of the body. Injury no. 6 is on the back of neck, injury no. 7 is on scapular area while injury no. 8 is on the back. It also appears from the autopsy report that deceased has resisted and tried to save himself from both his hands. He has received injuries on his hands. According to Dr. Krishna Kumar (P.W. 3), there was incised fracture in the bone of the left palm and major blood vessels were cut. Injury no. 9 and 10 which are multiple incised wounds, 4 in numbers and 7 in numbers respectively are also on both the hands. The nature of injuries as mentioned in the autopsy report reflects that the deceased was surrounded and then assaulted with knife. The size of the injuries also differs. The largest is 11 x 4 cm while the smallest is 2 x 0.5 cm. The number and nature of injuries and its size reflects that after surrounding the deceased more than one person have inflicted the knife blows from different directions. The manner of assault as described by Deepak Kumar (P.W. 2) is not in consonance with the autopsy report. So his oral statement does not stand corroborated by the medical evidence.

18. In the FIR Deepak and Kripal are named as eye witnesses. Madan Singh (P.W. 1) has also added the name of Dharmendra as an eye witness in his statement. All the three Deepak, Kripal and Dharmendra are close relations of the complainant. Kripal is the real uncle of complainant and Dharmendra is son of Kripal while Deepak is nephew of the wife of the complainant. So according to prosecution version at the time of incident three close relations of Badal were also present while accused were only two in number. There is no satisfactory explanation that how the accused two in number over powered Badal. It is also not established from the evidence that they made any serious efforts to save Badal. Further in the aforesaid context if the testimony of Deepak (P.W. 2) is to scrutinized then according to his statement the co-accused Manish was catching hold Badal and actually one of the accused the appellant was involved in inflicting knife blows. In such a situation absence of an effort on the part of the three companions of Badal raises serious doubts as regards their presence on the spot.

Deepak (P.W. 2) is a resident of village Bassi, P.S. Khekara while Kripal and Dharmendra are residents of village Luhara, P.S. Chhaprauli. The incident has occurred at Baraut town. According to prosecution, the deceased was a student of class 12 at Priya Bharati School, Baraut and on the date of occurrence he had gone to attend his school. So the presence of witnesses at the place of occurrence is unnatural being resident of distant places. The reason for presence of Kripal and Dharmendra at the place of occurrence is unexplained. All the aforesaid facts and circumstances clearly establishes that the name of close relations as eye witnesses in the FIR is a result of deliberation and it is an after thought. There is no good reason for their presence on the spot at the time of occurrence.

19. There are other serious infirmities in the oral testimony of sole eye witness Deepak Kumar (P.W. 2). In his examination-in-chief the witness has stated that on 12.1.2007 at 12:30 p.m. he, (the witness) Kripal and Badal were going on Nehru Road and when they reached near C-field of Jain College the incident occurred. While in his cross-examination the witness has said that he alone reached Baraut by train and Badal met him at the station and they went to Nehru Road from the station. Further in the cross-examination the witness has stated that when they were going then Kripal was coming towards them. This statement is also contradictory to his statement made during examination-in-chief that he, Kripal and Badal were going to Nehru Road when this incident occurred.

20. The presence of defence witness Mohit Tomer (D.W. 1) has been admitted by the complainant Madan Singh (P.W. 1) as well as Deepak (P.W. 2) and the defence witness Mohit Tomer (D.W. 1) has completely denied the prosecution case. He has also denied that Deepak or any other relative or family member of the deceased was present at the time of occurrence or at the hospital. The witness has also stated that Badal was taken to Akshaya Nursing Home by him, Ankit and Puneet.

From the statements of prosecution witnesses also it is established that the deceased was taken on a rickshaw to Akshaya Nursing Home. To establish the presence of the witness Deepak (P.W. 2) at the time of incident the document of admission of the deceased Badal in Akshaya Nursing Home was very relevant but the I.O. has not collected it and this material documentary evidence appears to be intentionally concealed.

21. Applying the test as prescribed for an interested and chance witness, the testimony of the sole eye witness Deepak (P.W. 2) is not confidence inspiring and trustworthy. His presence on the spot is highly doubtful.

22. Madan Singh, complainant (P.W. 1) in his cross-examination has given the following statement:

"करीब बारह एक बजे मेरा लड़का बादल अपने साथी मोहित पुनीत आदि के साथ नेहरू रोड पर जा रहा था। यह सही है कि वहां मेरे लड़के को चार पांच लड़कों ने पकड़ लिया व घेर लिया और उनमे से एक ने कोली भर ली और एक ने चाकू मार दिया।"

The aforesaid statement runs contrary to the prosecution case as alleged in the FIR and the oral testimony of sole eye witness Deepak (P.W. 2).

23. The prosecution has also relied on the evidence of recovery of knife. S.I. Rajvir Singh (P.W. 5), who has made the recovery, has stated that on 14.1.2007 he arrested accused Kala @ Ankit and in presence of the witnesses Dayanand Malik and Pramod Kumar interrogated the accused. The accused confessed his crime and made disclosure statement. A memo of disclosure statement was prepared and got signed. Thereafter, the knife was recovered at the pointing out of accused from bushes of C-field Nehru Road at about 8:00 O'clock. Except the oral statement of S.I. Rajvir Singh (P.W. 5), there is no other evidence in support. No public witness of this recovery has been produced in the court. The knife has also not been sent for forensic examination. Both the Investigating Officers Rajvir Singh (P.W. 5) and S.I. Nathi Ram (P.W. 6) have

accepted this in their cross-examination. The place of recovery is an open place accessible to public at large without any hindrance. Considering the aforesaid facts no reliance can be placed on this piece of prosecution evidence.

24. From the analysis of the prosecution evidence it is clear that the ocular testimony of sole eye witness Deepak Kumar (P.W. 2) is not reliable and trustworthy. No reliance can also be placed on the evidence of recovery of knife. So there is no reliable and cogent evidence on record to hold the accused guilty. The trial court has failed to appreciate the evidence in proper manner. The trial court has erred in placing reliance on the testimony of the sole eye witness Deepak Kumar (P.W.2) who is related as well as a chance witness and whose presence at the spot appeared doubtful. The learned trial court has also failed to take into consideration the defence evidence and also ignored the fact that the evidence of recovery of knife is not supported with any forensic report confirming that the recovered knife has been used in the offence. The learned trial court therefore erred in holding that from the prosecution evidence the case stands proved and appellant accused is guilty. The finding of conviction and sentence as recorded by the learned trial court is not sustainable in the eye of law and is liable to be set-aside and the appeal is liable to be allowed.

25. The criminal appeal is allowed. The impugned judgment and order of conviction dated 28.10.2010 passed by Additional Sessions Judge, F.T.C. No. 1, Bagpat in S.T. No. 166 of 2007, Case Crime No. 16 of 2007, under section 302 IPC, P.S. Baraut, District Bagpat (State Vs. Kala @ Ankit) is hereby set-aside. The appellant Kala @ Ankit is acquitted from the charge of offence punishable under section 302/34 IPC. He is in jail. He shall be released forthwith subject to compliance of Section 437A Cr.P.C. to the satisfaction of trial court, if not wanted in any other case.

26. The order be communicated to all concerned for necessary compliance.

Lower court's record along with the copy of the judgment be transmitted to the trial court immediately

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(2022) 9 ILRA 1693
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Criminal Revision No. 52 of 2021

Om Prakash Das Chela ....Revisionist
Versus
Vichar Das Chela & Ors. ...Respondents

Counsel for the Revisionist:
Sri Adya Prasad Tewari

Counsel for the Respondents:
Sri Anil Pratap Singh, Sri Kailash Pati, Singh Yadav, Sri Prabhakar Vardhan

A. Civil Law -Code of Civil Procedure, 1908-Section 115 - Order VI Rule 17 & Order I Rule 10(2)-Declaratory suit-plaintiff-revisionist filed a suit for declaration declaring him the Mahant of one Sant Kabir Math- Relief of permanent injunction was also claimed against defendants from not interfering into the peaceful possession of the plaintiff over the property of the Math and also not to evict the plaintiff-An amendment application under Order 6 Rule 17 was

filed by plaintiff in the year 2020 after the suit was being contested by defendant no. 3 for striking off her name from the plaint- The application was contested by defendant no. 3 by filing her objection that property in dispute was entered into the name of her father in whose favour one Jamuna Das had executed the Will. Her father had executed a Will in favour of defendant no. 3 and after the death of her father, name of defendant no. 3 was entered in the revenue records- Against the said order, a revision was preferred before the Additional Commissioner, Gorakhpur who dismissed the revision- The suit filed by the plaintiff relief for declaration as well as injunction has been sought, now at a later stage, the plaintiff cannot get the suit amended to the extent by deleting name of defendant no. 3 on the ground that only declaration as a Mahant has been sought-Hence, The trial court rightly rejected the application filed under Order 6 Rule 17 C.P.C. on the ground that in case the name of defendant no. 3 is deleted from the array of parties, it will give cause to the multiplicity of litigation.(Para 1 to 19)

B. The Sub-rule (2) of Rule 10 of Order 1 C.P.C. clearly provides for the addition of (i) necessary parties and (ii) proper parties. "Necessary parties' are parties, "who ought to have been joined", i.e., parties necessary to the constitution of suit without whom no decree can be passed at all. In order that a party may be considered a necessary party defendant, two conditions must be satisfied; first, that there must be a right to some relief against him in respect of matter involved in the suit. A necessary party is one without whom no decree can be made effectively.(Para 9)

The revision is dismissed. (E-6)

List of Cases cited:

1. Vidur Impex & Traders Pvt. Ltd. & ors.. Vs Tosh Apartments Pvt. Ltd. and Ors

2. Anil Kumar Singh Vs Shivnath Mishra

3. Kashi Vs Sadasiv

4. Shahsaheb Vs Sadashiv

5. Md.Hussain Gulam Ali Shariffi Vs Municipal Corp. of Grtr. Bom. & ors..

6. Kasturi Vs Iyyamperumal & ors..

7. Gurmit Singh Bhatia Vs Kiran Kant Robinson & ors..

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. This revision under Section 115 of Code of Civil Procedure, 1908 (hereinafter called as "C.P.C.') arises out of order dated 08.01.2021 passed by Civil Judge (Senior Division), Fast Track Court, Gorakhpur in Original Suit No. 400 of 2017, whereby the amendment application moved by the revisionist under Order 6 Rule 17 C.P.C. being Paper No. 25/K2 for striking out the name of defendant no. 3 from array of parties was

2. Facts in nutshell, are that plaintiff-revisionist filed a suit for declaration declaring him the Mahant of one Sant Kabir Math. Relief of permanent injunction was also claimed against defendants from not interfering into the peaceful possession of the plaintiff over the property of the Math and also not to evict the plaintiff. An amendment application under Order 6 Rule 17 was filed by plaintiff in the year 2020 after the suit was being contested by defendant no. 3 for striking off her name from the plaint. The application was contested by defendant no. 3 by filing her objection being Paper No. 28Ga and affidavit 29Ga on the ground that the property in dispute was entered into the name of her father Ram Nagina in whose favour one Jamuna Das had executed the Will. Ram Nagina had executed a Will in

favour of defendant no. 3 on 05.01.2002, and after the death of Ram Nagina, name of defendant no. 3 was entered in the revenue records vide order dated 20.03.2007. Against the said order, a revision was preferred before the Additional Commissioner, Gorakhpur who dismissed the revision on 08.04.2013, against which writ petition has been filed before this Court which is pending. According to defendant no. 3, her name is still recorded in the revenue records and the order dated 20.03.2007 is still standing in the revenue records. The court below after the exchange of pleadings vide order dated 08.01.2022 rejected the application of the plaintiff-revisionist. Hence, the present revision.

3. Sri A.P. Tewari, learned counsel appearing for the revisionist submitted that plaintiff is the dominus litis, and is master of the suit. According to him, defendant no. 3 is neither a necessary or a proper party and thus plaintiff sought for amendment for deleting the name of defendant no. 3. He then submitted that court below did not consider the true import of Order 1 Rule 10(2) C.P.C. and passed the order on non existent and unfounded grounds.

4. He then contended that as no relief was sought against defendant no. 3, thus, the court below was not justified in refusing the amendment sought. Reliance has been placed upon decisions of Apex Court in case of **Kasturi vs. Iyyamperumal and Ors1,** and decision rendered in **Gurmit Singh Bhatia vs. Kiran Kant Robinson and others2.**

5. I have heard learned counsel for the revisionist and perused the material on record.

6. Before adverting to decide the issue in hand, a cursory glance of Order 1 Rule 10 (2) is necessary for better appreciation of the case, which is extracted hereasunder:-

***"Order 1 Rule 10 (2) Court may strike out or add parties.**--The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."*

7. From perusal of Sub-rule (2) of Rule 10 of Order 1, it is clear that the court may at any stage of proceeding add parties or delete a party either on the application of a party or suo moto or by a third party who desires to be added as a party.

8. In exercise of the power to implead a person suo moto, the court has to see that a collusive decree is not obtained against real owner or interested owner without impleading him as a party and it does not become final affecting vitally the rights of such a person. The power of the court under this sub-rule is of discretion to be exercised judicially, keeping in mind that one of its object is to prevent multiplicity of suits and conflicts of decisions. Though, it is not in dispute that plaintiff is dominus litis, he cannot be compelled to sue a person against whom he does not claim any relief, unless it is held keeping in view pleading and relief claimed therein that a person sought to be added as a party is a necessary party and without his presence

neither the suit can proceed nor the relief can be granted. The doctrine of dominus litis was thus explained by the Apex Court in case of **Mohamed Hussain Gulam Ali Shariffi vs. Municipal Corporation of Greater Bombay and Ors.3**.

9. The Sub-rule (2) of Rule 10 of Order 1 C.P.C. clearly provides for the addition of (i) necessary parties and (ii) proper parties. "Necessary parties' are parties, "who ought to have been joined", i.e., parties necessary to the constitution of suit without whom no decree can be passed at all. In order that a party may be considered a necessary party defendant, two conditions must be satisfied; first, that there must be a right to some relief against him in respect of matter involved in the suit. A necessary party is one without whom no decree can be made effectively.

10. A proper party is one in whose absence, an effective order can be made but whose presence is necessary for complete and final decision on the question involved in the proceedings. Failure to implead a necessary party as a party to a proceeding is fatal. Proper parties are those whose presence enables the court to adjudicate more "effectually and completely", as held in case of **Shahsaheb vs. Sadashiv4.**

11. In **Kashi vs. Sadasiv5**, the Court held that a person may be impleaded as a defendant to a suit, though, no relief can be claimed against him, provided his presence is necessary for a complete and final decision of the questions involved in the suit.

12. In **Anil Kumar Singh vs. Shivnath Mishra6**, the Apex Court held that object of Order 1 Rule 10(2) of C.P.C. is to bring on record all the persons who are parties to the dispute relating to the subject-matter so that dispute may be determined in their presence and at the same time without any protraction, inconvenience and also to avoid multiplicity of proceedings. Relevant para 9 of the judgment is extracted hereasunder:-

"9. Sub-rule (2) of Rule 10 of Order 1 provides that the Court may either upon or without an application of either party, add any party whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. Since the respondent is not a party to the agreement of sale, it cannot be said that without his presence the dispute as to specific performance cannot be determined. Therefore, he is not a necessary party."

13. In **Vidur Impex and Traders Pvt. Ltd. and Ors. vs. Tosh Apartments Pvt. Ltd. and Ors7,** the Apex Court laid broad principles which should govern disposal of application for impleadment. Relevant paras are extracted hereasunder:-

"41.1. The court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the court is necessary for effective and complete adjudication of the issues involved in the suit.

41.2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the court.

41.3. A proper party is a person whose presence would enable the court to completely, effectively and properly adjudicate upon all matters and issues,

though he may not be a person in favour of or against whom a decree is to be made.

41.4. If a person is not found to be a proper or necessary party, the court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.

41.5. In a suit for specific performance, the court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

41.6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the court or the application is unduly delayed then the court will be fully justified in declining the prayer for impleadment."

14. Admittedly, defendant no. 3 is claiming right over the land for which relief for permanent injunction has been sought by plaintiff, and her name has been mutated on revenue records on the basis of the Will executed by her father in the year 2002 and is continuing over the possession since then. The defendant no. 3 is a necessary party in view of fact that her name has already been recorded in the revenue records on the basis of Will and plaintiff had sought relief of permanent injunction against defendants.

15. Though, in the suit filed by the plaintiff relief for declaration as well as injunction has been sought, now at a later stage, the plaintiff cannot get the suit amended to the extent by deleting name of defendant no. 3 on the ground that only declaration as a Mahant has been sought.

16. The trial court rightly rejected the application filed under Order 6 Rule 17 C.P.C. on the ground that in case the name of defendant no. 3 is deleted from the array of parties, it will give cause to the multiplicity of litigation. In Anil Kumar Singh (supra), the Hon'ble Apex Court had rightly held that all parties to dispute relating to a subject-matter should be brought on record and dispute be determined in their presence so as to avoid multiplicity of proceedings.

17. It is not in dispute that name of defendant no. 3 is recorded in the revenue records over the property in dispute for which the injunction has been sought by the plaintiff, while the first relief claimed is for declaring the plaintiff as Mahant of Sant Kabir Math. In case the name of defendant no. 3 is deleted it would lead to multiplicity of litigation.

18. Considering the facts and circumstances of the case, this Court finds that no interference is required in the order dated 08.01.2021 passed by court below rejecting the application for amendment.

19. The revision fails and is hereby ***dismissed.***

(2022) 9 ILRA 1697
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 144 of 2018

Krishna Kumar Gupta ...Revisionist
Versus
Manoj Kumar Sahu ...Opposite Parties

Counsel for the Revisionist:
Sri Vineet Vikram, Sri Imran Ullah, Sri G.S. Chaturvedi (Senior Counsel)

Counsel for the Opposite Parties:
G.A., Sri Anurag Kumar Singh, Sri Neeraj Tiwari, Sri Sanjay Kumar Yadav, Sri Gyan Prakash (Sr. Advocate), Sri Vinay Saran (Sr. Advocate), Sri Alok Kumar, Sri Alok Kumar Dubey, Sri Saumitra Dwivedi, Sri Vinay Prakash Shukla, Sri Rishi Shankar Dwivedi.

A. Civil Law - Transfer of Property Act,1882-Section 106-Evidence Act,1872-Section 114-General Clause Act, 1897-Section 27-Notice-Letter was sent through registered post on correct address, which was returned back with endorsement of postman-Notice under section 106 of the Act, shall be treated to be sufficient for filing SCC suit.(Para 1 to 31)

B. From the perusal of Section 27 of Act,1897, it clearly transpires that service shall be deemed to be affected by properly addressing, pre paying postal charges and posting by registered post, a letter containing the document shall be treated to be sufficient unless the contrary is proved. It shall also be seen in light of Section 114 (f) of of Act, 1872 which provides that in common course of business has to be followed and in present case, in light of Section 27 of Act,1897, common course of business is that letter has to be sent alongwith proper addressee, paying postal charges, having documents and further it will be presumed that address shall receive the same unless address is not correct. (Para 25)

The revision is dismissed. (E-6)

List of Cases cited:

1. Shamim Ahmad Alvi Vs Azizul Rahman Khan Second Appeal No. 979 of 1972 Shiv Narayan Goswami Vs Jagdish Prasad Gupta (2015) 3 ARC 171

2. Satish Chandra @ Satish Pandit Vs Manohar Lal Gera (2017) 1 ARC 470

3. Rama Devi Vs Ram Prakash1(984) LawSuit (All) 98

4. A. Rama Rao & ors. Vs Raghunath Patnaik & ors. (2007) 68 ALR 464

5. Ganga Ram Vs Phulwati (1970) SCC Online All 42

6. Ms/. Madan & Co. Vs Wazir Jaivir Chand (1988) 0 Supreme (SC) 715

7. Subhas Chandra Mitra Vs Netai Chand Dey (2004) 21 AIC 583

8. Sharda Prasad @ Chhulli Vs A.D.J.Alld & ors. (2005) 3 AWC 2417

9. C.C. Alavi Haji Vs Palapetty Md & anr. (2007) 5 Supeme 277

10. Ghulam Waris Khan Vs LT Col Ajeet Singh (2008) Supreme (All) 134

11. Mohanlal Manna Vs Lakshmi Prasad Shaw Second Appeal No. 732 of 1999

12. Smt. Vandana Gulati Vs Gurmeet Singh @ Mangal Singh (2013) 2 ADJ 281

13. Ajeet Seeds Ltd Vs K. Gopala Krishnaiah (2014) 12 SCC 685

14. Alok Kumar Kaushik Vs O.P. Shah & anr. (2017) 0 Supreme (All) 1170

15. Jain Developers & ors Vs Raja R. Chhabria & ors. Commercial Appeal No. 168 of 2017

16. P.T. Thomas Vs Thomas Job (2005) 6 SCC 478.

17. Lakshmi Prasad Sharma Vs Thakur Mahadeoji (1971) All WR HC 622

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri K.K. Arora, learned counsel for the revisionist and Sri Rakesh Prasad, learned counsel for opposite party.

2. Present revision has been preferred challenging the judgment and decree dated 03.10.2018 passed by Additional District and Sessions Judge/ F.T.C., Kanpur Nagar in S.C.C Suit No. 165 of 2015.

3. Learned counsel for the revisionist submitted that revisionist is tenant and suit for eviction being SCC Suit No. 165 of 2015 was filed after sending notice dated 6.4.2015 through registered post as required under Section 106 of Transfer Property Act, 1882 (hereinafter referred to as "Act, 1882"). He next submitted that said notice was returned back by the postman on the very next date i.e. 7.4.2015 with remark "दरियाफत करने पर घर वालों ने बताया कि प्राप्तकर्ता अपने निजी कार्य से बाहर गये हैं आने का कोई निश्चित समय नहीं है। " He next submitted that as per letter dated 8.6.2015, same has been returned to addressee i.e. Jai Prakash Yadav on 10.04.2015. Therefore, under such facts of the case, once the notice has not been served and on the very next date i.e. 7.4.2015, it was returned back with the endorsement of postman and further, notice has been sent back to addressee on 10.04.2015, it shall not be treated to be sufficient. It is settled position of law that without service of notice under Section 106 of Act, 1882, no SCC Suit can be maintained. In support of his contention, he has placed reliance upon the judgements of this Court in the matter of ***Shamim Ahmad Alvi Vs. Azizul Rahman Khan*** passed in Second Appeal No. 979 of 1972 decided on 11.3.1972, ***Shiv Narayan Goswami Vs. Jagdish Prasad Gupta; 2015(3) ARC 171, Satish Chandra @ Satish Pandit Vs. Manohar Lal Gera; 2017 (1) ARC 470 and Rama Devi Vs. Ram Prakash; 1984 LawSuit (All) 98.*** He also placed reliance upon the judgment of Apex Court in the matter of ***A. Rama Rao and others Vs. Raghunath Patnaik and others; 2007 (68) ALR 464.***

4. Learned counsel for opposite party has not disputed the said fact, but submitted that sending notice dated 6.4.2015 shall be treated to be sufficient in light of Section 27 of General Clauses Act, 1897 (hereinafter referred to as "Act, 1897"). In support of his contention, he has placed reliance upon the judgements of Full Bench of this Court in the matter of ***Ganga Ram Vs. Phulwati; 1970 SCC Online All 42.*** He also placed reliance upon the judgments of Apex Court as well as different High Courts in the matters of ***Ms/. Madan and Co. Vs. Wazir Jaivir Chand; 1988 0 Supreme (SC) 715, Subhas Chandra Mitra Vs. Netai Chand Dey; 2004 (21) AIC 583, Sharda Prasad @ Chhulli Vs. A.D.J., Allahabad and others; 2005 (3) AWC 2417, C.C. Alavi Haji Vs. Palapetty Muhammed & another; 2007 (5) Supeme 277, Ghulam Waris Khan Vs. LT Col Ajeet Singh; 2008) Supreme (All) 134, Mohanlal Manna Vs. Lakshmi Prasad Shaw*** passed in Second Appeal No. 732 of 1999 decided on 30.11.2011, ***Smt. Vandana Gulati Vs. Gurmeet Singh @ Mangal Singh; 2013 (2) ADJ 281, Ajeet Seeds Limited Vs. K. Gopala Krishnaiah; (2014) 12 SCC 685, Alok Kumar Kaushik Vs. O.P. Shah and another; 2017 0 Supreme (All) 1170, Jain Developers and 3 others Vs. Raja R. Chhabria and 4 others*** passed in Commercial Appeal No. 168 of 2017 In Suit No. 2808 of 2008 with Chamber Summons No. 139 of 2017 with Notice of Motion No. 2513 of 2016 In Suit No. 2808 of 2008 decided on 29.01.2018 and ***P.T. Thomas Vs. Thomas Job; (2005) 6 SCC 478.***

5. I have considered the rival submissions made by learned counsel for the parties, perused the relevant provisions of law as well as judgments relied upon.

6. The controversy before this Court is as to when service of notice shall be

treated sufficient. To deal with present controversy, Section 114 of Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1872") as well as Section 27 of Act, 1897 is relevant provision of law, in light of which controversy has to be decided, therefore, the same is quoted below;

Section 114 of Act, 1872

"Section 114- *Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened. regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.*

Illustrations

The Court may presume-

(f) That the common course of business has been followed in particular cases;

Section 27 of Act, 1897

"27. Meaning of service by post. –

Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre- paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

7. Learned counsel for the revisionist placed reliance upon the judgment of this Court in the matter of ***Shamim Ahmad Alvi (Supra)***. Relevant paragraphs are quoted below;

"From his deposition, it is clear that on the first day the postman could not meet the appellant. The endorsement on the cover of the letter was, therefore, made "not met". Next day, he again went to the appellant's house but the postman was informed by the brother of the appellant that he was out of station and on the request of the postman, he refused to supply the address of the appellant. The endorsement of refusal made by the postal department was on the basis of the report given by the postman that the brother of the appellant refused to supply him the address of the appellant. On the evidence of the postman, it is not possible to hold that any offer was made by the postman to the appellant and in the absence of any offer, it is illegal to hold that the notice was refused by the appellant.

It is true that the lower appellate court has recorded a finding that the appellant was at Moradabad, as he must have come to meet the children during Id holidays and must have remained at Moradabad as Holi holidays followed the Id holidays. Sri Bashir Ahmad sought to challenge even that finding of the lower appellate court, but it is not necessary to enter into that question. I assume for the purposes of this case that the appellant was present at Moradabad on the relevant date, but unless the Court recorded a finding that he was present at home, the endorsement of refusal by the appellant would be wholly illegal. There is no finding by the lower appellate court that the appellant was present at home. The testimony of the postman, which is the only evidence on this material question, does not indicate that the appellant was present at home. He has not deposed that he offered the registered

letter to the appellant and he refused to take the same. His evidence, on the other hand, clearly goes to show that he was not present at home and his brother refused to give the address. It is on this basis that the postal department has made the endorsement of refusal.

In Lakshmi Prasad Sharma v. Thakur Mahadeoji, (1971 All WR (HC) 622), it was held that unless there was an offer made, there could be no refusal. In this view of the matter, the finding that the appellant refused to receive the notice is wholly unwarranted on the evidence on the record. In my opinion, as there was no service of notice under Section 106 of the Transfer of Property Act on the appellant, there was no termination of his tenancy and the suit for ejectment could not possibly be decreed."

7. He further placed reliance upon the judgment of ***Shiv Narayan Goswami (supra)*** and submitted that after considering so many judgments of Apex Court, Court has taken same view. Relevant paragraphs are quoted below;

"The service of notice sent by registered post can be presumed to have been served upon the addressee when it is not returned undelivered or returned with postal endorsement of 'refusal' etc., but where the registered letter is received back with endorsement like "addressee is not available at the address" or "not met" or "out of station" etc., which shows that there was no occasion for postal authority to offer the letter to the addressee and there was no act on the part of addressee having the effect of denying receipt of such letter, such presumption of service in respect of registered letter cannot arise.

Section 27 of General Clauses Act, 1897 (hereinafter referred to as "Act, 1897") reads as under:

"27. Meaning of service by post.- Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, where the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Here the presumption in respect of registered letter applies only if otherwise is not proved. In the present case letters have been received back with endorsement "not met" and that being so there cannot be a presumption that registered letter must be deemed to have been proved. Here is also not a case where letter has been received with endorsement of 'refusal'.

In Sukumar Guha Vs. Naresh Chandra Ghosh AIR 1968 Cal. 49, a Single Judge (Hon'ble Amresh Roj, J.) referring to Section 114, Illustration (f) of Act, 1872, Section 106 of Act, 1882 and Section 27 of Act, 1897 said that presumption under Section 27 of Act, 1897 can arise only when a notice is sent by registered post while there may arise a presumption under Section 114 of Act, 1872 when notice is sent by ordinary post or under certificate of posting. Both the presumptions are rebuttable. When the cover containing notice has been returned to the sender by postal authorities, then that fact is direct proof of the fact that the notice sent by post was not delivered to the party to whom it was addressed. Similarly, presumption under Section 114, illustration (f) of Evidence Act also, in my view, has no application in the case in hand.

The court below, therefore, in holding that since letters were sent by registered post, they will must be deemed to have been delivered to the addressee and the mere fact that letters have been received with endorsement that addressee did not meet would make no difference, in my view, is not correct. Since no valid notice was served upon revisionist, it cannot be said that tenancy was validly terminated entitling revisionist to have a decree of eviction against him."

8. He also placed reliance upon the judgment of this Court in the matter of ***Satish Chandra @ Satish Pandit (supra)*** and submitted that in that case too, Court has taken the similar view. Relevant paragraphs are quoted below;

"The basic question which arises for consideration is the validity of the notice determining tenancy and its services in the absence of which the suit could not have decreed.

The tenancy of the defendant revisionist is said to have been determined vide notice dated 02.01.2009 which was brought on record. The trial court while deciding the issues No. 3 and 4 regarding the validity of the notice and if the defendant revisionist is liable to be evicted on its basis has recorded a finding that since the notice dated 02.01.2009 (Paper No.7Ga) has been filed in evidence it clearly shows that the tenancy of the defendant revisionist has been determined.

In the later part of the finding, the court below poses a question as to whether the notice was served upon the defendant revisionist but solely on the reasoning that the copy of the notice is on record held that the tenancy has been determined without recording any specific finding with regard to the service of the notice.

In view of above, there is no finding by the court below regarding the service of notice dated 02.01.2009 upon the defendant revisionist.

Sri B.N. Rai, learned counsel appearing for the plaintiff respondent has pointed out that the notice dated 02.01.2009 was sent to the defendant revisionist by registered post and it was served upon him on 04.01.2009. The copy of the notice, its dispatched receipt dated 03.01.2009 and acknowledgement (Paper No. 9 Ga) were filed in evidence and therefore, it is clear that the notice determining tenancy was duly served upon the defendant revisionist.

It is true that the plaintiff respondent pleaded issuance of the aforesaid notice and its service but the service was denied by the defendant revisionist in the written statement. The mere filing of the copy of the notice, its receipt of dispatched and acknowledgement is not sufficient to prove that the notice was served upon the defendant revisionist.

The court below has not recorded any finding regarding the service of notice. The tenancy will not stand determined unless the notice determining tenancy is reported to be served upon the tenant.

In the absence of any finding in this regard the court below committed jurisdictional error in decreeing the suit by holding that the tenancy of the defendant revisionist stood determined by the said notice."

9. Further, he placed reliance upon the judgment of this Court in the matter of ***Rama Devi (supra).*** Relevant paragraph is being quoted below;

"When the first appellate Court has been confused on account of wrong reading of evidence and has referred to

such wrong evidence naturally it will be now open to this Court to consider whether the evidence of Moti Lal, defendant No. 2, amounts to or serves as rebuttal of the initial presumption raised. Moti Lal has stated that the Moran of his son was to be performed at Vindhyachal and he has sent a postcard to his mother to reach Mirzapur by 6th evening so that she can accompany Moti Lal and others to Vindhyachal for such Mooran ceremony and his mother so accompanied and after performing the Mooran ceremony the party returned to Varanasi in the night of 8th Aug. 1970. True that if there is conduct or admission of the party belying such denial or rendering it improbable then their denial will not be proof but the conduct of the party denying the service does not appear to be such, rather circumstances are available to considerate be Moti Lal. (sic) A postcard was addressed to the mother much earlier and that evidence could not have been created later as an after-thought. This would mean that Mooran was planned as alleged and even defendant No. 1 the mother was summoned to accompany. There is another circumstance, namely, the leave taken by Moti Lal for 7-8-70, 8th being Saturday. I am really surprised how the lack of any permission to leave the station would be relevant. In fact he was out of station all right. The plaintiffs case is that he was in Varanasi proper. The defendant's case is that Moti Lal had gone to Mirzapur. I for one cannot apply two standards. If lack of permission is vague it is also vague against the case alleging that defendant No. 2 was at Varanasi so the question of permission has become irrelevant. The first appellate Court has fallen in error by misreading the evidence of the plaintiff and this Court can therefore well interfere with the findings of the first appellate Court. Moti Lal's evidence rebutted the presumption of service of notice by denial and in such situation it became incumbent upon the plaintiff to lead further evidence to prove otherwise. The first appellate Court has observed that there should have been some additional evidence including production of the mother. The mother's production as the other party would have simply meant multiplication of evidence in case of denial when it is a negative statement and the circumstances supporting or rebutting such statement are the only relevant facts of importance and this aspect has been overlooked by the first appellate Court. The presumption having stood rebutted the plaintiff should have given additional evidence as the burden again shifted upon the plaintiff to prove the service of notice which has not been done."

10. Lastly, he placed reliance upon the judgement of Apex Court in the matter of ***A. Rama Rao and others (supra).*** Relevant paragraphs are quoted below;

"It appears that stand was that when the defendant No. 1 on oath stated that he did not receive the notice allegedly sent by post, the same would prevail over the postal remarks that it was "refused" unless the postman was examined. Further, the plea that there was no specific averment regarding sending the notice by post or its refusal has not been considered. Learned Counsel for the respondents has submitted that suit was filed on 5.4.1984 i.e. the date of refusal overlooks the plea raised to the effect that the same could have been brought in by way of an amendment and/or that the alleged date of refusal was 8.4.1984.

Learned Counsel for the appellants has produced before us original paper books filed before the High Court

which show the endorsement that their refusal was 8.4.1984.

In above view of the matter, we direct the High Court to record its findings on the question of service of notice and also the effect of the absence of any definite and specific plea regarding dispatch of notice by post and/or its refusal. Even if it is accepted that the refusal was on 5.4.1984 i.e. the date of filing of the suit nothing prevented the plaintiff to at least mention that the notice has been sent by post. The findings shall be recorded by the High Court after granting opportunity to the parties to place their respective stand. The High Court shall send its findings to this Court after recording the same within a period of three months. Call this matter after four months."

11. Learned counsel for opposite party submitted that judgments so relied by learned counsel for the revisionist have not considered the consistent pronouncements made by this Court as well as Apex Court where the Court has taken specific view that once notice has been sent on correct address in light of Section 114 of Act, 1872 as well as Section 27 of Act, 1897 shall be treated sufficient.

12. First, he placed reliance upon judgment of Full Bench of this Court in the matter of ***Ganga Ram (supra)***. Relevant paragraph of said judgment is quoted below;

"The fact that the notice was returned back to the sender with an endorsement "Refused" does not in our opinion, dislodge the presumption that the registered notice had reached the addressee. On the other hand, it strengthens the presumption that the notice had reached the addressee. It could not be delivered to him because he refused to accept it. In view of what we have stated above, we proceed to answer as follows the three questions referred to the Full Bench:- -

Question Our Reply

1. Whether a notice under S. 3 of the U. P. (Temporary) Control of Rent and Eviction Act, even if combined with a notice under S.109 of the Transfer of Property Act, has to be served on the tenant personally?

Ans. The answer is in the negative. Even a notice of demand deemed or presumed to have been served on a tenant will be "service upon him of notice of demand".

2. Whether it is incumbent on the plaintiff to prove the endorsement of refusal on the notice sent by registered post by producing the postman or other evidence in case the defendant denies service on him ?

Ans. The answer is in the negative.

3. Whether in the circumstances of the present case the Courts below were right in raising the presumption under S.114 of the Evidence Act in favour of the landlord ?

Ans. The answer is in the affirmative. The presumption regarding service of such notice has also be made under S. 27, General Clauses Act."

13. He next relied upon the judgment of Apex Court in the matter of ***M/s. Madan and Co. (supra)*** in which the Apex Court has taken the very same view. Relevant paragraphs are quoted below;

"We are of opinion that the conclusion arrived at by the courts below is correct and should be upheld. It is true that the proviso to (i) of section 11(1) and the proviso to section 12(3) are intended for the protection of the tenant. Nevertheless it

will be easy to see that too strict and literal a compliance of their language would be impractical and unworkable. The proviso insists that before any amount of rent can be said to be in arrears, a notice has to be served through posts. All that a landlord can to comply with this provision is to post a prepaid registered letter (acknowledgment due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee under s.27 of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorised by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribe any detailed procedure regarding the delivery of such registered letters. When the postman is unable to deliver it on his first visit, the general practice is for the postman to attempt to deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the assessee's absence. His responsibilities cannot, therefore, be equated to those of a process server entrusted with the responsibilities of serving the summons of a Court under Order V of the C.P.C. The statutory provision has to be interpreted in the context of this difficulty and in the light of the very limited role that the post office can play in such a task. If we interpret the provision as requiring that the letter must have been actually delivered to the addressee, we would be virtually rendering it a dead letter. The letter cannot be served where, as in this case, the tenant is away from the premises for some considerable time. Also, as addressee can easily avoid receiving the letter addressed to him without specifically refusing to receive it. He can so manipulate matters that it gets returned to the sender with vague endorsements such as "not found", "not in station", "addressee has left" and so on. It is suggested that a landlord, knowing that the tenant is away from station for some reasons, could go through the motions of posting a letter to him which he knows will not be served. Such a possibility cannot be excluded. But, as against this, if a registered letter addressed to a person at his residential address does not get served in the normal PG NO 990 course and is returned, it can only be attributed to the addressee's own conduct. If he is staying in the premises, there is no reason why it should not be served on him. If he is compelled to be away for some time, all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward them to the address where he has B gone or to deliver them to some other person authorised by him. In this situation, we have to chose the more reasonable, effective, equitable and practical interpretation and that would be to read the words "served" as "sent by post", correctly and properly addressed to the tenant, and the word "receipt" as the tender of the letter

by the postal peon at the address mentioned in the letter. No other interpretation, we think, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him I gets served on, or is received by, the tenant.

Much emphasis has been placed by the courts below and counsel for the landlord on the attempt made by the landlord to serve the notice on the premises in the presence of the witnesses. While the counsel for the landlord would have it that the steps show the landlord's bona fides counsel for the tenant submits that the haste with which the 'substituted service' was effected and the lack of any real attempt to find out the whereabouts of the tenant (who had, according to him, been compelled to be away at Amritsar for medical treatment) throw consideration doubts on the claim of bona fides. We do not think that any statutory significance can at all be attached to the service by affixture claimed to have been effected by the landlord. The statute prescribes only one method of service for the notice and none other. If, as we have held, the despatch of the notice by registered post was sufficient compliance with this requirement, the landlord has fulfilled it. But, if that is not so, it is no compliance with the statute for the landlord to say that he has served the notice by some other method. To require any such service to be effected over and above the postal service would be to travel outside the statute. Where the statute does not specify any such additional or alternative mode of service, there can be no warrant for importing into the statute a method of service on the lines of the provisions of the C.P.C. We would therefore not like to hold that a "substituted" service, such as the one effected by the landlord in the present case, is a necessary or permissible requirement of the statute. It may be even an impracticable, if not impossible, requirement to expect some such service to be effected in cases where the landlord lives outside the town, or the State in which the premises are situated. If, in the present case, the landlord attempted such service because he was in the same town, that can only show His bona fides and it is only in this view that we proceed to express our findings in this regard."

14. He further placed reliance upon the judgment of Calcutta High Court in the matter of ***Subhas Chandra Mitra (supra)***. Relevant paragraph is being quoted below;

"So far as the first limb of argument of Mr. Chatterjee is concerned, as rightly pointed out by Mr. Dutta, it appears from the Ext. 3 that the notice was tendered on several occasions. It is not mentioned that the tenant was absent or had the left the premises. No such endorsement is appearing from Ext. 3. This position could not be disputed by Mr. Chatterjee. Admittedly, the notice was issued in the suit premises. Mr. Dutta had pointed out and contended that it was the address recorded with the landlord. That this was also an address of the tenant is also not denied by the tenant. It is not a case made out by the tenant that he had left the premises altogether and was residing elsewhere and that he did not come to or visit the suit premises. He had neither established nor contended that during the period when the notice was tendered, he had never been to the suit premises nor he had proved that he was absent or had left the suit premises when the notice was tendered successively. The fact that the landlord had addressed the earlier notice at different place will not invalidate the second notice addressed to the suit

premises when the notice addressed to some other place was not the address recorded with the landlord. The Tenant was connected with the tenancy and it could not be presumed that he had never visited the suit premises when admittedly he was running a Boarding house in the suit premises, as was pleaded in the written statement and in the reply to the first notice and as well as in the evidence of the DW-1, given by his son. Therefore, the action of the postal authority, which is done in the usual course of business, is to be accepted as correct unless it is otherwise proved by the tenant to show that he had no occasion to be in the premises during that period or that he had left the suit premises altogether. When it is not recorded on the postal endorsement by the postal authority that the tenant was absent or has left, we cannot presume that the tenant was absent from the suit premises during the period when the notice was tendered or had left the same. Therefore, we do not find any perversity in the concurrent finding of the Courts below that the service was good. Therefore, we are not inclined to interfere with the finding with regard to the validity of the service of notice on the basis of the endorsement "not claimed" by the postal authority."

15. He also placed reliance upon the judgment of this Court in the matter of ***Sharda Prasad @ Chhulli (supra)*** in which Court has considered the very same issue and taken same view about service of notice. Relevant paragraphs are quoted below;

"The postman initiated and put the date as 23.3.78.

In the instant case, both the Courts below after close scrutiny of the evidence on record found that there was presumption of service of notice on the tenant. Section 114 Clause (f) of the Evidence Act provides that the Court may presume that the common course of business has been followed. It was held by a Full Bench of this Court Ganga Ram's case (supra) that it is not incumbent on the plaintiff to prove the endorsement of refusal on the notice sent by registered post by producing the postman or other evidence in case the defendant denies service on him. The Bench further held that the Court below was right in raising the presumption under Section 114 of the Evidence Act in favour of the landlord where notice sent to the tenant was returned with an endorsement of refusal. The presumption regarding service has also to be made under Section 27 of General Clauses Act. This was held by the Supreme Court also in Puwada Venkateshwar Rao v. Chidamana Ventata Ramana,: AIR 1976 SC 869. The Apex Court of the country has also held in Gujarat Electricity Board (supra) that there is presumption of service of letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party, challenging the factum of service. In the instant case, the petitioner failed to discharged this burden as he failed to produce material before the Court to show that the endorsement of the postman was wrong. Mere denial by the petitioner in the circumstances of the case was not sufficient

to rebut the presumption. The petitioner deposed in the Courts below that no notice was served on him nor he refused to receive the notice. When he was confronted that he had refused to receive the letter in the presence of Ramesh Chandra, he denied the suggestion. He however admitted that Ramesh Chandra resided in front of his house. In this view of the matter I find that the presumption was not rebutted by the petitioner and he failed to show that letter was not sent on the correct address or there was no occasion for him to refuse. I therefore, find that the Courts below rightly found that notice was served on the tenant by refusal.

No other point was pressed in this petition."

16. He next placed reliance upon the judgment of Apex Court in the matter of ***C.C. Alavi Haji (supra)*** in which Apex Court has considered the matter in detail. Relevant paragraphs of the said judgment are quoted below;

"Therefore, the moot question requiring consideration is in regard to the implication of Section 114 of the Indian Evidence Act, 1872 insofar as the service of notice under the said proviso is concerned. Section 114 of the Indian Evidence Act, 1872 reads as follows:

Section 114 - Court may presume existence of certain facts - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume--------

(f) That the common course of business has been followed in particular cases.

...."

According to Section 114 of the Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

27. Meaning of service by post-

Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different

intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed. (Vide Jagdish Singh v. Natthu Singh: AIR 1992 SC 1604; State of M.P. v. Hiralal and Ors. : (1996) 7 SCC 523 and V. Raja Kumari v. P. Subbarama Naidu and Anr. : (2004) 8 SCC 774. It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved."

17. He also placed reliance upon the judgment of this Court in the matter of ***Ghulam Waris Khan (supra)***. Relevant paragraphs are quoted below;

"Section 27 of the General Clauses Act also deals with the meaning of word 'service' by post and according to the same the service shall be deemed to be effected if the letter is properly addressed and the same is sent by registered post after the postal charges have already been paid unless contrary is proved to have been effected at the time if letter would have been delivered in ordinary course.

Hon'ble Supreme Court in M/s. Madan and Company v. Wazir Jaivir Chand : 1989 (2) ARC page 381, cited on behalf of revisionists has observed that if a registered letter addressed to a person at his residential address does not get served in normal course and is returned, it can only be attributed to the addressee's own conduct. It has been further observed that the dispatch of the notice by registered post is sufficient compliance, the landlord is required to fulfill.

The Hon'ble Supreme Court in K. Bhaskaran v. Sankaran Vaishyan Balan and another : (1999) 7 SCC 510, has held that there is no significant difference when the notice is returned as "unclaimed" and not as "refused" and has further held that under section 27 of the General Clauses Act, there would be presumption of service in such cases and that it is upto the other party to rebut this presumption of service by post Although the said case was under section 138 of the Negotiable Instruments Act but the principle in such matter regarding service of notice will be applicable in the instant case also. Therefore, in the instant case also, in view of the above endorsements it can safely be said that presumption would be that the notice was served on the defendant as he failed to rebut the said presumption by adducing any notice in rebuttal. It was open to the revisionist to produce either any of his employees to belie the

endorsement of postman or postman himself."

18. Further, he placed reliance upon the judgment of Calcutta High Court in the matter of ***Mohanlal Manna (supra)***. Relevant paragraphs are quoted below;

"It is true that learned Lower Appellate Court in a cryptic manner accepted said postal endorsement 'not claimed' as a good service, but he relied on the findings of learned Trial Court on this score. Accordingly, it may be held that learned Lower Appellate Court did not make any elaborate discussion on the findings of learned Trial Court on this issue, as he concurred with learned Trial Court. Though a more detailed discussion on this point from the learned Lower Appellate Court was desirable but this cannot be a ground for not accepting the findings of learned Lower Appellate Court on this issue when he put reliance on the findings of the learned Trial Court who discussed this issue elaborately.

Accordingly, I am of opinion that the endorsements 'not claimed' on the notice sent under registered post amounted to good service in the facts and circumstances of this case and that findings of learned Courts on this score did not call for any interference by this Court."

19. He next placed reliance upon the judgment of this Court in the matter of ***Smt. Vandana Gulati (supra).*** Relevant paragraphs are quoted below;

"A Division Bench of this Court in Ram Nath and others v. Angan, 1984 (2) ARC 290, held that where a registered envelope with correct address of the tenant is posted and the tenant refuses to take notice or it is returned with the endorsement "not met" the notice shall be deemed to have been properly served upon him and the landlord is not required to examine the postman.

The above view is fulfilled by the observations of the Supreme Court in M/s. Madan and Co. v. Wazir Jaivir Chand, AIR 1989 SC 630, wherein it was remarked that when the postman is unable to deliver the letter/notice on repeated attempts either on account of the addressee 'not found' not in station, addressee is left or not met' the presumption of service arises as it is not possible for a landlord to ensure that the registered letter/notice sent by him is actually received by the tenant.

In the light of the above legal position, the argument that the endorsement "not claimed/not met" is not sufficient to prove deemed service of the notice cannot be accepted, particularly when there is no evidence to rebut the presumption of service which arises both on fact and law."

20. Again, Apex Court in the matter of ***Ajeet Seeds Limited (supra),*** reiterated the same view and relevant paragraph of the same is quoted hereinbelow;-

"This Court then explained the nature of presumptions under Section 114 of the Evidence Act and under Section 27 of the GC Act and pointed out how these two presumptions are to be employed while considering the question of service of notice under Section 138 of the NI Act. The relevant paragraphs read as under:

"13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are

circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

"27. Meaning of service by post.- Where any Central Act or regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression ''serve' or either of the expressions ''give' or ''send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement ''refused' or ''not available in the house' or ''house locked' or ''shop closed' or ''addressee not in station', due service has to be presumed. [Vide Jagdish Singh Vs. Natthu Singh (1992) 1 SCC 647; State of M.P. Vs. Hiralal & Ors. (1996) 7 SCC 523 and V.Raja Kumari Vs. P.Subbarama Naidu & Anr. (2004) 8 SCC 74] It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved."

It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is

deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business."

21. He next submitted that this Court again considered the very identical issue in the matter of ***Alok Kumar Kaushik (supra)*** where there is a postal remark that postman went at the addressee place, but either he had not met or door was locked. This Court has framed question no. 1 and finally replied that in such cases, notice shall be treated sufficient. Question No. 1 is quoted below;

"(i) Whether under the facts and circumstances of the case, there was a valid service of notice upon the defendant-revisionist terminating the tenancy and demanding arrears of rent ? "

22. The Court has replied the same, which is also quoted herein below;

"In the present set of facts, on account of default in payment of rent and also on account of expiry of the term of tenancy; the plaintiffs-respondents were seriously pursuing the matter terminating the tenancy of the defendant-revisionist and for recovery of arrears of rent amounting to Rs.54600/-. They sent repeated notices both at the residential address and Chamber address by registered post and also simultaneously under certificate of posting. The evidence being paper no.60-C and 61-C shows that they sent the notices at the residential address of the defendant-revisionist as well as at his Chamber address in Civil Court Compound, Ghaziabad. There is no dispute that the plaintiffs-respondents correctly mentioned the addresses of the defendant-revsionist on the envelops sent by registered post and under certificate of posting. The postman visited to deliver the registered envelops containing the notice, to the defendant-revisionist at his residential address and also Chamber address on several dates. Under the circumstances and also for the reasons recorded in preceding paragraphs no. 11,13 and 14 and the law laid down by Hon'ble Supreme Court as discussed in preceding paragraphs no. 12,14,15 and 16, I have no hesitation to hold that the facts of the present case fully justify a presumption to be drawn for valid service of notice upon the defendant-revisionist whereby the tenancy of the defendant-revisionist was terminated and arrears of rent were demanded."

23. He further placed reliance upon the judgment of Bombay High Court in the matter of ***Jain Developers and 3 others (supra).*** Relevant paragraph is being quoted below;

"Section 27 of the Code of Civil Procedure, 1908 deals with summons to be served to the defendants. It provides that where a suit has been duly instituted, a summons may be issued to the defendants to appear and answer the claim and may be served in the manner prescribed not beyond 30 days from the date of institution of the suit. Order V of the CPC deals with service of summons. Rule 2 mandates that every summons shall be accompanied by a copy of the plaint. As per Rule 5, the summons may be issued either for settlement of issues or final disposal of the suit and it is mandatory to mention the date of appearance of the defendants on receipt of service of summons. On receipt of the summons, the defendant may produce the documents which he intends to rely upon in his defence and if the summons is for final disposal, he may produce his witnesses on whom he intends to rely in support of his

case. Rule 9 prescribes the manner in which the summons are to be delivered to the defendant and the summons can be delivered or sent either to the proper office to be served by him or it can be served through a courier service approved by the Court. Rule 10 provides mode of service of summons by delivery or tendering a copy thereof signed by the Judge or any officer authorized on its behalf and sealed with the seal of the Court. Rule 17 prescribes the procedure when the defendant refuses to accept the service or cannot be found and it requires the serving officer to affix the copy of the summons on the door or some conspicuous part of the house in which the defendants ordinarily reside or carries on business or personally works for gain and to return the original to the Court from which it was issued. Rule 18 mandates the serving officer to endorse or annex or caused to be served, annexed or caused to be served, annexed or to the original summons returned stating the time and the manner in which the summons were served. When the summons is returned unserved, the Court is duty bond to examine the serving officer on oath and may make further enquiry about service of such summons."

24. He further placed reliance upon the judgment of Apex Court in the matter of ***P.T. Thomas (supra)*** and submitted that once the endorsement has been made by the postman with regard to service of notice, there is no requirement to examine the postman. Relevant paragraph of the said judgment is quoted below;

"The High Court, in our view, has also misinterpreted Section 27 of the Post Office Act. The requirement of Section has been complied with in this case. The reasoning of the High Court on this issue is not correct and not in accordance with factual position. In the notice issued, the Postman has made the endorsement. This presumption is correct in law. He had given notice and intimation. Nevertheless, the respondent did not receive the notice and it was returned unserved. Therefore, in our view, there is no obligation cast on the appellant to examine the Postman as assumed by the High Court. The presumption under Section 114 of the Evidence Act operates apart from that under the Post Office Act, 1898. "

25. From the perusal of Section 27 of Act,1897, it clearly transpires that service shall be deemed to be affected by properly addressing, pre paying postal charges and posting by registered post, a letter containing the document shall be treated to be sufficient unless the contrary is proved. It shall also be seen in light of Section 114 (f) of of Act, 1872 which provides that in common course of business has to be followed and in present case, in light of Section 27 of Act,1897, common course of business is that letter has to be sent alongwith proper addressee, paying postal charges, having documents and further it will be presumed that address shall receive the same unless address is not correct.

26. Now coming to the judgment relied upon by learned counsel for the revisionist, there is no doubt that earlier judgments so relied upon by learned counsel for the revisionist has taken a different view and different interpretation of Section 27 of Act, 1897 read with Section 114 (f) of of Act, 1872, but later judgments, which relied by learned counsel for opposite party has taken entirely different view. The very same question was subject matter of Full Bench of this Court in the matter of ***Ganga Ram (supra)***

whereafter framing the very same question as to whether it is incumbent upon the plaintiff to prove the endorsement of refusal on the notice sent by registered post by producing the postman or other evidence in case the defendant denies service on him and answer is in the negative. Not only this, Apex Court in the matter of ***M/s Madan and Co. (supra)*** has taken a very same view by detailed interpretation of Section 27 of Act, 1897, which is followed by Calcutta High Court in the matter of ***Subhas Chandra Mitra (supra)*** as well as by this Court in the matter of ***Sharda Prasad @ Chhulli (supra).***

27. Again, Apex Court in the matter of ***C.C. Alavi Haji (supra)*** has considered the very same issue and after interpretation of Section 114 (f) of of Act, 1872 as well as Section 27 of Act, 1897, has taken a view that once notice has been sent with proper address and stamping to registered post, which was returned back with postal endorsement refused or not available in the house or house locked or shop closed or addressee not in the station, shall be treated sufficient. While coming to this conclusion, Apex Court has considered many other judgments earlier decided by Apex Court. The very same dictum of law has been followed by this Court as well as Calcutta High Court in the matters of ***Ghulam Waris Khan (supra), Mohanla Manna (supra)*** and ***Smt. Vandana Gulati (supra)***. Once again, in the year 2014, this matter went up to Apex Court in the matter of ***Ajeet Seeds Limited (supra)*** and Apex Court after interpretation of Section 114 (f) of of Act, 1872 as well as Section 27 of Act, 1897, has taken same view, which was earlier taken by this Court and held that once notice has been sent and came back with postal remark about refusal or any other remark with regard to non service of notice, shall be treated sufficient. This Court again in the matter of ***Alok Kumar Kaushik (supra)*** has considered this issue by framing question about service of notice after having discussion of Act, law laid down by Apex Court as well as this Court and has held that in such circumstances whether notice has been sent upon proper address in duly stamped envelop shall be treated sufficient after endorsement of postman with regard to non service of any reason except incorrect address.

28. This dictum of law has also been followed by Bombay High Court in the matter of ***Jain Developers and 3 others (supra)***. Not only this, in such cases where the examination of postman is required or not, Apex Court in the matter of ***P.T. Thomas (supra)*** has taken a specific view that no such examination of postman is required under such circumstances.

29. In the present case too, facts are undisputed. Letter was sent through registered post on correct address, which was returned back with endorsement of postman "दरियाफत करने पर घर वालों ने बताया कि प्राप्तकर्ता अपने निजी कार्य से बाहर गये हैं आने का कोई निश्चित समय नहीं है।". Therefore, notice under Section 106 of Act, 1882 shall be treated to be sufficient for filing SCC Suit.

30. Accordingly, in light of provisions of Section 27 of Act, 1897 read with Section 114 (f) of Act, 1872 and law discussed hereinabove, this Court finds no good reason to hold that notice shall not be treated to be sufficient. I find no illegality in the impugned judgment and decree dated 03.10.2018 passed by Additional District and Sessions Judge/ F.T.C., Kanpur Nagar in SCC Suit No. 165 of 2015.

31. Accordingly, revision lacks merit and is **dismissed.**

32. No order as to costs.

(2022) 9 ILRA 1715
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Arbitration & Conciliation Application U/S11(4)
No. 104 of 2022

Mahendra Singh & Anr. ...Applicants
Versus
M/S Sriram Transport Finance Co. Ltd., Shyam Nagar Kanpur ...Opposite Party

Counsel for the Applicants:
Sri Pradip Kumar Srivastava

Counsel for the Opposite Party:

A. Civil matter-Arbitration and Conciliation Act, 1996-Section 34, 2(1)(e)-Arbitral award-setting aside-Maintainability of-High Court does not exercise ordinary original jurisdiction and thus, would not come within the ambit of Court as provided under section 34 read with section 2(1)(e)(i) of the Act 1996-application u/s 34 is maintainable only before Principal Civil Court of original jurisdiction and not High court-Held, the application under section 34 of the Act is not maintainable. The law in regard to the maintainability of the application under Section 34 of the Act of 1996 against an arbitral award has already been settled by the various judgments of Apex Court and the matter is no more *res integra.* (Para 1 to 18)

The application is dismissed. (E-6)

List of Cases cited:

1. Exe. Engr. Road Dev.Div. No. III, Panvel Vs Atlanta Ltd (2014) AIR SC 1093

2. P.T.C. Techno Pvt Ltd Vs Samsung India Electronics Pvt Ltd Civil Misc. Arbn. Appl. No. 01 of 2018

3. St. of WB Vs Asso. Contractors (2015) AIR SC 260

4. S.B.P. Co. Vs Patel Engg Ltd & anr. (2005) 8 SCC 618

5. Hindustan Cooper Ltd Vs Nicco Corp. Ltd. (2009) 6 SCC 69

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Pradip Kumar Srivastava, learned counsel for the applicants.

2. This is an application under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred as the "Act of 1996') laying challenge to the award dated 26.03.2022 passed by Sri J.P. Narayan, Additional District & Sessions Judge (Rtd.), sole Arbitrator.

3. The Stamp Reporter has made a report that the present application under Section 34 of the Act of 1996 is not maintainable in view of the order passed in Civil Misc. Arbitration Application No. 01 of 2018.

4. Sri P.K. Srivastva, learned counsel appearing for the applicants, while addressing on the maintainability of the application under Section 34 of the Act of 1996, submitted that the word "Court" used in Section 34 read with Section 2 (1) (e) (i) means the Principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary

original civil jurisdiction. According to learned counsel, both the Principal Civil Court and the High Court has jurisdiction to entertain the application under Section 34 of the Act of 1996.

5. He has placed reliance upon decision of Apex Court rendered in case of **Executive Engineer, Road Development Division No. III, Panvel Vs. Atlanta Limited, 2014 AIR (SC) 1093.**

6. I have heard learned counsel for the applicants and perused the material on record.

7. The sole question which has to be adjudicated is in regard to maintainability of the application under Section 34 of the Act of 1996 before this Court against the arbitral award passed by the sole Arbitrator.

8. Before adverting to decide the issue in hand a cursory glance of provisions of Section 2 (1) (e) (i) and Section 34 of the Act of 1996 are necessary for better appreciation of the case, thus, both the provisions are extracted here as under;

"**2. Definitions.--(1)** In this Part, unless the context otherwise requires,--

[(e) "Court" means--

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

.....

34. Application for setting aside arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application 1[establishes on the basis of the record of the arbitral tribunal that]--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by

arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

....."

9. From the conjoint reading of both the provisions, it is clear that the word "Court' used in Section 34 has been defined under the definition clause 2 (1) (e) (i) and it means the Principal Civil Court of Original Jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of arbitration if the same had been the subject matter of suit.

10. The law in regard to the maintainability of the application under Section 34 of the Act of 1996 against an arbitral award has already been settled by the various judgments of Apex Court and the matter is no more *res integra*.

11. In **Hindustan Cooper Limited Vs. Nicco Corporation Limited, 2009 (6) SCC 69,** Apex Court while dealing with the said issue held that the application under Section 34 of the Act of 1996 is to be filed before a Court which is a Principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary civil jurisdiction, having jurisdiction to decide the question forming the subject matter of the arbitration. It was a case where application under Section 34 of the Act of 1996 was preferred before Jharkhand High Court which was not a Court having ordinary original civil jurisdiction, and the Apex Court found that the challenge being made directly to the High Court was not permissible under Section 34 and it remitted the matter filed under Section 34 to the Civil Court competent to hear and decide the same.

12. In case of **Atlanta Limited (Supra)** one of the parties had approached the Principal Civil Court at district Thane, while the other party approached Bombay High Court which had the ordinary original civil jurisdiction, the Apex Court held that the High Court was competent to entertain the application under Section 34 being the superior Court. Relevant paragraph no. 25 is extracted here as under;

"25. All the same, it is imperative for us to determine, which of the above two courts which have been approached by the rival parties, should be the one, to adjudicate upon the disputes raised. For an answer to the controversy in hand, recourse ought to be made first of all to the provisions of the Arbitration Act. On the failure to reach a positive conclusion, other principles of law, may have to be relied upon. Having given out thoughtful consideration to the issue in hand, we are of the view, that the rightful answer can be determined from Section 2(1)(e) of the Arbitration Act, which defines the term "Court". We shall endeavour to determine

this issue, by examining how litigation is divided between a High Court exercising "ordinary original civil jurisdiction", and the "principal civil court of original jurisdiction" in a district. What needs to be kept in mind is, that the High Court of Bombay is vested with "ordinary original civil jurisdiction" over the same area, over which jurisdiction is also exercised by the "principal Civil Court of original jurisdiction" for the District of Greater Mumbai (i.e. the Principal District Judge, Greater Mumbai). Jurisdiction of the above two courts on the "ordinary original civil side" is over the area of Greater Mumbai. Whilst examining the submissions advanced by the learned counsel for the appellant under Section 15 of the Code of Civil Procedure, we have already concluded, that in the above situation, jurisdiction will vest with the High Court and not with the District Judge. The aforesaid choice of jurisdiction has been expressed in Section 2(1)(e) of the Arbitration Act, without any fetters whatsoever. It is not the case of the appellants before us, that because of pecuniary dimensions, and/or any other consideration(s), jurisdiction in the two alternatives mentioned above, would lie with the Principal District Judge, Greater Mumbai. Under the scheme of the provisions of the Arbitration Act therefore, if the choice is between the High Court (in exercise of its "ordinary original civil jurisdiction") on the one hand, and the "principal civil court of original jurisdiction" in the District i.e. the District Judge on the other; Section 2(1)(e) of the Arbitration Act has made the choice in favour of the High Court. This in fact impliedly discloses a legislative intent. To our mind therefore, it makes no difference, if the "principal civil court of original jurisdiction", is in the same district over which the High Court exercises original jurisdiction, or some other district. In case an option is to be exercised between a High Court (under its "ordinary original civil jurisdiction") on the one hand, and a District Court (as "principal Civil Court of original jurisdiction") on the other, the choice under the Arbitration Act has to be exercised in favour of the High Court."

13. In State of West Bengal Vs. Associated Contractors, AIR 2015 (SC) 260, Apex Court considering the decision rendered in Atlanta Limited (Supra) as well as 7 Judge Bench decision in case of S.B.P. Company Vs. Patel Engineering Limited and another (2005) 8 SCC 618, held as under;

"25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of original jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part-I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an Award is pronounced under Part-I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part-I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined,

such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an Arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil court having original jurisdiction in the district as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part-I.

(g) If a first application is made to a court which is neither a Principal Court of original jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject matter jurisdiction would be outside Section 42.

The reference is answered accordingly."

14. A coordinate Bench of this Court in case of **P.T.C. Techno Private Limited Vs. Samsung India Electronics Private Limited, Civil Misc. Arbitration Application No. 01 of 2018,** decided on 26.02.2019 held that Allahabad High Court does not exercise ordinary original civil jurisdiction, hence the application under Section 34 was not maintainable before this Court.

15. The judgment in **Atlanta Limited (Supra)** relied on by the the applicants' counsel is of no help to him as Bombay High Court exercises ordinary original civil jurisdiction and, thus, Apex Court held that in view of Section 2 (1) (e) (i) it was empowered to entertain the application under Section 34 being a Court.

16. The said ratio is not applicable in the present case as Allahabad High Court does not exercises ordinary original civil jurisdiction and, thus, would not come within the ambit of Court as provided under Section 34 read with Section 2 (1) (e) (i) of the Act of 1996.

17. The application moved by the applicants under Section 34 of the Act of 1996 challenging the arbitral award passed by the sole Arbitrator is only maintainable before the Principal Civil Court of original jurisdiction and not this Court.

18. In view of the law laid down by the Apex Court in case of **Atlanta Limited (Supra) and Associated Contractors (Supra)**, the present application under Section 34 of the Act of 1996 is not maintainable and same is hereby dismissed as not maintainable.

(2022) 9 ILRA 1719
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.03.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 4796 of 2022

Ram Avtar Sharma ...Petitioner
Versus
State of U.P. & Ors.. ...Respondents

Counsel for the Petitioner:

Sri Ramesh Chandra (Senior Advocate), Sri Narayan Dutt Shukla

Counsel for the Respondents:
Sri Ajay Prakash Paul (State Law Officer), Ms. Anjali Upadhya

A. Civil Law - Constitution of India,1950-Article 226-maintainability of-Land acquisition-delay-petition filed after 10 years of passing of impugned order- Order passed by the Secretary, Department of Industrial Development, in terms of directions issued by this Court vid has been challenged by filing the present writ petition after a decade-Hence,Delay not condoned- even if there is no period prescribed for filing the writ petition under Article 226 of the Constitution of India, yet it should be filed within a reasonable time. Relief to a person, who puts forward a stale claim can certainly be refused relief on account of delay and laches. Anyone who sleeps over his rights is bound to suffer. (Para 1 to 14)

B. Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. (Para 7)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Chennai Metropolitan Water Supply & Sewerage Board & ors. Vs T. T. Murali Babu (2014) 4 SCC 108

2. P. S. Sadasivasway Vs St. of T.N. (1975) 1 SCC 152

3. New Delhi Municipal Council Vs Pan Singh & ors. (2007) 9 SCC 278

4. St. of U.K. & anr. Vs Sri Shiv Charan Singh Bhandari & ors. (2013) 6SLR 629

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

ORDER

1. Order dated February 10, 2012 passed by the Secretary, Department of Industrial Development, in terms of directions issued by this Court vide order dated September 20, 2010 passed in Writ-C No.55926 of 2010, titled as Ram Avtar Sharma v. State of U.P. and others, has been challenged by filing the present writ petition.

2. In terms of aforesaid directions, application filed by the petitioner under Section 48 of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') was to be decided. The writ petition challenging the acquisition of land otherwise was dismissed.

3. After hearing learned Senior Counsel for the petitioner, we do not find any case is made out for interference in the present writ petition, on account of huge

delay and laches. The impugned order was passed by the Secretary of the Department concerned on February 10, 2012 and the writ petition has been filed more than a decade thereafter. As to how the petition, filed after huge delay, has to be dealt with has been considered by the Courts on number of occasions and the opinion expressed is that these petitions are required to be dismissed at the threshold.

4. In **P. S. Sadasivasway v. State of Tamil Nadu, (1975) 1 SCC 152**, wherein it has been laid down that a person aggrieved by an order of promoting a junior over his head should approach the court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time, but it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for the relief.

5. In **New Delhi Municipal Council v. Pan Singh and others, (2007) 9 SCC 278,** the Court has opined that though there is no period of limitation provided for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time. In the said case the respondents had filed the writ petition after seventeen years and the court, as stated earlier, took note of the delay and laches as relevant factors and set aside the order passed by the High Court which had exercised the discretionary jurisdiction.

6. In **State of Uttaranchal and another v. Sri Shiv Charan Singh Bhandari and others 2013 (6) SLR 629,** Hon'ble the Supreme Court, while considering the issue regarding delay and laches observed that even if there is no period prescribed for filing the writ petition under Article 226 of the Constitution of India, yet it should be filed within a reasonable time. Relief to a person, who puts forward a stale claim can certainly be refused relief on account of delay and laches. Anyone who sleeps over his rights is bound to suffer.

7. In **Chennai Metropolitan Water Supply and Sewerage Board and others v. T. T. Murali Babu 2014 (4) SCC 108**, Hon'ble the Supreme Court opined as under:-

"13. First, we shall deal with the facet of delay. In Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati and others, AIR 1969 SC 329, the Court referred to the principle that has been stated by Sir Barnes Peacock in Lindsay Petroleum Co. v. Prosper Armstrong Hurd, Abram Farewall, and John Kemp, (1874) 5 PC 221, which is as follows:-

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be

just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

15. In State of M. P. and others etc. etc. vs. Nandlal Jaiswal and others etc. etc., AIR 1987 SC 251, the Court observed that it is well settled that power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. It has been further stated therein that if there is inordinate delay on the part of the petitioner in filing a petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. Emphasis was laid on the principle of delay and laches stating that resort to the extraordinary remedy under the writ jurisdiction at a belated stage is likely to cause confusion and public inconvenience and bring in injustice.

16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the court. Delay reflects inactivity and inaction on the part of a litigant "a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. ... A court is not expected to give indulgence to such indolent persons- who compete with `Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."

8. In **State of Jammu & Kashmir vs. R. K. Zalpuri and others 2015 (15) SCC 602**, Hon'ble the Supreme Court considered the issue regarding delay and laches in raising the dispute before the Court. It was opined that the issue sought to be raised by the petitioners therein was not required to be addressed on merits on account of delay and laches. The relevant paras thereof are extracted below:-

"27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea

and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias - thanks to God".

28. Another aspect needs to be stated. A writ court while deciding a writ petition is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. Stale claims are not to be adjudicated unless non-interference would cause grave injustice. The present case, need less to emphasise, did not justify adjudication. It deserves to be thrown overboard at the very threshold, for the writ petitioner had accepted the order of dismissal for half a decade and cultivated the feeling that he could freeze time and forever remain in the realm of constant present."

9. The aforesaid view was followed by Hon'ble the Supreme Court in **Union of India and others v. Chaman Rana 2018 (5) SCC 798.**

10. Subsequently, a Constitution Bench of Hon'ble the Supreme Court in Senior Divisional Manager, Life Insurance Corporation v. Shree Lal Meena (2019) 4 SCC 479, considering the principle of delay and laches, opined as under:-

"36. We may also find that the appellant remained silent for years together and that this Court, taking a particular view subsequently, in Sheel Kumar Jain v. New India Assurance Company Limited, (2011)12 SCC 197 would not entitle stale claims to be raised on this behalf, like that of the appellant. In fact the appellant slept over the matter for almost a little over two years even after the pronouncement of the judgment.

37. Thus, the endeavour of the appellant, to approach this Court seeking the relief, as prayed for, is clearly a misadventure, which is liable to be rejected, and the appeal is dismissed."

11. Recently, in **Bharat Coking Coal Ltd. And othyers v. Shyam Kishore Singh (Civil Appeal No.1009 of 2020**, decided on 5.2.2020), the issue regarding the delay and laches, was considered by Hon'ble the Supreme Court and a petition filed belatedly, seeking change in the date of birth in the service record, was dismissed.

12. Relying on **T.T. Murali Babu' case (supra)** and **R.K. Zalpuri'case (supra),** same view has been expressed by Hon'ble the Supreme Court in **Union of India and others Vs. N. Murugesan and others (2022) 2 SCC 25** observing:

"We have already dealt with the principles of law that may have a bearing on this case. ... there was an unexplained and studied reluctance to raise the issue .... Hence, on the principle governing delay, laches ... Respondent No. 1 ought not to have been granted any relief by invoking Article 226 of the Constitution of India."

13. In the case in hand, after hearing learned counsel for the parties and taking the above authorities into account, in our opinion, the petitioner is not entitled to any relief. It is, however, sought to be contended that the order dated February 10, 2012 was communicated vide Communication dated December 30, 2021, which is sought to be relied upon to show that the order was communicated to the petitioner quite late in the year 2021. However, a perusal thereof shows that it is not addressed to him. It is merely an inter-departmental communication from the Joint Secretary in the State of U.P. to the Greater

NOIDA. In any case, the same cannot be taken to be a reasonable explanation for condoning huge delay in filing the present writ petition. In this case, the direction was issued by this Court about a decade back. The petitioner should have been vigilant and enquired about the status of the application filed by him before the competent authority. There is nothing on record to suggest that he ever made any representation or enquired about the order passed on his representation. In any case, the release of land under Section 48 of the Act is not a matter of right with the landowner. It is a power conferred on the Government.

14. For the reasons mentioned above, we do not find any merit in the present writ petition. The same is, accordingly, dismissed.

(2022) 9 ILRA 1724
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2022

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 20091 of 2022

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

Counsel for the Petitioner:
Sri Kartikeya Saran

Counsel for the Respondents:
C.S.C.

A. Civil Law - Uttar Pradesh Kshettra Samitis and Zila Parishads Adhiniyam, 1961-Section 11- The Uttar Pradesh Panchayat Laws (Amendment) Act, 2007-Section 9- Section 11(2) of the U.P. Kshetra Panchayats and Zila Panchayats Adhiniyam, 1961-Section 11 stipulates that a member shall be deemed to have vacated his office from the date on which notice of his resignation is received in the office of Kshetra Panchayat-The vacancy becomes effective from a date envisaged under the deeming provision engrafted in the statute-It thus becomes operative by operation of law from the date notice is received in the office of the Kshetra Panchayat-Unlike in case of Pramukh, the resignation to become effective, in case of a member, does not require any approval-the notices of resignation were received in the office of Kshetra Panchayat-Therefore, there is no illegality in the impugned notification.(Para 1 to 13)

The petition is dismissed. (E-6)

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. The petitioner is Pramukh of Kshetra Panchayat, Gulavathi, Bulandshahr. She has preferred the instant petition calling in question a notification issued from the office of respondent no.2, Assistant Development Officer showing two vacancies of members on account of respondents no. 4 and 5 having tendered their resignations. The date of vacancy as per the said chart is 5.04.2022 in case of respondent no. 5 and 26.04.2022 in case of respondent no. 4.

2. It is not disputed before us that the resignation letter of the members namely respondents no.4 and 5 have been received in the office of Kshetra Panchayat on respective dates from which the vacancies have been made effective.

3. Learned counsel for the petitioner submitted that mere submission of

resignation by respondents no.4 and 5 will not result in vacancy unless the resignations are approved in the meeting of the Kshetra Panchayat. He submitted that D.P.R.O. had sent communications to the Additional Chief Officer, Zila Panchayat on 5.5.2022 and 7.4.2022 for requisitioning a meeting of Zila Panchayat members for the purposes of accepting their resignations. It is submitted that since the resignations have yet not been accepted, therefore, the notification of the vacancy is illegal.

4. In order to consider as to when the resignation of an elected member of a Kshettra Panchayat would be effective, the provision contained under Section 11 of the Uttar Pradesh Kshettra Samitis and Zila Parishads Adhiniyam, 1961 [U.P. Act No. 33 of 1961], would be required to be adverted to.

5. Section 11 of the Act, 1961 as it originally stood, reads as follows:

*"**11. Resignation of Pramukh, Up-Pramukh or member.** - (1) A Pramukh, Up-Pramukh or any member mentioned in clause (iii) of section (1) of section 6, or in sub-section (2) of that section may resign his office by giving notice of writing to the Kshettra Samiti.*

(2) The resignation of the Pramukh shall take effect on the from the date on which the sanction thereto of the Adhyaksh is received in the office of the Kshettra Samiti and the resignation of the Up-Pramukh or member shall take effect on and from the date on which the notice is received in the office of the Kshettra Samiti."

6. Consequent to the Constitution (73rd Amendment) Act, 1992, the State Legislature considered it expedient to amend the United Provinces Panchayat Raj Act, 1947 and the Uttar Pradesh Kshettra Samitis and Zila Panchayat Adhiniyam, 1961 in keeping with the objectives and the guidelines incorporated in the Constitution amendment. The amendments were brought forth by the Uttar Pradesh Panchayat Laws (Amendment) Act, 1994 [U.P. Act No. 9 of 1994].

7. Section 66 of the amending Act of 1994, relates to amendment of Section 11 of the U.P. Act No. 33 of 1961 and the same was in the following terms:

*"**66. Amendment of Section 11** - In Section 11 of the principal Act, -*

(a) for sub-section (1), the following sub-section shall be substituted, namely, -

"(1) A Pramukh, Up-Pramukh or any elected member of the Kshettra Panchayat may resign his office by writing under his hand addressed, in the case of the Pramukh, to the Adhyaksha of the Zila Panchayat concerned, and in other cases to the Pramukh of the Kshettra Panchayat;";

(b) in sub-section (2), after the words "notice is received in the office of the Kshettra Samiti", the words "and such Pramukh, Up-Pramukh or the member shall be deemed to have vacated his office" shall be inserted."

8. Section 11 of the Act of 1961, as it stood consequent to the amending Act of 1994, was as follows:

*"**11. Resignation of Pramukh, Up-Pramukh or member**. - (1) A Pramukh, Up-Pramukh or any elected member of the Kshettra Panchayat may resign his office by writing under his hand addressed, in the case of Pramukh, to the Adhyaksha of the Zila Panchayat concerned, and in other cases to the Pramukh of the Kshettra Panchayat.*

(2) The resignation of the Pramukh shall take effect on the from the date on which the sanction thereto of the Adhyaksh is received in the office of the Kshettra Samiti and the resignation of the Up-Pramukh or member shall take effect on and from the date on which the notice is received in the office of the Kshettra Samiti ***and such Pramukh, Up-Pramukh or the member shall be deemed to have vacated his office."***

9. The Uttar Pradesh Panchayat Laws (Amendment) Act, 2007 [U.P. Act No. 44 of 2007] inter alia, brought about a general amendment in U.P. Act No. 33 of 1961 by providing for omission of the word "Up-Pramukh" wherever occurring in the Act, including the marginal headings and the Schedules. Section 9 of the Amending Act of 2007 which brought about the aforestated general amendment, reads as follows:-

*"**9. General Amendment of U.P. Act No. 33 of 1961.** - In the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, hereinafter in this chapter referred to as the principal Act, the words "Up-Pramukh", "Senior Up-Pramukh", "Junior Up-Pramukh" and "Upadhyaksha" wherever occurring including marginal headings and Schedules, shall be omitted."*

10. Section 11 of the U.P. Act No. 33 of 1961, after the amendments brought into effect in terms of the amending Act of 2007, presently stands as under:-

*"**11. Resignation of Pramukh or member.** - (1) A Pramukh, or any elected member of the Kshettra Panchayat may resign his office by writing under his hand addressed, in the case of Pramukh, to the Adhyaksha of the Zila Panchayat concerned, and in other cases to the Pramukh of the Kshettra Panchayat.*

(2) The resignation of the Pramukh shall take effect on the from the date on which the sanction thereto of the Adhyaksh is received in the office of the Kshettra Samiti and the resignation of member shall take effect on and from the date on which the notice is received in the office of the Kshettra Samiti and such Pramukh or the member shall be deemed to have vacated his office."

11. Thus, Section 11(2) of the U.P. Kshetra Panchayats and Zila Panchayats Adhiniyam, 1961 stipulates that a member shall be deemed to have vacated his office from the date on which notice of his resignation is received in the office of Kshetra Panchayat. The vacancy becomes effective from a date envisaged under the deeming provision engrafted in the statute. It thus becomes operative by operation of law from the date notice is received in the office of the Kshetra Panchayat. Unlike in case of Pramukh, the resignation to become effective, in case of a member, does not require any approval.

12. Indisputably, the notices of resignation were received in the office of Kshetra Panchayat on 5.04.2022 and 26.4.2022, respectively. Consequently,

there is no illegality in the impugned notification.

13. The petition lacks merit and is accordingly dismissed.

(2022) 9 ILRA 1727
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.06.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE ANIL KUMAR OJHA, J.

Writ C No. 24086 of 2019

Maulana Mohd. Riyasat Ali ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mahabir Yadav, Sri Ram Awtar

Counsel for the Respondents:
C.S.C.

A. Civil Law - Kazis Act,1880-Sections 2,4-Appointment of Kazi-Claim of petitioner for appointment as City Kazi has been rejected-Even there was not considerable number of persons belonging to Muslim Community of locality expressing their support for appointment of the petitioner as "Kazi"-Appointment of a person as Kazi does no confer any exclusive right upon that person-It is a mere title, conferment of which rests in the discretion of State-Hence, no interference requires.(Para 1 to 12)

B. A close examination of the provisions of section 2 of the Act would indicate that for appointment of a person as Kazi there are two stages. The first stage is that it must appear to the State Government that a considerable number of the Mohammedans residing in any local area desire that one or more Kazis should be appointed for such local area. Once, the first stage is crossed, the State gets discretion to appoint, if it thinks fit, one or more fit persons, after consultation with the principal Mohammedan residents of such local area. Section 4 of the Act by declaring that no appointment made under the Act could prevent a person from discharging any of the functions of a Kazi clarifies that appointment of a Kazi does not confer any exclusive status or powers.(Para 9)

The writ petition is dismissed. (E-6)

List of Cases cited:

Katil Sheikh Ummar Saheb Vs Khazi Budan Khan Saheb (1915) AIR Madras 28

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Anil Kumar Ojha, J.)

1. This matter has been heard through video conferencing.

2. We have heard Sri Mahabir Yadav for the petitioner; the learned Standing Counsel for the respondents 1 to 7; and have perused the record.

3. The petitioner seeks quashing of the order dated 20.6.2019 passed by Principal Secretary (Nyay Anubhag-3) (Appointments), Govt. of U.P., Lucknow rejecting the representation of the petitioner for appointment as a "Kazi" under Section 2 of the Kazis Act, 1880 (for short the Act).

4. Briefly stated the facts giving rise to this petition are as under: One Janab Sayed Sabir was earlier appointed as Kazi in Agra City. He died in the year 2013. After his death no City Kazi has been appointed by the State. The petitioner, by claiming that he had been performing duty as a Naib City Kazi, applied to the State

Government seeking for his appointment as "Kazi". When no decision was taken on the application of the petitioner, a writ petition was filed which was disposed off by requiring the concerned Secretary in the Government to take decision on petitioner's claim. When a decision was not taken, contempt application was filed. Now, by the impugned order, the claim of the petitioner for appointment as Kazi has been rejected.

5. A perusal of the impugned order reveals that the State Govt., upon consideration of the provisions of Section 2 of the Act, found that there was not considerable number of persons belonging to the Muslim Community of the locality expressing their support for appointment of the petitioner as "Kazi" inasmuch as recommendation for his appointment came from only six persons.

6. The learned counsel for the petitioner by inviting our attention to various recommendation letters as also to paragraph 6 of the writ petition wherein it is stated that Janab Sayed Sabir, the erstwhile "City Kazi", had required the petitioner to perform as Naib City Kazi, submitted that rejection of petitioner's claim for appointment as "Kazi" is arbitrary.

7. In reply, the stand of the respondents is that, under Section 2 of the Act, the State Government has complete discretion whether to appoint a person as Kazi or not, after drawing satisfaction that considerable number of Mohammedans residing in any local area desire that one or more Kazis be appointed for such local area. It is therefore the case of the respondents that once a decision has been taken upon finding that the support for appointment of the petitioner is not considerable, such decision is not justiciable.

8. Before we proceed to weigh the rival submissions, it would be useful to have a glimpse at the relevant provisions of the Act. Sections 2 and 4 of the Act are relevant to understand the true import of its provisions. They are thus extracted below:

*"**Section 2.-- Power to appoint Kazis for any local area.**-- Wherever it appears to the State Government that any considerable number of the Muhammadans resident in any local area desire that one or more Kazis should be appointed for such local area, the State Government may, if it thinks fit, after consulting the principal Mohammedan residents of such local area, select one or more fit persons and appoint him or them to be Kazis for such local area.*

If any question arises whether any person has been rightly appointed Kazi under this section, the decision thereof by the State Government shall be conclusive.

The State Government may, if it thinks fit, suspend or remove any Kazi appointed under this section who is guilty of any misconduct in the execution of his office, or who is for a continuous period of six months absent from the local area for which he is appointed or leaves such local area for the purpose of residing elsewhere, or is declared an insolvent, or desires to be discharged from the office, or who refuses or becomes in the opinion of the State Government unfit, or personally incapable, to discharge the duties of the office."

Section 4.-- Nothing in the Act to confer judicial or administrative powers; or to render the presence of Kazi

***necessary; or to prevent any one acting as Kazi.**-- Nothing herein contained and no appointment made hereunder, shall be deemed--*

(a) to confer any judicial or administrative powers on any Kazi or Naib Kazi appointed hereunder; or

(b) to render the presence of a Kazi or Naib Kazi necessary at the celebration of any marriage or the performance of any rite or ceremony; or

(c) to prevent any person discharging any of the functions of a Kazi."

9. A close examination of the provisions of section 2 of the Act would indicate that for appointment of a person as Kazi there are two stages. The first stage is that it must appear to the State Government that a considerable number of the Mohammedans residing in any local area desire that one or more Kazis should be appointed for such local area. Once, the first stage is crossed, the State gets discretion to appoint, if it thinks fit, one or more fit persons, after consultation with the principal Mohammedan residents of such local area. Section 4 of the Act by declaring that no appointment made under the Act could prevent a person from discharging any of the functions of a Kazi clarifies that appointment of a Kazi does not confer any exclusive status or powers.

10. A Division Bench of the Madras High Court in **Katil Sheikh Ummar Saheb V. Khazi Budan Khan Saheb, AIR 1915 Madras 28** upon examination of the provisions of Sections 2 and 4 of the Act held that the object of the Kazis Act was merely to appoint a person whose duty it would be to render certain services to such Mohammedans as may choose to resort to him for certain purposes, and does not confer on him any exclusive right to perform the functions which his office requires him to discharge.

11. Having examined the scheme of the Act and the decision noticed above, we are of the view that the appointment of a person as Kazi does not confer any exclusive right upon that person. It is therefore a mere title, conferment of which rests in the discretion of the State, subject to the provisions of the Act. No one therefore, gets a right to claim appointment as Kazi under the Act. Thus, keeping in mind that denial of appointment does not affect any right of the petitioner, the decision of the State Government rejecting petitioner's claim for appointment as Kazi does not give a cause of action to the petitioner to maintain a writ petition. Had it been a case of taking away the conferred title of Kazi from the petitioner, situation would have been different and he would have had a right to question the same on grounds permissible for judicial review. But here the petitioner was never appointed by the State Government therefore a question of his removal does not arise.

12. For the reasons aforesaid, we do not find a good reason to entertain this petition. The petition is **dismissed.**

(2022) 9 ILRA 1729
ORIGINAL JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 05.09.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 29052 of 2021

Principal Commissioner Cgst & Central Excise Lucknow & Anr. ...Petitioners
Versus
M/S Bushrah Export House Two Star Lko & Anr. ...Respondents

Counsel for the Petitioners:
Sri Kuldeepak Nag K.D. Nag

Counsel for the Respondents:
Vibhanshu Srivastava

A. Civil Law - Constitution of India, 1950 & Central Goods and Services Tax Act,2017 –Challenge to appellate order- In the present case, the show cause notice as issued to the petitioner had made three precise allegations that the supplier of the goods to the respondents had supplied the goods without generation of the e-way bills which was contrary to the E-Way Bill Rules and thus, the claim of the respondents was liable to be rejected- That being the nature of the allegations levelled in the show cause notice, the submission that the goods sent from Surat to Kanpur for export did not carry e-way bills as admitted by the respondents in their memo of appeal, cannot be accepted as it is well settled that the allegations as levelled in the show cause notice should be clear and specific and the findings cannot go beyond the allegations as levelled in the show cause notice- It is well settled that the show cause notice is issued to make the noticee understand the allegation and facts as are levelled in the show cause notice and it is aimed that putting the noticee to whom the show cause notice is issued on guard, In the present case, no allegations were levelled in the show cause notice to the effect that the respondents had transferred the finished goods for export from Surat to Kanpur without e-way bill as such the arguments of petitioner on that count are without any foundation and thus liable to be rejected. the specific finding by the Commissioner (Appeals) that the goods were received by the respondents through e-way bills within the same city, there was no requirement of generation of e-way bills as provided under the notification dated 19.09.2018, the said finding has not been shown to be perverse or in any way arbitrary or illegal.(Para 1 to 17)

B. In the present case, the respondents moved an application seeking refund of the CGST through their application dated 20.02.2020 claiming an amount of Rs.1,84,17,252/- on the tax paid inputs of the Goods, which was ultimately exported by the respondents. It is claimed that after verifying the claims, prima-facie an acknowledgment was issued to the respondents and a provisional order dated 04.03.2020 allowing partial refund amounting to Rs.1,65,75,526.80 was granted on a provisional basis out of the total refund claimed. When the claims of the respondent were subjected to scrutiny, the department was of the view that the provisional refund granted to the respondents was erroneous refund and, as such, a show cause notice dated 07.04.2020 was issued to the respondents calling upon the respondents to show cause as to why the application for grant of refund may not be rejected. (Para 3)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Oryx Fisheries Pvt Ld Vs U.O.I. & ors. (2010) 13 SCC 427

2. Siemens Public Commn. Networks Pvt Ld & Anr Vs UOI & ors. (2008) 16 SCC 215

3. Gorkha Security Services Vs Govt of NCT (2014) 9 SCC 105

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard the counsel for the petitioner and Sri Jayant Kumar assisted by Sri Vibhanshu Srivastava, the counsel for the respondents.

2. The present petition has been filed challenging the appellate order dated 13.08.2021 passed by the Additional Commissioner (Appeals), Customs, GST and Central Excise whereby the Appeal No.31-GST/2020 has been allowed. The

said appeal is stated to have been preferred by the respondents against the Order-in-Original dated 24.04.2020 passed by the Deputy Commissioner, Central Excise and Service Tax, Division-I, Lucknow whereby the claim of the respondents was rejected.

3. The facts, in brief, are that the respondents moved an application seeking refund of the CGST through their application dated 20.02.2020 claiming an amount of Rs.1,84,17,252/- on the tax paid inputs of the Goods, which was ultimately exported by the respondents. It is claimed that after verifying the claims, prima-facie an acknowledgment was issued to the respondents and a provisional order dated 04.03.2020 allowing partial refund amounting to Rs.1,65,75,526.80 was granted on a provisional basis out of the total refund claimed. When the claims of the respondent were subjected to scrutiny, the department was of the view that the provisional refund granted to the respondents was erroneous refund and, as such, a show cause notice dated 07.04.2020 was issued to the respondents calling upon the respondents to show cause as to why the application for grant of refund may not be rejected and further why the recovery of the sanctioned amount should not be initiated against the respondents and why the recovery of Input Tax Credit of the remaining amount should not be initiated along with the interest thereupon. The show cause notice is contained in Annexure no.2 to the writ petition.

4. From perusal of the show cause notice, it is clear that the allegations were that the respondents had claimed the Input Tax Credit in the form of IGST against the supply received from three Tax Payers named therein. It was further alleged that one of the supplier namely M/s Risuddeen Kamruddin Shekh had issued 132 invoices totaling to Rs.10,02,08,500/- in the month of January 2019, similarly one supplier namely M/s Sagar Rajendra Sonvane had issued 84 invoices totaling to Rs.6,38,07,492/- in the month of March 2019 and similarly M/s Ahmed Tax had issued 10 invoices in the month of April 2019 totaling to Rs.9,70,666/-, 18 invoices in May 2019 totaling to Rs.17,81,692/- and three invoices in the month of June 2019 totaling to Rs.3,07,592/-. It was further alleged that as per the E-way Bill Rules contained in Chapter XVI of the CGST Rules 2017, the information was required to be furnished prior to the commencement of the movement of the goods and generation of e-way bill by the registered person, which has not been done. This fact was revealed to the department on the scrutinizing of GSTR-2A return filed by the respondents. It was further alleged that all theses three suppliers named above had done huge volume of business in a very short span of time and subsequently their registration was canceled.

5. The respondents were called upon to show cause and to produce the invoices raised by the said suppliers / taxpayers and e-way bills generated in the process so as to ascertain if the goods were indeed received by the respondents and the Input Tax Credit has been claimed in accordance with the Section 16(2) of the CGST Act 2017. It has been alleged that despite asking for the same, the respondents failed to produce the same and thus, they were asked to show cause as to why the action as prescribed in the show cause notice may not be taken. It is claimed that the respondents did not give the reply which led to the passing of the order dated 24.04.2020 (Annxure no.3). In the said order, it has been recorded that the taxpayer did not respond against the

charges raised in the show cause notice and neither did the taxpayer appear on the personal hearing date and thus agreeing with the allegations levelled in the show cause notice, a view was formed by the Deputy Commissioner that the suppliers to the respondents had actually not supplied the goods in the absence of their being any e-way bill generated in favour of the respondents and thus the following order came to be passed :

"(i). I reject the remaining 10% of the Refund claim amounting to Rs. 18,41,725/-.

(ii). I confirm the recovery of Input Tax Credit of the remaining refund amount i.e. Rs. 18,41,725/- under Section 74 read with Section 16 of the CGST Act, 2017 read with the IGST Act, 2017.

(iii). I confirm that the refund to the taxpayer has erroneously been made and accordingly, the already sanctioned amount to the tune of Rs. 61,18,640/- may be recovered under Section 74 of the CGST Act, 2017, read with the IGST Act, 2017.

(iv). I confirm the interest on the above points (ii) and (iii) under Section 50 read with Section 54 of the CGST Act, 2017, read with the IGST Act, 2017.

(v). I impose the penalty amounting to Rs.79,60,365/- under Section 74 of the CGST Act, 2017, read with the IGST Act, 2017.

(vi). I impose the penalty amounting to Rs.79,60,365/- under Section 122 (1)(viii) of the CGST Act, 2017 for obtaining refund fraudulently, read with the IGST Act, 2017.

(vii). I impose the penalty amounting to Rs.79,60,365/- under Section 122 (1)(xiv) of the CGST Act, 2017 for transporting taxable goods without the cover of specified documents i.e. e-way bill, read with the IGST Act, 2017."

6. The respondents aggrieved against the said order preferred an appeal before the Additional Commissioner (Appeals) CGST, Lucknow wherein it was specifically stated that the inputs received by the respondents were sent from Surat to the warehouse of the respondents at Surat where they were processed and subsequently the goods were exported through ICD Kanpur after transporting the goods from Surat to Kanpur. They placed reliance upon the notification No.GSL/GST/Rule-138 (14)/B.19 dated 19.09.2018 issued by the Commissioner of State Tax, Gujarat State Ahmadabad wherein the authority had issued a notification providing that e-way bill was not required to be generated for intra-city movement of any goods irrespective of the value.

Placing reliance on the said notification, the respondents argued before the Commissioner (Appeals) that the foundation for passing of the order, namely non-generation of e-way bills had no basis as the goods were received by the respondents from suppliers at Surat at their office at Surat and thus there was no requirement of the generation of e-way bill by the suppliers. The Commissioner (Appeals) agreeing with the contentions as raised by the respondents proceeded to allow the appeal by means of the impugned judgment dated 13.08.2021 whereby, the appeal was allowed and the order under challenge was set aside and further directions were issued to sanction the

refund of amount of Rs.18,41,725/- to the appellant.

7. The department has preferred the present writ petition challenging the said order in view of the fact that the appellate tribunal has not been created as prescribed under the statute and the petitioner cannot be left remedy-less in the absence of creation of the statutory tribunal.

8. Sri K. D. Nag appearing on behalf of the petitioner argues that in view of the averments as made in the memo of the appeal, the respondents admit that the goods were transported from Surat to ICD Panki Kanpur for its further export without the e-way bills and in view of the statement as contained in the memo of appeal, the appellate authority has erred in allowing the appeal.

9. Subsequent to the filing of the appeal, a supplementary affidavit was filed duly sworn by one Sri Rakesh Srivastav wherein he had specifically stated that no e-way bills were ever annexed with the appeal and they were not produced before the learned Additional Commissioner (Appeals). The said averments made in paragraph 7 of the supplementary affidavit were sworn on the basis of the records.

10. The counsel for the respondents had drawn my attention to the specific assertions made highlighting that the invoices depicting the purchase of the goods by the respondents were duly produced through an excel sheet filed during the pendency of the appeal on 02.03.2020. The appellate authority in the impugned order also recorded that in view of the e-way bills, the respondents were entitled to the benefit of the notification dated 19.09.2018 and on the said foundation had allowed the appeal. This court finding contradictions in the supplementary affidavit filed by the department and the stand taken by the respondents had called for the records of the case before the Commissioners (Appeals), which has been produced today. I have perused the record which contain the invoices whereby the goods were supplied by the suppliers to the respondents at Surat.

11. In view of the records as produced today, prima-facie the supplementary affidavit filed by Sri Rakesh Srivastava, prima-facie does not appear to be correct. Sri K. D. Nag clarifies that the affidavit was filed based upon the copy of the memo of the appeal served by the respondents to the department and there was no deliberate error or misleading of the facts. The court accepts the said explanation offered by Sri Nag with a advice that the department should be careful in future in filing such affidavit.

12. Coming to the facts leading to the present case, the show cause notice as issued to the petitioner had made three precise allegations that the supplier of the goods to the respondents had supplied the goods without generation of the e-way bills which was contrary to the E-Way Bill Rules and thus, the claim of the respondents was liable to be rejected. That being the nature of the allegations levelled in the show cause notice, the submission of Sri K. D. Nag that the goods sent from Surat to Kanpur for export did not carry e-way bills as admitted by the respondents in their memo of appeal, cannot be accepted as it is well settled that the allegations as levelled in the show cause notice should be clear and specific and the findings cannot go beyond the allegations as levelled in the show cause notice.

13. It is well settled that the show cause notice is issued to make the noticee understand the allegation and facts as are levelled in the show cause notice and it is aimed that putting the noticee to whom the show cause notice is issued on guard, this view has been expressed by the Hon'ble Supreme Court in the case of ***Oryx Fisheries Private Limited vs. Union of India and others; (2010) 13 SCC 427,*** judgment of the Supreme Court in the case of ***Siemens Public Communication Networks Private Limited and another vs. Union of India and others reported at (2008) 16 SCC 215*** and explaining in ***Gorkha Security Services vs. Government of NCT (2014) 9 SCC 105***. In the present case, the show cause notice is confined to the allegations against the respondents receiving the supplies of goods without the e-way bills, which fact has been dealt with by the appellate authority after perusing the invoices that the goods were supplied to the respondents from Surat to Surat and thus, the notification dated 19.09.2018 was clearly in favour of the respondents.

14. In the present case, no allegations were levelled in the show cause notice to the effect that the respondents had transferred the finished goods for export from Surat to Kanpur without e-way bill as such the arguments of Sri Nag on that count are without any foundation and thus liable to be rejected.

15. In view of the specific finding by the Commissioner (Appeals) that the goods were received by the respondents through e-way bills within the same city, there was no requirement of generation of e-way bills as provided under the notification dated 19.09.2018, the said finding has not been shown to be perverse or in any way arbitrary or illegal in the arguments as raised by Sri Nag and referred to above.

16. In view thereof, no interference is called for in the appellate order.

17. The writ petition lacks merit and is ***dismissed.***

(2022) 9 ILRA 1734
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.05.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DINESH PATHAK, J.

Writ C No. 30563 of 2021

Satyendra Kumar Yadav ...Petitioner
Versus
U.O.I. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ram Raj Prajapati, Sri Dinesh Kumar Maurya

Counsel for the Respondents:
A.S.G.I., Sri Gaurav Kumar Chand, Sri Nishant Mehrotra

A. Civil Law - Constitution of India, 1950- Article 226- in the instant case, no document was required to be filed along with the application form- The procedure followed by HPCL was that after an applicant is selected, he is informed of the same and at that stage, he was required to submit documents, therefore, even if the affidavit, as initially filed by the petitioner, was of a subsequent date, it would have no adverse effect nor would render his candidature ineligible-In alternative, he submitted that the petitioner having filed on record the affidavit of his mother of a date prior to submission of application form and there being no time limit prescribed under the brochure for supplying the documents, the affidavit filed along with the representation dated 24.7.2019 ought to have been considered-the decision taken by the respondent No. 2 declining to consider the affidavit submitted by the

petitioner along with representation dated 24.7.2019 and communication dated 13.12.2019 are not sustainable and are hereby quashed-Since the respondent has yet not examined whether the said affidavit is genuine or not but has refused to consider the same solely on the ground that it was filed beyond time prescribed for submitting documents, therefore, we grant liberty to the respondent-Corporation to examine the said aspect and if it is found that affidavit is a genuine one, the respondent-Corporation shall proceed to consider the same as due compliance of the requirement relating to submission of affidavit in Appendix- III A and will proceed accordingly. (Para 1 to 17)

The writ petition is disposed of. (E-6)

List of Cases cited:

Nikhil S/o Dilipsing Rajput Vs U.O.I. & ors. (2021) SCC OnLine Bom 489 Ganapathiraman Srinivasan Vs IOC Ltd (2021) SCC OnLine Mad 1172

(Delivered by Hon'ble Manoj Kumar Gupta, J. &
Hon'ble Dinesh Pathak, J.)

1. Heard Sri Ram Raj Prajapati, learned counsel for the petitioner, Sri Gaurav Kumar Chand, learned counsel for the respondent No. 1 and Sri Nishant Mehrotra, learned counsel for the respondent No. 2 and perused the record.

2. Sri Nishant Mehrotra, learned counsel for the respondents has obtained instructions in the matter from time to time and has placed the same on record for our perusal and states that he does not wish to file any affidavit. Accordingly, the instant matter is being disposed of.

3. The facts, in brief, necessary for decision of the instant petition are that the petitioner applied online on 22.12.2018 for allotment of retail outlet dealership at Gram Chhaparapuri, Pargana Mahuli Purab Tehsil Dhanghata, District Sant Kabir Nagar under OBC category in pursuance of advertisement dated 25.11.2018 issued by Hindustan Petroleum Corporation Limited (in short "HPCL'). The petitioner offered, for setting up of the retail outlet, a piece of land owned by his mother on long term lease for a period of nineteen years and eleven months. The petitioner's application was considered by HPCL along with other applicants falling under Group 1. It is pertinent to note that Group 1 applicants are those, who have suitable piece of land in the advertised location/area or long term lease for a period of minimum nineteen years and eleven months. The petitioner was found successful in the Draw of Lots of Group 1 applicants held on 4.7.2019. He was intimated about the same by HPCL by letter dated 5.7.2019 and was required to complete various formalities including the one relating to submission of certain documents. Amongst other, the documents required to be submitted were declaration in Appendix- III A (for offer of land) and Appendix- III B (Advocate's letter). It further stipulated that verification of all attested copies with the original documents would be done during Field Verification of Credentials and that applicant should be in possession of original documents, photostat whereof had been submitted. It further provided that the candidature would be cancelled, in case, initial security deposit is not remitted or the documents listed above, are not submitted within ten days from the date of intimation. It seems that the petitioner in purported compliance of the requirements contained in letter dated 5.7.2019 submitted various documents on 11.7.2019 enclosing therewith affidavit of his mother dated 10.7.2019 in Appendix-

III A and Certificate of Advocate in Appendix- III B (dt. 22.12.2018). Respondent No. 2 by order dated 18.7.2019 informed the petitioner that the documents submitted by him are not valid for considering the offer of land in Group I. Accordingly, he was declared ineligible. He was also informed that now his candidature would be considered along with Group III applicants as per guidelines. On receipt of the said letter, the petitioner made a representation on 24.7.2019 stating therein that, by inadvertence, he had filed a recent affidavit of his mother in Appendix- III A albeit having filed the Declaration of Advocate in form III B of a date on which application was filed. He further stated that at the time of submitting the documents, he was informed that documents were in order. Now, he has come to know that his candidature has been rejected finding fault with the affidavit of his mother in Appendix- III A inasmuch as it was not of a date on which original application was filed or prior to it. He submitted that affidavit of his mother in Appendix- III A, which was dated 17.12.2018, i.e. prior to the date on which the application was submitted (22.12.2018) was in his possession and the same was duly enclosed with the representation, with prayer to consider the same. By the impugned order dated 30.12.2019, the respondent No. 2 has declined to consider the affidavit dated 17.12.2018 on the ground that it has been submitted after due date of submission of documents.

4. Learned counsel for the petitioner submitted that the petitioner was in possession of affidavit of his mother dated 17.12.2018 and Certificate of Advocate dated 22.12.2018 (Appendix- III-A and III-B respectively) of a date prior to the last date specified in the advertisement for submission of application form. At the time of submission of documents, in pursuance of letter dated 5.7.2019, one of the document submitted by the petitioner was Certificate of Advocate in Appendix- III B dated 22.12.2018 (on which date, the application form was submitted). However, under some misapprehension, he filed recent affidavit of his mother along with other documents. As soon as the petitioner came to know that respondents were insisting for an affidavit of a date prior to the submission of application form, the petitioner immediately filed affidavit of his mother dated 17.12.2018, which he was having in his possession even at the time of making the application, along with representation dated 24.7.2019 and requested the respondents to consider the same before proceeding any further in the matter. However, the respondents, in a wholly illegal and arbitrary manner, refused to consider the same. Learned counsel for the petitioner submitted that submission of documents was a stage after a candidate is declared successful, therefore, in any event, the affidavit in Appendix- III A, which was filed by the petitioner along with his representation dated 24.7.2019 ought to have been considered. It is further submitted that the time limit prescribed for filing the documents by letter dated 5.7.2019 was directory in nature and not mandatory, and in appropriate case, it can be relaxed. Thus, once the petitioner had duly brought to the notice of the respondents, the fact that the petitioner was in possession of affidavit of his mother dated 17.12.2018 but on account of some confusion and inadvertence, he filed a recent affidavit, the respondents ought to have considered the same.

5. Sri Nishant Mehrotra, learned counsel appearing on behalf of the

respondent No. 2 submitted that the documents should be of a date on which application was filed or prior to it. In support of his contention, he has relied upon Note 1, page 12 of the brochure relating to selection of dealership for regular and rural retail outlets, which reads as follows:

"1. All certificate/documents required for meeting Eligibility/Specific eligibility criteria should be in possession of the applicant and valid as on date of application."

6. He has further placed reliance on the stipulation in Clause 13 of the Application Form to the effect that **"The above piece of plot owned by me/my family member (as defined in clause 4(v)e of the Brochure) either by way of ownership/long term lease, would be made available for a period of minimum 19 years 11 months as advertised by the Oil Company Hindustan Petroleum Corporation Ltd..**

That as per the documents and report from advocate, available with me/us, my/our offer qualifies for being considered under "GROUP 1" as defined in clause 4 (v) of the Brochure for retail outlet dealer selection by the Oil Company Hindustan Petroleum Corporation Ltd."

7. It is submitted that the applicant can make the above declaration only if he was already in possession of the documents contemplated under Appendix- III A and III B. It is urged that this is further clear from paragraph 3 of the Appendix III A, which is as follow:-

"3. That in case he/she/M/s. (name of the Entity) is selected for RO dealership I will either sell/transfer/lease the above mentioned piece of land to Oil Company or to Shri/Smt/Kum/M/s. (name of the Entity _____ for setting of Retail Outlet facilitates at the above mentioned location as per the site plan duly signed by me/all co-owners. In case of lease, I further confirm that I have no objection if the subject piece of land leased to Shri/Smt./Kum/M/s. (name of the Entity) _____ is further leased/sub-leased to the Oil Company by him/her as per terms of the Oil Company."

8. Sri Nishant Mehrotra further submitted that since the affidavit in Appendix- III A was of a date subsequent to the date of filing the application form, the respondent-Corporation is fully justified in rejecting petitioner's application under category Group 1. He further submitted that since by letter dated 5.7.2019 while informing the petitioner about his selection, he was granted ten days' time to supply documents, therefore, the documents supplied at a later stage cannot be considered. In support of the said submission, he placed reliance on judgment of Bombay High Court in **Nikhil S/o Dilipsing Rajput Vs. Union of India and others, 2021 SCC OnLine Bom 489 and Madras High Court in Ganapathiraman Srinivasan Vs. India Oil Corporation Ltd., 2021 SCC OnLine Mad 1172.**

9. In reply, learned counsel for the petitioner tried to distinguish the above judgments by contending that the selection procedure followed in these cases required the applicants to submit documents along with application form, therefore, the documents had to be in possession of the applicant on the date of filing of the application form and the said deficiency cannot be made good at a later stage by

submitting certificate/affidavit on a subsequent date. However, in the instant case, no document was required to be filed along with the application form. The procedure followed by HPCL was that after an applicant is selected, he is informed of the same and at that stage, he was required to submit documents, therefore, even if the affidavit, as initially filed by the petitioner, was of a subsequent date, it would have no adverse effect nor would render his candidature ineligible. In alternative, he submitted that the petitioner having filed on record the affidavit of his mother of a date prior to submission of application form and there being no time limit prescribed under the brochure for supplying the documents, the affidavit filed along with the representation dated 24.7.2019 ought to have been considered.

10. We have considered the rival submissions and perused the relevant provisions of the brochure relating to selection of dealership.

11. At the outset, we may mention that we made a specific query from Sri Nishant Mehrotra as to whether any document was required to be filed along with application form. He verified the said fact from the officials of HPCL. In this regard, email received by him from the concerned official of HPCL has been placed on record and it clarifies the position thus:- **"We seek documents including Appendix IIIA only after selection of applicant in Draw of lots/Bid opening."**

12. The first issue for consideration is whether the affidavit filed by the petitioner in Appendix- III A of a date subsequent to the submission of application form can be considered as valid compliance of the conditions as stipulated in the brochure. In this regard, he may like to refer to Note. 1 at page 12 of the brochure quoted above. According to it, all certificates/documents required for meeting specific eligibility criteria should be in possession of the applicant and valid as on date of application. According to the brochure, there is a common eligibility criteria for all applicants applying as individual as on date of application, unless mentioned otherwise. Thereunder, land and various conditions and requirements attached thereto is also covered. The other type of eligibility prescribed is specific eligibility for those applying in different reserved categories.

13. The stipulation in the application form contained in Clause 13 to the effect that piece of land offered belonging to family member either by way of ownership or long term lease would be made available for a period of nineteen years and eleven months as advertised by the Oil Company as well as paragraph 3 of the form in Appendix III A clearly reveals that an applicant would be in position to make concrete offer of land belonging to his family members only if he is in possession of affidavit in form III -A on or before the date of submission of the application form. The same view has been taken in the judgments cited by the learned counsel for the respondent No. 2. Therefore, we do not find any force in the submission of learned counsel for the petitioner that the affidavit of his mother of a date subsequent to the date of filing of the application form was valid compliance of the requirements under the selection procedure.

14. Coming to the alternative submission, it may be noted that in the selection procedure, which has been adopted by respondent No. 2 in the case at hand, indisputably documents were not

required to be submitted along with the application form but after the applicant is declared successful in Draw of Lots, which has been confirmed by the official of respondent No. 2 via email sent to their counsel, Sri Nishant Mehrotra and a copy of which, has also been placed on record. In fact, the same is also clear from the stipulation made in the communication dated 5.7.2019 whereby the petitioner was informed about his selection and was required to submit various documents, one amongst them being affidavit as prescribed by Appendix- III A. Sri Nishant Mehrotra, learned counsel for the respondent-Corporation admits that, in the brochure, there is no time limit prescribed for filing of the documents, however as noted above, the petitioner was provided ten days for submitting the documents in question. Indisputably, the petitioner had submitted the documents on 11.7.2019 and along with which, apart from the Certificate of Advocate in Appendix- III B dated 22.12.2018 (the date on which the application form was submitted), the petitioner also filed affidavit of his mother in Appendix III A dated 10.7.2019. As soon as the petitioner came to know that the said affidavit is not acceptable to the respondents, he submitted a representation on 24.7.2019 and along with it, he filed an affidavit of his mother in Appendix- III A dated 17.12.2018, a date prior to the date of submission of the application form.

15. Concededly, vide allotment letter dated 5.7.2019, the petitioner was permitted ten days time to supply documents. Thus, even if it is assumed that letter dated 5.7.2019 was communicated to the petitioner on the same date, the said period of ten days expired on 15.7.2019. Consequently, it is evident that the affidavit in Appendix- III A dated 17.12.2018 was put on record before the respondent-Corporation by the petitioner with a delay of merely nine days. It is an admitted position that since the passing of order dated 30.12.2019, the selection rests at the same stage and has not proceeded any further so far. As noted above, in the brochure for selection of dealership, no specific time limit is prescribed for submitted documents in response to the letter of allotment. We, therefore, are of the considered opinion that in the absence of any statutory prohibition in accepting the documents beyond time frame prescribed in the letter of allotment and having regard to the fact that the petitioner submitted the affidavit of his mother in Appendix- III A of a date prior to the submission of application form soon after he came to know that recent affidavit is not acceptable as well as the fact that by that time, the selection had not progressed any further, respondent No. 2 ought to have considered the said affidavit.

16. In view of above, we are of the opinion that the decision taken by the respondent No. 2 declining to consider the affidavit submitted by the petitioner along with representation dated 24.7.2019 and communication dated 13.12.2019 are not sustainable and are hereby quashed. Since the respondent has yet not examined whether the said affidavit is genuine or not but has refused to consider the same solely on the ground that it was filed beyond time prescribed for submitting documents, therefore, we grant liberty to the respondent-Corporation to examine the said aspect and if it is found that affidavit is a genuine one, the respondent-Corporation shall proceed to consider the same as due compliance of the requirement relating to submission of affidavit in Appendix- III A and will proceed accordingly. The

aforesaid exercise shall be completed by the respondent-Corporation within three weeks from today.

17. The writ petition stands disposed of with the above directions.

(2022) 9 ILRA 1740
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ C No. 41940 of 2013

Lalti Devi & Anr. ...Petitioners
Versus
Bindu Bihari Verma & Ors. ....Respondents

Counsel for the Petitioners:
Sri Arvind Srivastava, Sri Ram Milan Mishra, Sri Vinay Mishra

Counsel for the Respondents:
Sri Umesh Vats

A. Civil Law - Code of Civil Procedrue,1908-Section 115, Order 26, Rule 9-Civil suit-Appointment of Court Commissioner- The case of the respondents/plaintiffs is that suit property is a joint family property in which a business of jewellery is being run-According to the plaint allegation, respondent no.2 was also a sleeping partner in the family business to the extent of 30% share- At the time of filing of the suit, respondents/plaintiffs also filed an application under Order 26 Rule 9 of C.P.C. for the appointment of the court commissioner to make an inventory of the accounts and gold, silver, and jewellery lying in the stock of the firm-The trial court instead of going into the merits of the case proceeded to reject the same on the ground that more than three and half years have passed since the institution of suit and respondents/plaintiffs have not pressed the application therefore, there is no good ground to appoint court commissioner at this stage- Hence, the revision court has not committed any error in holding that revision is maintainable against the order passed by the trial court and has rightly remanded the matter to the trial court to decide the application under Order 26 Rule 9 of C.P.C. afresh.(Para 1 to 30)

B. A Commissioner for local investigation is deputed under Order 26 Rule 9 CPC when the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or for ascertaining any other matter mentioned in the said rule. The object of local investigation under the above provision is to obtain evidence which from its peculiar nature can best be had from the spot itself. Such evidence enables the Court to properly and correctly understand and assess the evidence on record already recorded. It clarifies or explains any point which is left doubtful on the evidence on record- Thus, keeping in view the law on the point in issue, as stated herein above, and the rival averments made by the parties as well as the evidence on record, a Commissioner's report of local investigation was absolutely necessary in this case.(Para 17)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Rama Shanker Tiwari Vs Mahadeo & ors.. (1968) A.W.R. 103 (F.B.)

2. Haryana Waqf Board Vs Shanti Sarup & ors. (2008) 8 SCC 761

3. Shreepat Vs Rajendra Prasad & ors.. (2000) 2 JCLR 462 SC

4. Ponnusamy Vs Salem Vaiyappamalai Jangamar Sangam (1986) AIR Mad 33

5. New Meena Sahkari Awas Samiti Ltd. LKO. Vs A.D.J., CT. No. 2 LKO (2016) 6 ADJ 595

6. Ram Ishwar @ Rameshwar & ors. Vs Laxmi Narain & anr. (2007) 102 RD 258

7. Rajesh Kumar Gautam Vs Maha Mandleshwar Vedabayasanad Geeta Ashram (2003)95 RD 521.

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

1. Heard learned counsel for petitioners.

2. The petitioners who are defendants in the suit have assailed the order dated 03.07.2013 passed by the Additional District Judge, Court No.1, Jaunpur in Civil Revision No.148 of 2007 whereby the revision court has allowed the application of respondents/plaintiffs for appointment of court commissioner.

3. The facts, in brief, are that respondent no.1 and 2 instituted a suit bearing Original Suit No.589 of 2003 praying for a decree of injunction in respect of their 1/3 share and rendition of account in respect of jwellery business being run in the suit property.

4. The suit has been instituted on the ground that the suit property was joint property and was purchased in the name of Urmila Devi, Lalti Devi, and Bindu Devi through various sale deeds. The construction lying before the sale deed on the suit property was demolished, and a house and shop were constructed over the said suit property after obtaining permission from the competent authority. It is further pleaded that it was agreed upon between the brothers i.e. husband of Urmila Devi, Lalti Devi, and Bindu Devi that the house shall remain joint property, and business in the house shall be run in the name of the wife of Bindu Bihari Verma (plaintiff no.1) and Nanhe Lal Verma (defendant no.2). It was also agreed that business shall be run under the supervision of Nanhe Lal Verma and in the name of 'Kirti Kunj Jwellers. In the said business, Urmila Devi-plaintiff no.2 wife of Bindu Bihari Verma (plaintiff no.1), and Lalti Devi wife of Nanhe Lal Verma-(defendant no.1) will be sleeping partners, and Nanhe Lal Verma will act as an acting partner.

5. It is further pleaded that respondents/plaintiff came to know that Bindu Devi-defendant no.3 and Ram Asrey Verma-defendant no.4 adopted the son of Lalti Devi and Nanhe Lal Verma. The respondents/plaintiffs further pleaded that they came to know that share of Bindu Devi in the suit property has been given to Nanhe Lal Verma which led to creating a doubt in the mind of respondents/plaintiffs that their share may be usurped by the petitioners/defendants. The respondents/plaintiffs demanded the petitioners/defendants to show accounts of the business, but petitioners/defendants refused to show the account of the business which led to filing the present suit praying for the aforesaid relief.

6. In the said suit, respondents/plaintiffs submitted an application 8Ga on 08.12.2003 under Order 26 Rule 9 of C.P.C. to prepare a map of the suit property and also make an inventory of gold, silver, and jwellery in the shop and the accounts of the business.

7. The aforesaid application was contested by the petitioners/defendants by filing objection 20Ga contending inter-alia that application 8Ga is misconceived.

8. The application 8Ga was rejected by the trial count on the ground that more than three and half years have passed since

the institution of the suit, but respondents/plaintiffs did not press for disposal of the said application, therefore, at this stage, no ground is made out for entertaining the application 8Ga. Accordingly, the trial court dismissed the application 8Ga vide order dated 26.07.2007.

9. The respondents/plaintiffs preferred Civil Revision No.148 of 2007 against the order dated 26.07.2007 on the ground that the trial court has committed material irregularity in rejecting the application 8Ga of the respondents/plaintiffs. The aforesaid revision was contested by the petitioners/defendants contending interalia that revision under Section 115 of C.P.C. against an order rejecting or allowing the application is not maintainable.

10. The revision court vide order dated 03.07.2013 allowed the revision and remanded the matter to the trial court to decide the application 8Ga under Order 26 Rule 9 of C.P.C. afresh.

11. Challenging the aforesaid order, learned counsel for the petitioners has contended that an order allowing or rejecting the application under Order 26 Rule 9 of C.P.C. is an interlocutory order, and as it has not decided any issue between the parties or disposed of the suit finally, therefore, revision is not maintainable against the said order.

12. In support of his contention, learned counsel for the petitioners has placed reliance upon the judgement of this Court in the case of ***Ram Ishwar @ Rameshwar and Others Vs. Laxmi Narain and Another 2007 (102) RD 258*** and judgement of Uttrakhand High Court in the case of ***Rajesh Kumar Gautam Vs. Maha Mandleshwar Vedabayasanad Geeta Ashram 2003 (95) RD 521.***

13. Counsel for the respondents was not present. However, a counter affidavit has been filed by the respondents in which it has been pleaded that appointment of the court commissioner was necessary as the suit is for accountancy. It is further stated that an order rejecting or allowing the application amounts to a 'case decided' and as such revision is maintainable against the said order.

14. I have considered the argument of learned counsel for the petitioners and perused the record.

15. The fact as emanates from the record reflects that case of the respondents/plaintiffs is that suit property is a joint family property in which a business of jwellery is being run. According to the plaint allegation, respondent no.2 was also a sleeping partner in the family business to the extent of 30% share. At the time of filing of the suit, respondents/plaintiffs also filed an application 8Ga under Order 26 Rule 9 of C.P.C. for the appointment of the court commissioner to make an inventory of the accounts and gold, silver, and jwellery lying in the stock of the firm. The trial court instead of going into the merits of the case proceeded to reject the same on the ground that more than three and half years have passed since the institution of suit and respondents/plaintiffs have not pressed the application 8Ga filed on 08.12.2003, therefore, there is no good ground to appoint court commissioner at this stage.

16. The trial court did not dwell upon the merits of the case nor endeavoured to find out as to whether the appointment of

the court commissioner is necessary for effective and proper adjudication of the lis involved in the suit between the parties.

17. This Court in the case of ***New Meena Sahkari Awas Samiti Ltd. LKO. Vs Additional District Judge, CT. No. 2 LKO; 2016 6 ADJ 59***5, after considering various pronouncements of the Apex Court, has held that the court cannot prevent a party from adducing the best evidence, if such evidence, can be gathered with the help of the Commissioner. In this respect, it would be apt to reproduce paragraph no. 29, 30, 32, 33, 34, and 35 of the said judgement:-

"29. In a suit for injunction to restrain the defendants from interfering with the possession due to alleged encroachment into the land of the plaintiff, one of the methods to find out as to whether or not there is encroachment is to have the local investigation done by a competent Commissioner.

30. A Commissioner for local investigation is deputed under Order 26 Rule 9 CPC when the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or for ascertaining any other matter mentioned in the said rule. The object of local investigation under the above provision is to obtain evidence which from its peculiar nature can best be had from the spot itself. Such evidence enables the Court to properly and correctly understand and assess the evidence on record already recorded. It clarifies or explains any point which is left doubtful on the evidence on record.

32. Accordingly, rejected the same on the ground that at the stage of arguments there is no necessity for issue of Amin Commissioner. Thus, keeping in view the law on the point in issue, as stated herein above, and the rival averments made by the parties as well as the evidence on record, a Commissioner's report of local investigation was absolutely necessary in this case. The appellate Court, therefore, was not justified in rejecting the prayer of the petitioner/ plaintiff for issue of commission. As in the case of Ponnusamy v. Salem Vaiyappamalai Jangamar Sangam, AIR 1986 Mad 33, it is observed as follows : -

"The object of the local investigation under Order 26 Rule 9 is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in Court but could be taken only from its peculiar nature on the spot. This evidence will elucidate a point which may otherwise be left in doubt or ambiguity on record. The Commissioner in effect is a projection of the Court appointed for a particular purpose. In this regard the implication of Order 26, Rule 10 cannot be lost sight of when it says that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. A party has a right to place evidence which he could require to substantiate his case before the Court and it is the duty of the Court to receive such evidence unless there are other justifiable factors in law to decline to receive it. This right of the party to adduce evidence gets adjudicated in the interlocutory proceedings under Order 26 Rule 9, When the Court declines to issue the Commission asked for to make local investigation that order certainly disposes of the right claimed by the party to place the requisite evidence on his behalf. Therefore, an order refusing to appoint a Commissioner under Order 26 Rule 9 to make local investigation and report is a

"case decided" and hence revisable under Section ".

33. And in the case of Shreepat vs. Rajendra Prasad & Ors., 2000 (2) JCLR 462 (SC), Hon'ble the Apex Court held as under :-

"In our opinion, this contention is correct. Since there was a serious dispute with regard to the area and boundaries of the land in question, especially with regard to its identity, the courts below, before decreeing the suit should have got the identity established by issuing a survey commission to locate the plot in dispute and find out whether it formed part of Khasra No. 257/3 or Khasra No 257/1. This having not been done has resulted ' in serious miscarriage of justice. We consequently allow the appeal, set side' the order passed by the courts below as affirmed by the High Court and remand the case to the trial court to dispose of the suit afresh in the light of the observations made above and in accordance with law".

34. In the case of Haryana Waqf Board vs. Shanti Sarup and others (2008) 8 SCC 761, Hon'ble the Supreme Court held as under:-

"It is also not in dispute that even before the appellate court, the appellant Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land."

35. Accordingly, the Court cannot prevent a party from adducing the best evidence, if such evidence can be gathered with the help of a Commissioner. Refusal of the request of the party to appoint a Commissioner under Order 26 Rule 9 CPC to make a local investigation in an appropriate case amounts to failure of exercise of jurisdiction vested in it. In this view of the matter, I find that the impugned order cannot be sustained and the action on the part of appellate court, rejecting the prayer of the petitioner/ plaintiff for issue of commission most probably will produce error or defect in the decision of the case on merits. Therefore, the impugned order dated 23.2.2012 passed by opposite party no.1/ Additional District Judge, Court no.2 Lucknow liable to be set aside."

18. In view of the judgement of this Court in the case of ***New Meena Sahkari Awas Samiti Ltd. (supra),*** the trial court in the instant case ought to have considered the application of the respondent under Order 26 Rule 9 of C.P.C. on merit so as the valuable rights of the respondents to produce the best evidence may not be defeated. The trial court instead of considering the application under Order 26 Rule 9 of C.P.C. on merit took a very technical approach in rejecting the application of respondents.

19. In such view of the fact, this Court finds that the trial court has committed jurisdictional error in not deciding the application 8Ga within the parameters of Order 26 Rule 9 of C.P.C. rather it was swayed by the fact of delay in pressing the application 8Ga by the respondents/plaintiffs.

20. Now, the question which arises for consideration is whether in the facts of the present case when the trial court has committed jurisdictional error in rejecting the application 8Ga whether revision under Section 115 of C.P.C. as applicable in the State of U.P. shall lie or not.

21. In this respect, it would be apt to reproduce Section 115 C.P.C. as applicable in the States of U.P:-

"115. Revision (1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and where the subordinate court has--

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A revision application under sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the district court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district court.

(3)The superior court shall not, under this section, very or reverse any order made except where,-

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made."

22. In the case of ***Rama Shanker Tiwari Vs. Mahadeo and Others 1968 A.W.R. 103 (F.B.),*** Full Bench considered the meaning of the 'case decided' and held that the order allowing or disallowing an application for amendment in pleading is a case decided and is revisable in this Section, if the amendment sought has or is likely to have a direct bearing on the rights and obligation of the parties. Paras 23 & 24 of the said judgement are reproduced herein below:-

"23. I am, therefore, of opinion that every order granting or dismissing an application for amendment of pleading will not give rise to a case decided revisable u/S. 115 of the Code. An order allowing or disallowing an application for amendment of pleading may however, give rise to a case decided revisable under that Section if the amendment sought has or is likely to have a direct bearing on the rights and obligations of the parties and affects or is likely to affect the jurisdiction of the Court. To this extent the decision in Mst. Suraj Pali's case can, in may opinion, be said to be no longer good law.

24. The opinion of the majority of Judges constituting the Full Bench is that an order passed u/O. VI R.17 of the CPC, either allowing an amendment or refusing to allow an amendment, is a "case decided" within the meaning of that expression in S.115, Code of Civil Procedure."

23. Now, applying the principles laid down in the case of ***Rama Shanker Tiwari (supra),*** it can safely be concluded that if an order deciding an application would have a direct bearing on the rights of the parties, if it is allowed or rejected, same would amount to 'case decided' and revision would lie.

24. Section 115 (3) (ii) of C.P.C. as applicable in Uttar Pradesh clearly states that the order, if allowed to stand, results in failure of justice or causes irreparable injury to the party against whom it is made, the revision under Section 115 of C.P.C as applicable in the State of U.P. is maintainable.

25. Viewed from this angle, if any order illegally passed by the court below on any application is allowed to stand affecting the rights of parties, it would cause the failure of justice or cause irreparable injury to the party against whom it is made, therefore, if said condition is present, the revision against such order passed by the court below vide Section 115 (3) (ii) of C.P.C. as applicable in the State of U.P. would lie.

26. In view of aforesaid discussions, this Court believes that the trial court in not deciding the application under Order 26 Rule 9 of C.P.C. on merit and dismissing the same by taking a pedantic view has exercised its jurisdiction illegally and with material irregularity, therefore, the case being covered under Section 115 (1)(c) and Section 115 (3)(ii) of C.P.C., the revision would lie. In such view of the fact, this Court finds that revision in the instant case is maintainable.

27. So far as the judgement relied upon by the learned counsel for the petitioners in the case of ***Ram Ishwar @ Rameshwar (supra)*** is concerned, this Court finds that in the said case, the Court did not consider the Full Bench judgement of this Court in the case of Rama Shanker Tiwari (supra) which defines the meaning of 'case decided' and further the Court has not considered the issue in the light of Section 115 (3)(ii) of C.P.C. as applicable in the State of U.P.

28. So far as another judgement relied upon by the learned counsel for the petitioner in the case of Uttrakhand High Court in the case of ***Rajesh Kumar Gautam (supra)*** is concerned, the Uttrakhand High Court was considering Section 115 of Central Act and did not consider the Section 115 of C.P.C. as applicable in the State of U.P.

29. In such view of the fact, this Court finds that the revision court has not committed any error in holding that revision is maintainable against the order passed by the trial court and has rightly remanded the matter to the trial court to decide the application under Order 26 Rule 9 of C.P.C. afresh.

30. Thus, for the reasons writ petition lacks merit and is accordingly, ***dismissed*** with no order as to costs.

(2022) 9 ILRA 1746
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2022

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Habeas Corpus Writ No. 402 of 2022

Poonam Kushwaha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Dwivedi

Counsel for the Respondents:
G.A.

A. Criminal Law-Constitution of India, 1950-Article 226 - Indian Penal Code,1860 - Section 366-Maintainability of-writ of Habeas Corpus can only be issued when there is specific assertion in the writ petition that the corpus is in the illegal captivity or wrongful confinement of an individual against his/her wish and desire- In the instant case, when the girl, major girl of 24 years, no doubt, without any information to her parent, fled away with respondent no.4 and she has allegedly solemnized marriage and happily residing with him, it is a million dollar question as to whether she could be considered in the illegal confinement of the said boy- This is a precise question of investigation- in this backdrop, the custody of the victim being disputed, now it is the police who has to investigate this factual issue that the corpus is residing with respondent no.4 on her sweet will OR respondent no.4 is keeping her in his illegal captivity, against her desire. This comes within exclusive domain of police to investigate into the matter-Since the parent are against this marriage and that's why after concocting the facts of the case, wants to involve the High Court to exert pressure upon the police, to hold a futile exercise- Filing of the present Habeas Corpus Petition is nothing but an arm twisting of the local police officials who are already engaged, after lodging of the FIR. This Court feels that after the girl is fled away from the guardianship of her parent, it is their personal perception that their son or daughter has been kept in the illegal captivity of the offence. But, in majority of the cases, when these couples are brought before the Court, after the notices, these couples ruthlessly blasts the perception of their parent, resultantly, the Habeas Corpus Petition would end into big zero and an exercise in vanity-where the FIR with regard to alleged act of kidnapping, abduction or illegal confinement or for ransom has already been filed and police personnel are pursuing the matter at their end, the lodging of parallel Habeas Corpus Petition is motivated and purposive one- By filing such type of petitions, the impatient petitioner wants to involve the Courts to exert their pressure upon the police to speed up their investigation. The Habeas Corpus Petitions should not to be used as whip over the police to officials, just to serve out the petition's vanity over the police-Accordingly instant Habeas Corpus Petition is dismissed at the admission stage itself. (Para 1 to 31)

B. A writ of habeas corpus can only be issued when the detention or confinement of a person is without the authority of law. Though the literal meaning of the Latin phrase habeas corpus is "to produce the body", over a period of time production of the body is more often than not insisted upon but legally it is to be decided whether the body is under illegal detention or not. Habeas corpus is often used as a remedy in cases of preventive detention because in such cases the validity of the order detaining the detenu is not subject to challenge in any other court and it is only writ jurisdiction which is available to the aggrieved party. The scope of the petition of habeas corpus has over a period of time been expanded and this writ is commonly used when a spouse claims that his/her spouse has been illegally detained by the parents. This writ is many times used even in cases of custody of children. Even though, the scope may have expanded, there are certain limitations to this writ and the most basic of such limitation is that the Court, before issuing any writ of habeas corpus must come to the conclusion that the detenu is under detention without any authority of law. (Para 16)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Lata Singh Vs St. of U.P. (2006) Cr.L.J. 3312

2. Bhagwan Das Vs NCT, New Delhi (2011) 6 SCC 396

3. Greene Vs Home Secry. (1941) 3 All ER 388

4. St. Vs H. Nilofer Nisha (2020) 14 SCC 161

5. UOI Vs Yumnam Anand M. @ Bocha @ Kora @ Suraj (2007) 10 SCC 190

6. Kanu Sanyal Vs D. M.(1973) 2 SCC 674

7. Swapan Das Vs St. of W.B. & ors. (2013) SCC Online Cal 11681

8. Sulochana Bai Vs St. of M.P. & ors. (2008) 2 MPHT 233

9. Selvaraj Vs St. Rep. by the Suptt of Police, Nagapattinam Distt. (2018) 3 MLJ (Cri) 712

10. Amar Nath Chaubey Vs UOI, SLP (Cr.) No.6951 of 2018

11. Manohar Lal Sharma Vs Prin. Secy & ors. (2014) 2 SCC 532

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

1. Heard Sri Manish Dwivedi, learned counsel for the petitioner as well as Sri Ghanshyam Kumar and Sri Mohd. Afzal, learned counsels appearing for the State and perused the records of the case.

2. At the outset, learned A.G.A. has raised strong preliminary objection with regard to the maintainibility of the present Habeas Corpus petition and floated certain arguments against this petition, which would be considered in the later part of the judgment.

3. From the petition, Sri Dwivedi, learned counsel for the petitioner has sought following prayer mentioned hereinbelow viz:-

"a) Issue a writ, order or direction in the nature of Habeas Corpus direction the respondent no.2 to produce the corpus-Km. Poonam from the custody of respondent no.4(Manish Kumar Sharma) before this Hon'ble Court to ensure his safety and happy life

b) Issue any other suitable writ, order or direction, as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

c) Award cost of this petition in favour of the petitioner."

In this petition, Ms. Poonam Kushwaha (25 years) is the daughter of Kailash Chandra Kushwaha who in fact, is the "petitioner no.2" has arrayed (i) State of U.P. Principal Secretary, Homes, Lucknow, Uttar Pradesh; (ii) Superintendent of Polilce, Banda ; (iii) S.H.O. Police Station-Kalinger, Banda ;(iv) Manish Kumar Sharma aged 29 years s/o Rajesh Sharma, r/o village-Talahati, police station-Kalinger, District-Banda, as respondents from whom he has sought aforementioned prayer.

4. The bare skelton fact which has given rise to the present Habeas Corpus petition are formulated hereinbelow: -

(A) Submission advanced by learned counsel for the petitioner no.2 is that Kailash Chandra Kushwaha, has lodged the FIR on 24.01.2022 for the alleged act of enticement of his daughter Poonam Kushwaha on 22.01.2022 from Kalinger. This FIR was got registered as case crime no.25 of 2022 under section 366 IPC at Police Station-Kalinger, District-Banda.

(B) On account of certain misconceptions and mis-information received to the informant, initially the FIR was registered against one Biru Prajapati,

but later on, it was revealed to the informant that a person Rohit Bhatt@Manish Kumar Sharma, after hatching the conspiracy with one Afsar, Chand Khan and two others, has forcibly taken away Km. Poonam Kushwaha (24 years) from the custody of her father/petitioner no.2. Consequently, an application was moved on the same day i.e 24.01.2022 itself to the concerned Investigating Officer giving the correct information about the real offenders.

(C) During the pendency of the investigation, petitioner no.2 came to know that Rohit Bhatt@Manish Kumar Sharma carried her daughter to the Bench of this Hon'ble Court seeking civil protection, projecting that both of them are major and now are married couple and thus, their future may be secured by giving certain civil protection to them, accordingly, a Civil Writ Petition No.3002 of 2022 was filed by them and on 17.02.2022, co-ordinate Bench of this Court while relying upon the judgments of ***Lata Singh Vs. State of U.P. 2006 Cr.L.J. 3312*** and ***Bhagwan Das Vs. NCT, New Delhi,(2011) 6 SCC 396*** disposed of the aforesaid petition protecting the interest of the couple with certain conditions.

(D) The father of the corpus Mr. Kailash Chandra Kushwaha also came to know that his daughter Poonam Kushwaha got married with respondent no.4.

(E) In the present petition, father has levelled all sorts of severe allegations about the nature and character of respondent no.4 that after laying love trap, Rohit Bhatt@Manish Kumar Sharma spoiled the life of many other young girls, were trapped in his love and thereafter, utilized them for women trafficking and thrown them into flesh market etc.

(F) Raising all his suspicion, father of the girl moved an application on 04.04.2022, raising his grievance regarding his daughter before the Superintendent of Police, Banda but it seems that no heed was paid on the said letter. In addition to this in paragraph no.12 of the petition, it is also alleged that informant's wife Ram Janki(mother of Poonam Kushwaha) has received phone calls allegedly from Manish Bhatt@Manish Kumar Sharma demanding Rs.5 lacs for the safety and security of the kidnapee Ms. Poonam Kushwaha. Perturbed by this, Ram Janki too made an application to the concerned S.H.O., Kalinger on 09.05.2022 but that application too gone into deaf ear of concerned S.H.O.

In paragraph no.14 of the petition, on 24.01.2022, Manish Kumar Sharma and Poonam Kushwaha got married but this marriage was never accepted by her parent. The marriage certificate is from Ram Janki Mandir, Prayagraj dated 24.01.2022 certified by one Acharya Vijay Shashtri annexed as Annexure-8 to the petition.

5. The petitioner/father was anxious to know about the well-being of his daughter and it is the petitioner who also received unconfirmed information that her daughter may be carried way outside the country and on this ground, it is prayed that S.P. Banda(respondent no.2) was directed to produce the corpus of Poonam Kushwaha from the custody of respondent no.4-Manish Kumar Sharma to ensure the safety and security of her life so that justice could be done during the pendency of the present petition.

Interestingly, in the entire writ petition, there is not even a whisper, that his daughter was in the illegal confinement of respondent no.4 or she has been kept forcibly against her wish with respondent no.4.

6. After hearing these factual submissions advanced by learned counsel for the petitioner, learned A.G.A. relying upon the instructions received from the S.H.O. Kalinger, Banda have pointed out that pursuant to the FIR as case crime no.25 of 2022 under section 366 IPC, police station-Kalinger dated 24.01.2022, the investigation is still going on with full swing. It is the informant who has initially lodged the FIR againt one Biru Prajapati and later on, gave an application, have replaced him by inserting Manish Kumar Sharma. During investigation, it has come to the knowledge of the Investigating Agency that the aforesaid couple have solemnized marriage in some temple at Prayagraj and appeared before the Court for having a civil protection by means of Writ-C No.3002 of 2022 and vide order dated 17.02.2022, the single Bench of this Court has protected the interest of the couple with certain conditions.

7. Besides this, petitioner no.1-Poonam Kushwaha on 27.02.2022 has given an application to the S.P. Banda annexing the certified copy of the aforesaid order levelling specific allegations against her own father, that petitioner no.2 Kailash Chandra Kushwaha was planning to get her married with a person double of her age. Meanwhile, she, on her own, contacted Manish Kumar Sharma, respondent no.4 and both of them got married on 24.01.2022 at Prayagraj. This marriage was performed by them as per their own sweet will without any coercion or duress from any quarter and now, they are leading happy marital life.

However, as per the wild allegations levelled in paragraph 12, 13, 15, 16 and 17 of the writ petition, that ransom of Rs.five lacs were demanded on telephone of Ram Janki, mother of Poonam Kushwaha is concerned, the police is examining all these allegations in a thorough professional way and yet to file their report under section 173(2) Cr.P.C.

Learned A.G.A. has accused the petitioner with regard to the maintainability that by filing the present Habeas Corpus petition, the father Kailash Chandra Kushwaha wants to exploit its extra-ordinary power just to exert extra pressure on the police who are in the midst of the investigation. It is further contended by learned A.G.A. that this Habeas Corpus petition is nothing but a device of arm twisting by involving the High Court in this ongoing investigation thus, it is not only purposive but also misconceived.

8. It has been further contended that writ of Habeas Corpus can only be issued when there is specific assertion in the writ petition that the corpus is in the illegal captivity or wrongful confinement of an individual against his/her wish and desire. In the instant case, when the girl, major girl of 24 years, no doubt, without any information to her parent, fled away with respondent no.4 and she has allegedly solemnized marriage and happily residing with him, it is a million dollar question as to whether she could be considered in the illegal confinement of respondent no.4?

9. After hearing the rival parties, the father is asserting that his daughter is being enticed away by respondent no.4 in the dead hours of the night of 21/22.01.2022 whereas the other documents especially Annexure-4 order in the writ petition Smt. Poonam Kushwaha and ors. Vs. State of U.P., indicates that both of them got married and leading a happy marital life. This is a precise question of investigation. However, in this backdrop, the custody of the victim being disputed, now it is the

police who has to investigate this factual issue that the corpus is residing with respondent no.4 on her sweet will OR Manish Kumar Sharma respondent no.4 is keeping her in his illegal captivity, against her desire. This comes within exclusive domain of police to sinvestigate into the matter.

After hearing the rival submission, the Court has formulated following proposition of law for the judicial scrutiny, viz :-

WHEN THE POLICE IS PURSUING ITS INVESTIGATION AFTER LODGING OF THE FIR, AND, IS IN THE MIDST OF INVESTIGATION, WHETHER HABEAS CORPUS PETITION IS MAINTAINIBLE OR NOT ?? OR IN OTHER WORDS, THE HABEAS CORPUS PETITION AND INVESTIGATION WITH REGARD TO THE SAME ISSUE CAN GO PARALLELLY OR NOT ?

Let us examine this instant prelimnary objection raised by the learned A.G.A.

10. So far as this pertinent question regarding maintainability of the present Habeas Corpus petition is concerned, it is imperative to examine the meaning and scope of Habeas Corpus petition from its historical background.

11. The Latin phrase habeas corpus means literally that "you", that is, the person with custody over the prisoner, must "have the body" of the prisoner produced in court at the place and time ordered by a judge. The writ of habeas corpus provides individuals with protection against arbitrary and wrongful imprisonment.

12. The meaning of the term habeas corpus is "you must have the body". In ***Halsbury Laws of England, 4th Edition, Vol.11, p.1452, p.768***, it is observed:

"The writ of habeas corpus ad subjiciendum" which is commonly known as the writ of habeas corpus, is a prerogative High Court process for securing the liberty of the subject by affording an effective means of immediate release from the unlawful or unjustifiable detention whether in prison or in private custody. It is a prerogative writ by which the queen has a right to inquire into the causes for which any of her subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command the production of that subject, and inquiry into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. Release on habeas corpus is not, however, an acquittal, nor may the writ be used as a means of appeal."

13. Habeas corpus ad subjiciendum means "that you have the body to submit or answer."

May *in his Constitutional History of England (1912), Vol.II, p.130, described writ of habeas corpus as "the first security of civil liberty". Blackstone called the writ of habeas corpus as "the great and efficacious writ in all manner of illegal confinement."*

14. ***Julius Stone in Social Dimensions of Law and Justice, (1966),*** p.203 described the writ of habeas corpus as a picturesque writ with an extraordinary scope and flexibility High Court of an application.

15. According to **Dicey (A.C. Dicey),** Introduction to the Study of Law of the Constitution, Macmillan and Co., Ltd., p.215(1915): *"if, in short, any man, woman or child is, or is asserted on apparently good grounds to be deprived of liberty, the court will always issue a writ of habeas corpus to anyone who has the aggrieved person in his custody to have such person brought before the court and if he is suffering restraint without lawful cause, set him free."*

16. In ***Greene vs. Home Secretary, (1941) 3 All ER 388***, it has been observed:

"Habeas corpus is a writ in the nature of an order calling upon the person who has detained another to produce the later before the court, in order to let the court know on what ground he has been confined and to set him free if there is no legal jurisdiction of imprisonment."

17. The prerogative writ of habeas corpus ad subjiciendum is the most renowned contribution of English common law to the protection of human member.

In India, the jurisdiction to issue prerogative writs came with the establishment of the Supreme Court by regulating Act of 1773. The charter of 1774 gave power to each High Court of the justices of the Supreme Court of Calcutta to issue a writ of habeas corpus. The three Supreme Courts in Calcutta, Bombay and Madras by the Act of Parliament in 1861 were abolished and High Courts were established and the power to issue writs of habeas corpus was inherited by them. This power to issue writ of habeas corpus was taken away from 1875 and new power of the High Court arose under Section 491 of the Code of Criminal Procedure, 1898 to issue statutory directions in the nature of habeas corpus. By Articles 32 and 226, the Supreme Court and all the High Court got jurisdiction to issue writ of habeas corpus throughout their respective territorial jurisdiction when the Constitution came into force.

18. Considering the decision of the Constitution Bench, recently the Apex Court in ***State Vs. H. Nilofer Nisha, since reported in (2020) 14 SCC 161*** has considered the expanding scope of the writ of habeas corpus and has held as under :-

"16. A writ of habeas corpus can only be issued when the detention or confinement of a person is without the authority of law. Though the literal meaning of the Latin phrase habeas corpus is "to produce the body", over a period of time production of the body is more often than not insisted upon but legally it is to be decided whether the body is under illegal detention or not. Habeas corpus is often used as a remedy in cases of preventive detention because in such cases the validity of the order detaining the detenu is not subject to challenge in any other court and it is only writ jurisdiction which is available to the aggrieved party. The scope of the petition of habeas corpus has over a period of time been expanded and this writ is commonly used when a spouse claims that his/her spouse has been illegally detained by the parents. This writ is many times used even in cases of custody of children. Even though, the scope may have expanded, there are certain limitations to this writ and the most basic of such limitation is that the Court, before issuing any writ of habeas corpus must come to the conclusion that the detenu is under detention without any authority of law."

19. Illegal confinement is the pre-condition to issue a writ of habeas corpus. Though a writ of right, it is not a writ of course. It is an extra ordinary remedy and cannot be granted on mere asking. It cannot be resorted to in a casual and routine manner. Who is responsible for kidnapping the son of the petitioner and who is wrongfully confining him are maters of investigation and definite opinion in this regard is lacking in the present case.

20. In a criminal investigation, what action should have been taken by the police that cannot be a matter of habeas corpus because there is no application whatsoever that there has been wrongful confinement by the police.

In **Union of India vs. Yumnam Anand M. @ Bocha @ Kora @ Suraj**, (2007) 10 SCC 190 while explaining the nature of writ of habeas corpus, **the Supreme Court held that it is writ of right, it is not a writ of course**. The application must show a prima facie case of his unlawful detention. Relevant para-7 of the judgment reads as under:

"7.Article 21 of the Constitution having declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was definitely needed to examine the question of illegal detention with utmost promptitude. The writ of habeas corpus is a device of this nature. Blackstone called it "the great and efficacious writ in all manner of illegal confinement". The writ has been described as a writ of right which is grantable ex debito justitiae. Though a writ of right, it is not a writ of course. The applicant must show a prima facie case of his unlawful detention. Once, however, he shows such a cause and the return is not good and sufficient, he is entitled to this writ as of right."

21. In **Kanu Sanyal vs. Distt. Magistrate, *(1973) 2 SCC 674*** , the Supreme Court held that while dealing with a writ of habeas corpus, the Supreme Court held that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty.

22. In **Swapan Das vs. the State of West Bengal & Ors. *2013 SCC Online Cal 11681***, the High Court Calcutta held as under:

"A habeas corpus writ is to be issued only when the person concerning whose liberty the petition has been filed is illegally detained by a respondent in the petition. On the basis of a habeas corpus petition the power under art.226 is not to be exercised for tracing a missing person engaging an investigating agency empowered to investigate a case under the Code of Criminal Procedure, 1973. The investigation, if in progress, is to be overseen by the criminal court. Here the petitioner is High Court asking this court to direct the police to track down his missing son. For these reasons, we dismiss the writ petition."

23. Similarly, in **Sulochana Bai vs. State of M.P. & Ors, *2008 (2) MPHT 233***, the High Court of Madhya Pradesh observed as under:

"12. We have referred to the aforesaid decisions only to highlight that the writ of habeas corpus can only be issued when there is assertion of wrongful confinement. In the present case, what has been asserted in the writ petition is that her father-in-law has been missing for last four years and a missing report has been lodged

at the Police Station. What action should have been taken by the Police that cannot be the matter of habeas corpus because there is no allegation whatsoever that there has been wrongful confinement by the police or any private person. In the result, the writ petition is not maintainable and is accordingly dismissed."

24. In ***Selvaraj vs. the State, Rep. by the Superintendent of Police, Nagapattinam District, in 2018(3) MLJ (Cri) 712***, a Division Bench of the Madras High Court observed as under:

The constitutional Courts across the country predominantly held in catena of judgments that establishing a ground of "illegal detention" and a strong suspicion about any such "illegal detention" is a condition precedent for moving a Habeas Corpus petition and the Constitutional Courts shall be restrained in entertaining such Habeas Corpus petition, where there is no allegation of "illegal detention" or suspicion about any such "illegal detention". Man/Women missing cases cannot be brought under the provision of the Habeas Corpus petition. Man/Women missing cases are to be registered under the regular provisions of the Indian Penal Code and the Police officials concerned are bound to investigate the same in the manner prescribed under the Code of Criminal Procedure. Such cases are to be dealt as regular cases by the competent Court of Law and the extraordinary jurisdiction of the Constitutional Courts cannot be invoked for the purpose of dealing with such Man/Women Missing cases.

To hold investigation in a cognizable offence is the statutory right of the police. It is well settled that at the stage of investigation the Court has no role to play. However, the investigating agency is required to take all necessary steps to conclude the investigation and submit its report to the Magistrate concerned. If the police fail to perform their statutory duty in accordance with law, the Court has a bounden statutory obligation to ensure that the investigation is conducted in accordance with law.

25. In ***Amar Nath Chaubey Vs. Union of India (SLP (Cr.) no.6951 of 2018)*** by order dated 14 th December, 2020, a three-Judge Bench of the Supreme Court observed as under :-

"8. The police has a statutory duty to investigate into any crimein accordance with law as provided in the Code of Criminal Procedure. Investigation is the exclusive privilege and prerogative of the police which cannot be interfered with. But if the police does not perform its statutory duty in accordance with law or is remiss in the performance of its duty, the court cannot abdicate its duties on the precocious plea that investigation is the exclusive prerogative of the police. Once the conscience of the court is satisfied, from the materials on record, that the police has not investigated properly or apparently is remiss in the investigation, the court has a bounden constitutional obligation to ensure that the investigation is conducted in accordance with law. If the court gives any directions for that purpose within the contours of the law, it cannot amount to interference with investigation. A fair investigation is, but a necessary concomitant of Articles 14 and 21 of the Constitution of India and this Court has the bounden obligation to ensure adherence by the police."

26. In ***Manohar Lal Sharma Vs. Principal Secretary & Ors., since reported***

in (2014) 2 SCC 532, the Supreme Court observed as under :-

"24. In the criminal justice system the investigation of an offence is the domain of the police. The power to investigate into the cognizable offences by the police officer is ordinarily not impinged by any fetters. However, such power has to be exercised consistent with the statutory provisions and for legitimate purpose. The courts ordinarily do not interfere in the matters of investigation by police, particularly, when the facts and circumstances do not indicate that the investigating officer is not functioning bona fide. In very exceptional cases, however, where the court finds that the police officer has exercised his investigatory powers in breach of the statutory provision putting the personal liberty and/or the property of the citizen in jeopardy by illegal and improper use of the power or there is abuse of the investigatory power and process by the police officer or the investigation by the police is found to be not bona fide or the investigation is tainted with animosity, the court may intervene to protect the personal and/or property rights of the citizens."

27. Now, in this backdrop of settled tenets of law with regard to Habeas Corpus petition from its very inception, its historical background and thereafter its gradual evolution by various court of law in India, one of the basic and essential convenent that, an individual must be detained or confined without any authority of law. Confinment means, "the state of being forced to stay in prison or another place which one cannot leave". Thus the basic ingredient of illegal confinement or detention is forced stay and against one's wish or desire. If a person is residing on his own sweet free will or on his own volition, cannot be fall within realm of illegal confinement, under these circumstances, Habeas Corpus Petition is simply a futile exercise.

In the instant case, when both the victim(girl) and respondent no.4 themselves reached to the Bench of this Court by filing a Writ C No.3002 of 2022 and entertaining that writ, on 17.02.2022, Bench has protected their interest that by no stretch of imagination, the girl is said to be in illegal confinement or detention of respondent no.4. Not only this, after obtaining the order from this Court, she has submitted the same by giving a covering letter in her own writing to the concerned police station, accusing her own father, that she was compelled to marry of a person double of her age, an elderly person and thus, she on her own, decided to fled away with the boy(respondent no.4) with whom she has got an early acquaintance/friendship and a tender relationship and both of them have decided to marry. Since, both of them were major, they decided to marry with each other and now they are married couple. It seems that the parent are against this marriage and that's why after concocting the facts of the case, wants to involve the High Court to exert pressure upon the police, to hold a futile exercise.

28. From above, this Court is of the strong opinion, that petitioner no.2 invoking this extra-ordinary powers by way of Habeas Corpus petition, when he has already lodged an FIR and the police is seized with the matter. It is expected from the S.S.P. and S.H.O. Concern district and police station to look into the matter with all their professional skills and competence at the earliest, else the petitioner may explore other alternative avenues from their redressal of grievance, but certainly not, the

Habeas Corpus Petition. In the instant Habeas Corpus Petition, there is not even a whisper that the corpus has been kept forcibly by respondent no.4 against her wish. In the absence of the basic pleadings in the petition, it lacks merits and liable to be dismissed on this score alone.

29. In my view, filing of the present Habeas Corpus Petition is nothing but an arm twisting of the local police officials who are already engaged, after lodging of the FIR. This Court feels that after the girl is fled away from the guardianship of her parent, it is their personal perception that their son or daughter has been kept in the illegal captivity of the offence. But, in majority of the cases, when these couples are brought before the Court, after the notices, these couples ruthlessly blasts the perception of their parent, resultantly, the Habeas Corpus Petition would end into big zero and an exercise in vanity.

30. Rightly so, the Court too is of the considered opinion that where the FIR with regard to alleged act of kidnapping, abduction or illegal confinement or for ransom has already been filed and police personnels are pursuing the matter at their end, the lodging of parallel Habeas Corpus Petition is motivated and purposive one. By filing such type of petitions, the impatient petitioner wants to involve the Courts to exert their pressure upon the police to speed up their investigation. The Habeas Corpus Petitions should not to be used as whip over the police to officials, just to serve out the petition's vanity over the police.

31. Thus, after marshalling of facts and circumstances of the instant case and the law in this regard, the preliminary objection raised by learned A.G.A., finds force and accordingly instant Habeas Corpus Petition is **dismissed** at the admission stage itself.

32. It is made clear that the ratio adopted in the present case shall not apply in the case of minors because any amount of their consent or willingness is not a valid consent in the eye of law and therefore, the police report shall not be precluded in the matter of minors.

(2022) 9 ILRA 1756
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.09.2022

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE SHEKHAR KUMAR YADAV, J.

Habeas Corpus Writ No. 30758 of 2021

Ram Sevak ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Arvind Kumar Tripathi, Dr. Ravi Kumar Mishra

Counsel for the Respondents:
G.A.

A. Criminal Law - Constitution of India,1950-Article 226 - National Security Act, 1980- Section 3 (2) - Indian Penal Code,1860-Sections 302 , 201 & 376 read with Section 5(d)/6 of Prevention of Children from Sexual Offence Act, 2012- Preventive detention- It is not a case involving merely law and order, but, a case where the public order got disturbed initially and, the District Magistrate was well within his rights to form a subjective opinion on the basis of objective material before him that in the event the petitioner was enlarged on bail it would prejudice

the public order and create fear and terror in the locality-The fact that the petitioner does not have a prior criminal history is irrelevant considering the impact of his alleged crime on the even tempo of life in the locality as an incident involving rape and murder of a minor girl is bound to send shock waves and create a sense of fear and terror amongst residents of the locality-Such an offence cannot be said to be an individual offence against the person of the deceased- Crime, generally, is not only against the individual in respect to whom it is committed but also against the society, but it is more so, in the case of rape and murder of a girl child as such crimes, send shock waves throughout the society-There is material on record in the form of statements of Gram Pradhan, etc. as also newspaper items to show the impact of the incident on the residents of the local area. This is not a simple case of law and order, but, a case where the District Magistrate has correctly formed the opinion that public order got disturbed and in the event the petitioner is enlarged on bail, there is a likelihood of repetition of such crimes and also a general and genuine apprehension in the mind of the residents of the area about such repetition of crime by the petitioner endangering the life and liberty of their women and children, therefore, preventive detention of the petitioner satisfies the ingredients of Section 3 (2) of the Act 1980 and the contentions of the petitioner are not acceptable.(Para 1 to 19)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Rameshwar Shaw Vs DM, Burdwan & anr.

2. Dr. Ram Manohar Lohia Vs St. of Bih.

3. Pushkar Mukherjee & ors. Vs St. of W.B.

4. Shyamal Chakraborty Vs The Commr. of Police, Calcutta & anr.

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

1. Heard Dr. Ravi Kumar Mishra, learned counsel for the petitioner and Mr. S.P. Singh, learned AGA for the State.

2. This petition has been filed seeking issuance of writ of certiorari quashing the order of detention dated 01.10.2021 passed by the District Magistrate, Sitapur under Section 3 (2) of the National Security Act, 1980 (for short the 'Act 1980'). A writ of mandamus has also been sought commanding the opposite parties to set the petitioner at liberty forthwith.

3. The facts of the case are that an incident took place on 18.08.2021 at about 7 PM, when minor daughter of Kamal Kishore aged about 10 years went missing. The villagers searched her and ultimately her body was found in a field at about 10 PM. The aforesaid Kamal Kishore lodged a First Information Report bearing case Crime No. 229 of 2021 under Section 302 IPC. Subsequently, Sections 201 and 376 IPC read with Section 5(d)/6 of Prevention of Children from Sexual Offence Act, 2012 were also added. The petitioner herein was apprehended on 20.08.2021 in connection with the said crime and was sent to jail. The petitioner applied for bail in the said case. During pendency of the bail application, the impugned order of preventive detention was passed by the District Magistrate on 28.09.2021 under Section 3(2) of the Act 1980 so as to prevent him from acting in a manner prejudicial to the maintenance of public order. The District Magistrate passed the order on the report of the Sponsoring Authority. The supporting material which is the basis for preventive detention was supplied to the petitioner and has been annexed by him. Apart from the

satisfaction recorded by the District Magistrate with reference to the ingredients of Section 3 (2) of the Act 1980, as claimed by the learned AGA, he has also mentioned that enlargement of the petitioner on bail could endanger public order, hence the preventive detention.

4. The contention of learned counsel for the petitioner was that the alleged incident of rape and murder took place at a secluded place and was an individual offence which could very well be dealt with under the ordinary law of the land and there was no requirement of invoking the provisions of the Act 1980 for the petitioner's preventive detention. It was at best a case involving law and order and not public order. He submitted that the District Magistrate has not independently exercised his mind to the material before him.

5. Learned AGA opposed the writ petition. He submitted that the crime was gruesome which disturbed the even tempo of life of the persons residing in the locality where the crime was committed, therefore, based on the material supplied by the Sponsoring Authority, the District Magistrate has formed an independent opinion for preventive detention of petitioner which does not suffer from any error.

6. We have heard the learned counsel for the parties and perused the records.

7. We take note of the fact that vide order dated 10.06.2022, the petitioner-Ram Sewak has been enlarged on bail by the High Court in Criminal Misc. Bail Application No. 2393 of 2022.

8. The term of detention of the petitioner, which cannot exceed 12 months, is to expire in October, 2022.

9. As regards the contention of petitioner's counsel that the offence having been committed in a secluded area and not in a public place, therefore, the ingredients of Section 3 (2) of the Act 1980 were not satisfied, we are not ready to accept this contention. Merely because the offence was committed in a secluded area does not mean that public order cannot be disturbed. We may in this regard refer to the decision of Hon'ble the Supreme Court in the case of ***Arun Ghosh vs. State of West Bengal and others*** wherein a Four Judge Bench had the occasion to consider the scope of Section 3 (2) of the Preventive of Detention Act, 1950 and in that context had the occasion to consider as to which act would be subversive of public order. It considered the difference between the maintenance of law & order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than the law & order. Public order is even tempo of life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished, from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Then, their Lordships referred to various instances. One of the instances was that a man who molests women in lonely places. Their Lordships opined that as a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the

other man (other instance referred where public order was not disturbed) but in its potentiality and in its affect upon the public tranquility, there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. Their Lordships further observed that similar acts in different context affect differently law and order on the one hand and public order on the other hand. It is always a question of degree of the harm and its effect upon the community. The question to ask is : does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another. In this context, their Lordships referred to earlier decisions in the case of ***Dr. Ram Manohar Lohia vs. State of Bihar; Pushkar Mukherjee and others vs. State of West Bengal;*** and**,** ***Shyamal Chakraborty vs. The Commissioner of Police, Calcutta and another.***

10. The aforesaid observations and enunciation of the law on the subject by Hon'ble Supreme Court apply squarely to the facts of the case.

11. We have perused the detention order as also the material on the basis of which it has been passed. The District Magistrate has opined in the impugned order that a minor girl was raped and then murdered with the use of silk lace. Her body was hidden in a sack of husk. The incident was gruesome and of such nature that it created an environment of fear in the area. The people of the area were anguished and angry. They collected in large number. The general tempo of life in the area was disturbed. People in general were terrorized and fearful of any such happening against their own women and children. The entire area where the crime had been committed was tense for several days and police had to be deployed to restore the confidence of the public. The police had to be called from various police stations to meet the needs of the situation and instill confidence in the public. The public had to be assured about the well being of their women and children. The police had to be deployed for several days for maintaining public order and ensuring that it is not disturbed any further. The District Magistrate referred to the report of the Station House Officer, Rampur Kala in this regard. He has mentioned about the terror and fear created by the incident in the public of the locality. Women and children got frightened on account of the diabolical act of the petitioner. Small girls stopped going out of their house. Some of the shops were closed. Girl children were not being sent to school. The incident, thus, in the opinion of the District Magistrate disturbed public order in the locality. The incident hogged the limelight in various newspapers. The District Magistrate has further opined that the petitioner was in District Jail, Sitapur in connection with the aforesaid crime and had applied for bail which was fixed for hearing on 04.10.2021.

Based on the material available with him, the District Magistrate opined that there was likelihood of the petitioner being enlarged on bail and this information had created terror and fear in the locality.

12. He has also opined that if the petitioner is enlarged, considering his criminal mentality and the brutal act committed by him, there was a likelihood of repetition of such acts by him which would prejudice and endanger public order which had been restored after lot of efforts. In order to prevent public order from being prejudiced, it was necessary to detain the petitioner as a preventive measure under the Act 1980. It is permissible in law, in the facts of a case, to take into account the possibility of release of a detenue on bail while considering preventive detention under Section 3 (2) of the Act 1980. We may in this contest refer to the decision of Hon'ble the Supreme Court in the case of ***Rameshwar Shaw vs. District Magistrate, Burdwan and Anr***. We have no doubt that it was a relevant factor in the facts of this case.

13. Along with the writ petition, statements of Gram Pradhan, etc. have been annexed wherein they have spoken about the fear and terror created in the area on account which girl children were not being sent to school and were not leaving their house, etc.

14. An incident involving rape and murder of a minor girl is bound to send shock waves and create a sense of fear and terror amongst residents of the locality. Crimes on women and crime on minor girls create sensation in the locality wherein the residents become fearful of well being of women, especially girls in their family. It is bound to disturb public order. Crime of rape and murder on a minor girl can be committed only by a depraved person with a hardened criminal mentality who lacks sensitivity and emotions towards the fairer sex, especially small children. Such an offence cannot be said to be an individual offence against the person of the deceased. Crime, generally, is not only against the individual in respect to whom it is committed but also against the society, but it is more so, in the case of rape and murder of a girl child as such crimes, send shock waves throughout the society.

15. There is material on record in the form of statements of Gram Pradhan, etc. as also newspaper items to show the impact of the incident on the residents of the local area. This is not a simple case of law and order, but, a case where the District Magistrate has correctly formed the opinion that public order got disturbed and in the event the petitioner is enlarged on bail, there is a likelihood of repetition of such crimes and also a general and genuine apprehension in the mind of the residents of the area about such repetition of crime by the petitioner endangering the life and liberty of their women and children, therefore, the contentions of the petitioner's counsel in this regard, especially that it was a case which could have been dealt with under the ordinary law of the land, are not acceptable.

16. It is not a case involving merely law and order, but, a case where the public order got disturbed initially and, the District Magistrate was well within his rights to form a subjective opinion on the basis of objective material before him that in the event the petitioner was enlarged on bail it would prejudice the public order and create fear and terror in the locality. The fact that the petitioner does not have a prior

criminal history is irrelevant considering the impact of his alleged crime on the even tempo of life in the locality as already discussed. We are not concerned as to whether the offence was actually committed by the petitioner or not as that is a matter which will be seen during trial.

17. Based on the discussions already made and law discussed in the case of ***Arun Ghosh*** (supra), we are of the opinion that the order of the District Magistrate for preventive detention of the petitioner satisfies the ingredients of Section 3 (2) of the Act 1980 and the contentions of the petitioner's counsel are not acceptable.

18. We find no reason to interfere with the satisfaction recorded by the District Magistrate as the same does not suffer from any error.

19. The writ petition is ***dismissed***.
